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# A SYSTEMIC ANALYSIS OF AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS

Richard H. Sander\*

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## INTRODUCTION

For the past thirty-five years, American higher education has been engaged in a massive social experiment: to determine whether the use of racial preferences in college and graduate school admissions could speed the process of fully integrating American society. Since *Bakke*,<sup>1</sup> universities have often tended to justify affirmative action for its contributions to diverse classrooms and campuses. But the overriding justification for affirmative action has always been its impact on minorities. Few of us would enthusiastically support preferential admission policies if we did not believe they played a powerful, irreplaceable role in giving nonwhites in America access to higher education, entrée to the national elite, and a chance of correcting historic underrepresentations in the leading professions.

Yet over the years of this extraordinary, controversial effort, there has never been a comprehensive attempt to assess the relative costs and benefits of racial preferences in any field of higher education. The most ambitious efforts have been works like *The Shape of the River* and *The River Runs Through Law School*.<sup>2</sup> These have provided valuable evidence that the beneficiaries of affirmative action at the most elite universities tend, by and large, to go on to the kinds of successful careers pursued by their classmates. This is helpful, but it is only a tiny part of what we need to know if we are to assess affirmative action as a policy *in toto*. What would have happened to minorities receiving racial preferences had the preferences not existed? How much do the preferences affect what schools students attend, how much they learn, and what types of jobs and opportunities they have when they graduate? Under what circumstances are preferential policies most likely to help, or harm, their intended beneficiaries? And how do these preferences play out across the entire spectrum of education, from the most elite institutions to the local night schools?

These are the sorts of questions that should be at the heart of the affirmative action debate. Remarkably, they are rarely asked and even more rarely answered, even in part. They are admittedly hard questions, and we can never conduct the ideal experiment of rerunning history over the past several decades—without preferential policies—to observe the differences. But we can come much closer than we have to meaningful answers. The purpose of this Article is to pursue these questions within a single realm of the academy: legal

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1. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plurality opinion).

2. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 *LAW & SOC. INQUIRY* 395 (2000). Bowen and Bok do, briefly, consider the question of how students would fare without affirmative action, but their analysis is so superficial as to provide little helpful insight on this question; subsequent work has thrown even their modest conclusions into question.

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education in the United States. Several remarkable data sets on law schools and the early careers of young lawyers have recently emerged. Together, they make it possible to observe and measure the actual workings of affirmative action to an unprecedented degree. Here we begin the application of that data to the question of how much affirmative action across American law schools helps and hurts blacks seeking to become lawyers. The results in this Article are not intended to be definitive; they are intended to take us several steps in a new direction.

My goal in this Article is to be *systemic*—that is, to analyze legal education as a complete, interlocking system. As we will see, the admissions policies of law schools, as within any discipline, are necessarily interdependent. Individual schools have less freedom of action than an outsider might assume. Moreover, one cannot understand the consequences of racial preferences without understanding the relative trade-offs for students attending schools in different tiers of the education system. In many ways, law schools are an ideal subject for this type of systemic approach. The vast majority of states have fairly uniform educational requirements for lawyers, and the vast majority of law schools are licensed by the same national organizations. Nearly all aspirants to law school go through a similar application process and take a uniform exam, the Law School Admission Test (LSAT). First-year law students across the country follow similar curricula and are graded predominantly on a curve. Nearly all graduates of law school who want to practice law must take bar exams to begin their professional careers.<sup>3</sup> These uniformities make comparisons within the legal education system much easier. At the same time, the 180-odd accredited law schools in the United States encompass a very broad hierarchy of prestige and selectivity; like the legal profession itself, legal education is more stratified than most nonlawyers realize. This makes legal education an excellent candidate for the systemic analysis of affirmative action. If racial preferences are essential anywhere for minorities to vault into the more elite strata, they should be essential here.

My focus in this Article is on the effects racial preferences in admissions have on the largest class of intended beneficiaries: black applicants to law school. The principal question of interest is whether affirmative action in law schools generates benefits to blacks that substantially exceed the costs to blacks. The “costs” to blacks that flow from racial preferences are often thought of, in the affirmative action literature, as rather subtle matters, such as the stigma and stereotypes that might result from differential admissions standards. These effects are interesting and important, but I give them short shrift for the most part because they are hard to measure and there is not enough data available that is thorough or objective enough for my purposes.

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3. There are exceptions. California still allows prospective lawyers to learn the law in a law office and bypass law school; Wisconsin allows graduates of some schools to automatically enter its bar.

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The principal “cost” I focus on is the lower actual performance that usually results from preferential admissions. A student who gains special admission to a more elite school on partly nonacademic grounds is likely to struggle more, whether that student is a beneficiary of a racial preference, an athlete, or a “legacy” admit. If the struggling leads to lower grades and less learning, then a variety of bad outcomes may result: higher attrition rates, lower pass rates on the bar, problems in the job market. The question is how large these effects are, and whether their consequences outweigh the benefits of greater prestige.

My exposition and analysis in this Article focus on blacks and whites. I do this principally for the sake of simplicity and concreteness. Many of the ideas that follow are complicated; to discuss them in the nuanced way necessary to take account of American Indians, Hispanics, and Asians would force me to make the narrative either hopelessly tangled or unacceptably long. And if one is going to choose a single group to highlight, blacks are the obvious choice: the case for affirmative action is most compelling for blacks; the data on blacks is the most extensive; and law school admissions offices treat “blacks” as a group quite uniformly—something that is not generally true for Hispanics or Asians. I concede that any discussion of affirmative action that ignores other ethnic groups (who often make up a majority of the recipients of preferences) is seriously incomplete. I am nearing completion of a larger work (to be published as a book) that, among other things, replicates many of the analyses found in this Article for other racial groups.

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No writer can come to the subject of affirmative action without any biases, so let me disclose my own peculiar mix. I am white and I grew up in the conservative rural Midwest. But much of my adult career has revolved around issues of racial justice. Immediately after college, I worked as a community organizer on Chicago’s South Side. As a graduate student, I studied housing segregation and concluded that selective race-conscious strategies were critical, in most cities, to breaking up patterns of housing resegregation. In the 1990s, I cofounded a civil rights group that evolved into the principal enforcer (through litigation) of fair housing rights in Southern California. My son is biracial, part black and part white, and so the question of how nonwhites are treated and how they fare in higher education gives rise in me to all the doubts and worries of a parent. As a young member of the UCLA School of Law faculty, I was deeply impressed by the remarkable diversity and sense of community the school fostered, and one of my first research efforts was an extensive and sympathetic analysis of academic support as a method of helping the beneficiaries of affirmative action succeed in law school.<sup>4</sup> Yet as I began my studies of legal

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4. Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157 (1995).

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education in the early 1990s, I found myself troubled by much of what I found. The first student survey I conducted suggested that UCLA's diversity programs had produced little socioeconomic variety; students of all races were predominantly upper crust.<sup>5</sup> Black-white performance gaps were very large, and this had visible effects on classroom interaction. I began to ask myself some of the questions explored in this Article, but for years the lack of data seemed an insuperable barrier to anything more than casual speculation. At the same time, I was somewhat dismayed by the unwillingness of many architects of racial preferences at law schools to be candid about how these preferences operated. It seemed to me that debate and discussion in the area were unduly circumscribed; hard questions about what we were doing were rarely asked within the academy—in part, admittedly, because of the desire to protect the delicate sense of community.

I therefore consider myself to be someone who favors race-conscious strategies in principle, if they can be pragmatically justified. Racial admissions preferences are arguably worth the obvious disadvantages—the sacrifice of the principle of colorblindness, the political costs—if the benefits to minorities substantially exceed the costs to minorities.<sup>6</sup> By the same token, if the costs to minorities substantially exceed the benefits, then it seems obvious that existing preference programs should be substantially modified or abandoned. Even if the costs and benefits to minorities are roughly a wash, I am inclined to think that the enormous social and political capital spent to sustain affirmative action would be better spent elsewhere.<sup>7</sup>

What I find and describe in this Article is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries. The admission preferences extended to blacks are very large and do not successfully identify students who will perform better than one would predict based on their academic indices. Consequently, most black law applicants end up at schools where they will struggle academically and fail at higher rates than they would in the absence of preferences. The net trade-off of higher prestige but weaker academic performance substantially harms black

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5. I explored this and other matters related to law school socioeconomic diversity in Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997).

6. This is especially true in the absence of compelling evidence that whites are substantially harmed. Careful readers will realize that the evidence in this Article suggests that the material harms to whites from affirmative action in law schools are comparatively slight. Indeed, the effects on whites are in many ways a mirror image of the effects on blacks (though more muted by relative numbers), and thus whites probably have higher grades, graduation rates, and bar passage rates than they would in a system totally lacking racial preferences.

7. These costs include not only the national competition between Democrats and Republicans, but interracial goodwill, the belief held by whites that they are “already” making sufficient sacrifices for the cause of racial justice, and the credibility of institutions that are often trapped in deceptions by their own policies.

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performance on bar exams and harms most new black lawyers on the job market. Perhaps most remarkably, a strong case can be made that in the legal education system as a whole, racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system.<sup>8</sup> Affirmative action as currently practiced by the nation's law schools does not, therefore, pass even the easiest test one can set. In systemic, objective terms, it hurts the group it is most designed to help.

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The Article is organized as follows: Part I briefly recounts the development of racial preferences in legal education admissions. In addition to providing some context and perspective, I try to make clear how *Bakke*, while legitimating affirmative action, created distinctions that produced a code of silence among law schools about their racial preference programs, and deterred meaningful research. In Part II, I try to explicate exactly what we mean by "racial preferences," creating a more concrete vocabulary than the vague and sometimes contradictory terms used by the courts, and applying these concepts to some specific cases, including the University of Michigan Law School admission policies examined in *Grutter*.<sup>9</sup> Part III examines whether racial preferences are limited to the most "elite" schools, as is often claimed. I find that the current structure of preferences creates a powerful "cascade effect" that gives low- and middle-tier schools little choice but to duplicate the preferences offered at the top.

Part IV considers the question of whether the numerical predictors heavily used by law schools are either biased against minorities or fairly useless in predicting actual outcomes. If either claim is true, then we would expect racial preferences in admissions to have only minor harmful effects on the performance of beneficiaries. In other words, although we might argue that preferences are unfair, most beneficiaries would perform at levels close to everyone else and the system would work to achieve its intended effects. I find, however, compelling evidence that the numerical predictors are both strong and unbiased. Those unconvinced by statistical predictors may be convinced by Part V, which presents comprehensive data on how blacks and whites actually

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8. See *infra* Table 8.2 and accompanying text (showing how race-blind admissions would produce an 8% increase in the number of blacks passing the bar each year, even though the legal education system would matriculate 14% fewer black students). Like any simulation, my analysis is subject to debatable assumptions. Two fundamental points are beyond doubt, however: (a) because of the effect of preferences, see *infra* Part III, a general abandonment of racial preferences would have a relatively modest effect on total black admissions; and (b) current preferences cause blacks to be clustered academically in the bottom of their law school classes, see *infra* Tables 5.1, 5.3, 5.4, greatly increasing black attrition in law school and the bar. These effects combined strongly suggest there would be a net increase in black lawyers under a race-blind system.

9. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

perform in law school. In the vast majority of American law schools, median black grade point averages (GPAs) at the end of the first year of law school are between the fifth and tenth percentile of white GPAs; they rise somewhat thereafter only because those black students having the most trouble tend to drop out. The black-white gap is the same in legal writing classes as it is in classes with timed examinations. Because of low grades, blacks complete law school less often than they would if law schools ignored race in their admissions process.

Part VI explores how affirmative action affects black success on postgraduate bar examinations. At most law schools in most of the United States, ultimate bar passage rates for graduates are very high—generally above eighty percent. If we use regression analysis to predict bar passage, we find that going to an elite school helps a little, but getting good grades is much more important. Blacks and whites at the same school with the same grades perform identically on the bar exam; but since racial preferences have the effect of boosting blacks' school quality but sharply lowering their average grades, blacks have much higher failure rates on the bar than do whites with similar LSAT scores and undergraduate GPAs. Affirmative action thus artificially depresses, quite substantially, the rate at which blacks pass the bar. Combined with the effects on law school attrition examined in Part V, many blacks admitted to law school with the aid of racial preferences face long odds against ever becoming lawyers. Part VI ends with an exploration of why "grades" should be more important than "eliteness" in passing the bar. A growing body of evidence suggests that students who attend schools where they are at a significant academic disadvantage suffer a variety of ill effects, from the erosion of aspirations to a simple failure to learn as much as they do in an environment where their credentials match those of their peers.

Part VII examines the job market for new lawyers. The premise of affirmative action is that elevating minorities to more elite schools will help them secure high-prestige jobs and thus integrate the profession at its highest levels. This proves to be true at the very top of the law school hierarchy: black graduates at Harvard and Yale have their pick of jobs. But in most of the job market, legal employers in both private firms and government seem to attach more weight to grades than school eliteness; so again, the school shuffling involved in affirmative action tends to be a net minus for the typical new black lawyer. Moreover, the data shows that many employers exercise strong preferences for blacks in their own hiring. Blacks who have passed the bar and have good grades from *any* law school do very well in the job market.

Part VIII examines the claim that the number of new black lawyers produced each year would drop dramatically without racial preferences. The claim does not survive close scrutiny. Because the cascade effect principally reshuffles black applicants among law schools rather than expanding the pool, about 86% of blacks currently admitted to some law school would still gain admission to the system without racial preferences. Those who would not be

admitted at all have, under current practices, very small chances of finishing school and passing the bar. The 86% admitted to a race-blind system would graduate at significantly higher rates, and pass the bar at substantially higher rates, than they do now. Under a range of plausible assumptions, race-blind admissions would produce an *increase* in the annual number of new black lawyers. It is clear beyond any doubt that a race-blind system would not have severe effects on the production of black lawyers, and that the black lawyers emerging from such a system would be stronger attorneys as measured by bar performance.

In the Conclusion, I consider what steps law schools should consider in light of these findings. Despite the serious failings identified here, some good arguments for more narrowly targeted use of affirmative action by law schools remain. There are specific research questions that should be pursued much further. But the need for substantial internal reforms, before courts or legislatures foreclose all room to maneuver, is clear.

#### I. A NOTE ON ORIGINS

In the academic year that began in the fall of 2001, roughly 3400 blacks were enrolled in the first-year classes of accredited law schools in the United States, constituting about 7.7% of total first-year enrollment.<sup>10</sup> This is very close to the proportion of blacks (8.9% in 2001<sup>11</sup>) among college graduates—the pool eligible to apply to law schools. Although blacks are underrepresented in law school compared to their numbers among all young adults (by a factor of nearly 2:1),<sup>12</sup> law schools compare well with other areas of postbaccalaureate education in their recruitment and enrollment of black students.<sup>13</sup>

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10. Am. Bar Ass'n, *Minority Enrollment 1971-2002*, at <http://www.abanet.org/legaled/statistics/minstats.html> (last visited Nov. 3, 2004) [hereinafter Am. Bar Ass'n, *Minority Enrollment 1971-2002*]; Memorandum from David Rosenlieb, Data Specialist, Section of Legal Education and Admission to the Bar, American Bar Association, to Deans of ABA-Approved Law Schools, *Corrected Fall 2002 Enrollment Statistics* (May 16, 2003), at <http://www.abanet.org/legaled/statistics/Fall%202002%20Enrollment.pdf> (last visited Nov. 22, 2004) [hereinafter Rosenlieb Memorandum].

11. U.S. CENSUS BUREAU, 2003 STATISTICAL ABSTRACT OF THE UNITED STATES 191 tbl.299 (2003).

12. In 2001, blacks made up 14.5% of U.S. residents between the ages of twenty and twenty-four. U.S. CENSUS BUREAU, 2002 STATISTICAL ABSTRACT OF THE UNITED STATES 16 tbl.14 (2002).

13. According to the 2002 *Statistical Abstract of the United States*, blacks secured 8.2% of master's degrees granted in 2001, along with 4.9% of doctoral degrees and 6.8% of "first professional" degrees (including degrees in law, medicine, theology, and dentistry). *Id.* at 191 tbl.299. According to the American Bar Association's website, blacks earned 7% of all law degrees in that year. Am. Bar Ass'n, *J.D. Enrollment and J.D. Degrees Awarded (Total/Women/Minorities)*, at <http://www.abanet.org/legaled/statistics/jd.html> (last visited Nov. 22, 2004); Am. Bar Ass'n, *Minority Degrees Awarded (by Ethnic Groups 1980-2002)*,



It was not always so. In 1964, there were only about three hundred first-year black law students in the United States, and one-third of these were attending the nation's half-dozen historically black law schools.<sup>14</sup> Blacks accounted for about 1.3% of total American law school enrollment,<sup>15</sup> and since blacks also accounted for about 1.1% of all American lawyers,<sup>16</sup> we can infer that their relative enrollment numbers had been flat for quite some time. The story was much the same for Mexican-Americans, Puerto Ricans, and Asians (though of course the relative numbers of these groups were much smaller at the time).<sup>17</sup> Minorities were generally underrepresented by a factor of five or six in graduate education, but they fared particularly badly in law schools.<sup>18</sup>

In the South, at least, black underrepresentation was an obvious by-product of deliberate discrimination. Some southern states excluded blacks completely from public law schools; others created Jim Crow law schools with tiny black enrollments.<sup>19</sup> I have found no study that attempts to document the extent of racial discrimination in northern law school admissions. Certainly many northern schools admitted blacks (and produced some famous black

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at <http://www.abanet.org/legaled/statistics/mindegrees.html> (last visited Nov. 22, 2004) [hereinafter Am. Bar Ass'n, Minority Degrees Awarded].

14. Harry E. Groves, *Report on the Minority Groups Project*, 1965 ASS'N AM. L. SCHS. PROC., PART ONE 171, 172. I infer these numbers from the fact that total black enrollment at ABA-approved law schools for 1964-1965 was 701, with 267 attending the six historically black law schools and 165 at Howard University Law School alone. Because of prevalently high dropout rates at the time, over forty percent of all law students were first-year students. At the time, Howard was by far the largest and most respected of the black law schools. The other law schools were institutions established by southern states to maintain segregated education; these schools had tiny enrollments.

15. *Id.*

16. Blacks accounted for about 1.1% of all American lawyers in 1960. U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION: 1960, SUBJECT REPORTS OCCUPATIONAL CHARACTERISTICS 21 tbl.3 (1963).

17. For example, Asians, who have generally been overrepresented in higher education relative to their numbers, made up about 0.7% of the U.S. population in 1970, but only 0.4% of third-year students in law schools in 1971-1972. By 2000, Asians made up 3.8% of the U.S. population but 6.7% of first-year law students. FRANK HOBBS & NICOLE STOOPS, U.S. BUREAU OF THE CENSUS, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 77 fig.3-4 (2002); Am. Bar Ass'n, Legal Education and Bar Admissions Statistics, 1963-2002, at [http://www.abanet.org/legaled/statistics/le\\_bastats.html](http://www.abanet.org/legaled/statistics/le_bastats.html) (last visited Nov. 22, 2004); Am. Bar Ass'n, Minority Enrollment 1971-2002, *supra* note 10.

18. Comparison data for other types of graduate education can be found in FRANK BROWN ET AL., MINORITY ENROLLMENT AND REPRESENTATION IN INSTITUTIONS OF HIGHER EDUCATION (1974). In 1960, blacks made up 2.9% of all graduate school enrollment in the United States. *Id.* at 186. The percentage in 1970 was 3.1%. *Id.*

19. Some of the early litigation against "separate but equal" regimes focused on these southern law schools. See *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). On black exclusion in the South, see also RICHARD L. ABEL, AMERICAN LAWYERS 100 (1989).

graduates<sup>20</sup>), and it is doubtful that many of these schools sought racial information about applicants. But it seems likely enough that a variety of informal barriers helped to keep enrollments quite low—lower than black enrollments in many other types of northern graduate schools.<sup>21</sup>

The conscience of the legal academy quivered noticeably in the early 1960s, as the civil rights movement swept the nation and many law schools became prominent centers of reform activity. As early as 1962, the American Association of Law Schools's (AALS) Committee on Racial Discrimination in Law Schools was unable to identify any clear practices of admissions discrimination outside the South;<sup>22</sup> by 1964, this group had concluded that there was "no longer any discrimination problem of sufficiently serious proportion to deserve the maintenance of a large committee."<sup>23</sup> Yet at mid-decade, black enrollment was still miserably low and black attrition rates were miserably high (about fifty percent).<sup>24</sup>

During the 1964-1967 period, when civil rights issues dominated public discourse, but affirmative action programs were still largely unknown, many within the legal education community identified low black enrollment as a problem and began to think systematically about solutions. Most observers agreed that several factors contributed to underrepresentation: a scarcity of black candidates with strong credentials; a perception among black college graduates that law schools and the legal profession were particularly rigid bastions of tradition, and thus less attractive than other routes to the middle class; and the cost of law school and the small supply of financial aid.<sup>25</sup> Several

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20. Examples include Charles Hamilton Houston (the first black editorial member of the *Harvard Law Review*, in 1921), William Henry Hastie (another black *Harvard Law Review* member, who became a federal judge in 1937), and Dr. Sadie Tanner Mossell Alexander (a black economist who served on the *Pennsylvania Law Review*). See *Many of the Nation's Most Prestigious Law Reviews Have Lily-White Editorial Boards*, 19 J. BLACKS HIGHER EDUC. 44, 55 (1998).

21. See generally BROWN ET AL., *supra* note 18 (comparing minority enrollment data for different types of graduate education).

22. Charles C. Davidson et al., *Report of the Committee on Racial Discrimination in Law Schools*, 1962 ASS'N AM. L. SCHS. PROC. 195, 195.

23. Benjamin F. Boyer et al., *Report of the Committee on Racial Discrimination: Problem of Negro Applicants*, 1964 ASS'N AM. L. SCHS. PROC., PART ONE 159, 160-61.

24. The fifty-percent figure is the median ten-year attrition rate calculated from the responses of fifty-four law schools surveyed by the AALS in 1964-1965. See Groves, *supra* note 14, at 172-73.

25. See generally Earl L. Carl, *The Shortage of Negro Lawyers: Pluralistic Legal Education and Legal Services for the Poor*, 20 J. LEGAL EDUC. 21 (1967-1968) (arguing that blacks viewed law as "white man's business" and had little awareness of the existence of a black bar); Earl L. Carl & Kenneth R. Callahan, *Negroes and the Law*, 17 J. LEGAL EDUC. 250 (1964-1965) (claiming that blacks felt general mistrust of the law as an instrument of whites); Groves, *supra* note 14, at 173-74 (presenting survey of law school deans asked to explain low black enrollment).

schools launched outreach programs in the mid-1960s aimed at identifying and recruiting promising blacks.<sup>26</sup>

Ironically, during the same period when law schools were eliminating the last vestiges of discrimination and finally reaching out to blacks, the schools were also becoming transformed into more selective institutions. As the ranks of college graduates swelled in the late 1950s and 1960s, the number of applicants to law school rose sharply. The LSAT, introduced in the late 1940s, precipitated the development and adoption of more objective admissions practices. By the late 1960s and early 1970s, admission to many law schools had become dramatically more competitive.<sup>27</sup>

The rise of more competitive admissions placed a new hurdle in the path of blacks just getting a foothold in mainstream American education. It was not hard to deduce that equal access alone would not produce large numbers of black law students. As early as 1964, an AALS report explored early stirrings of the idea of racial admissions preferences:

Several institutions have either made active efforts to recruit well qualified Negro students or have given consideration to the possibility of adjusting admission standards to accommodate the few Negro applicants whose records approach acceptability . . . .

. . . .

The suggestion has been made that entrance requirements might be lowered a bit to accommodate the cultural deficiencies so frequently found in the case of the Negro applicant. In favor of this is the occasional experience of the Negro student with a lower aptitude score who nevertheless gives a good or even outstanding performance in law school. The objections, however, deserve serious consideration: (1) Inverse discrimination is unfair to white students; (2) lowering admission standards to help unqualified Negroes is unfair to the Negro student and to the law school; (3) the lack of background and undergraduate training of Negroes generally must be remedied, not in the law schools, but in the elementary schools, high schools and colleges. It is too late when they reach law school.<sup>28</sup>

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26. Not atypically, it was a program started by Harvard (which beginning in 1965 brought black college students to Cambridge for a summer session) that secured the most publicity. See Robert M. O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. TOL. L. REV. 281, 301; see also Louis A. Toepfer, *Harvard's Special Summer Program*, 18 J. LEGAL EDUC. 443 (1966).

27. Sixty-nine law schools reported the LSAT distributions of their students to both the 1969 and 1980 *Prelaw Handbooks* issued by the American Association of Law Schools. The proportion of these schools with median LSAT scores higher than 600 rose from 10.2% in 1969 to 71% in 1980. ASS'N OF AM. LAW SCHS. & LAW SCH. ADMISSION TEST COUNCIL, *LAW STUDY AND PRACTICE IN THE UNITED STATES, 1969-70 PRE-LAW HANDBOOK B(2)-3*, tbl.X (1970); ASS'N OF AM. LAW SCHS. & LAW SCH. ADMISSION TEST COUNCIL, *1980-82 PRE-LAW HANDBOOK: OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 45* (1980). It should be noted that the methodologies used to arrive at the cited figures were slightly different, so the numbers may not exactly correlate.

28. Boyer et al., *supra* note 23, at 159-60.

Although rather patronizing in tone, this early report evidences how quickly the thoughts of law school administrators advanced from the idea of eliminating antiblack discrimination to the idea of instituting black admissions preferences. It also remarkably foreshadows many of the affirmative action debates that emerged more widely in the 1970s.

Still, there is not much evidence that many law schools actually engaged in preferential admissions until 1968 and 1969.<sup>29</sup> The release of the Kerner Commission Report in March 1968,<sup>30</sup> the assassination of Martin Luther King, Jr., in April, and the renewal of rioting in the inner cities that followed produced a general sense of national crisis in race relations. Gradualism as a philosophy of racial justice seemed discredited; many of those running both private and public institutions felt they had to do something rapid and dramatic to demonstrate progress in black access. A large number of colleges and graduate programs, including law schools, therefore initiated or accelerated racial preference programs in 1968 and succeeding years.<sup>31</sup> Ahead of most other disciplines, a number of leaders in legal education had been laying the groundwork for a large-scale racial preferences program a year before King's death. The Council on Legal Education Opportunity (CLEO), organized by the AALS, the Law School Admission Council (LSAC), the American Bar Association (ABA), and the National Bar Association, with funding from the federal Office of Equal Opportunity (OEO) and the Ford Foundation, was created in 1967 to develop large-scale summer programs for promising nonwhite students with low academic credentials. Participating law schools would help to host the programs and would agree in advance to admit CLEO students who successfully completed the summer program.

Fueled by the broader shift in higher education toward racial preferences, the CLEO program took off, expanding from around one hundred students in 1968 to almost four hundred in 1969.<sup>32</sup> Many schools launched their own outreach and summer programs. The effect on enrollments was impressive. The number of black first-year law students outside the historically black schools

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29. One notable exception was Emory University School of Law. In 1965, Emory instituted a summer program for interested black students; any student who completed the program was guaranteed a seat in the first-year class. The program was quite similar to the much-larger-scale Council on Legal Educational Opportunity (CLEO) program begun a few years later. Hardy Dillard et al., *Report of the Advisory Committee for the Minority Groups Study*, 1967 ASS'N AM. LAW SCHS. PROC., PART ONE 160, 166-67.

30. The Kerner Commission, charged by President Lyndon Johnson with investigating the causes of the rioting that had rocked many central cities in the mid-1960s, produced a surprisingly harsh assessment of continuing racism in American society and institutions.

31. The first federally mandated affirmative action program in the employment arena—the so-called “Philadelphia Plan,” affecting construction jobs in federally funded projects—began soon afterwards, in the fall of 1969.

32. O'Neil, *supra* note 26, at 306-07.

rose from about two hundred in 1964-1965<sup>33</sup> to perhaps five hundred in 1968-1969, eight hundred in 1969-1970,<sup>34</sup> and seventeen hundred in 1973-1974.<sup>35</sup>

During these early years, no bones were made about the application of different standards to minority applicants. Indeed, it was widely argued that elemental fairness *required* different standards; the LSAT in particular was regarded as a culturally biased test that substantially understated the academic potential of black students.<sup>36</sup> Moreover, it was believed that conventional standards were most inapplicable to socioeconomically disadvantaged minorities, so black and Latino students from low-income families were admitted under especially relaxed standards. The result was, initially, very high attrition rates and low bar passage rates among the beneficiaries of preferences. The average minority attrition rate at ABA-approved law schools was

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33. See Groves, *supra* note 14, at 172.

34. An ABA analysis of black enrollments at law schools in 1969-1970 makes plain which schools had launched affirmative action programs and which had not. Considering students in all three years of law school, Columbia in that term was 6.3% black while Fordham was 1% black, UCLA was 6.9% black while Stanford was 2% black, and Yale was 8.5% black while the University of Connecticut was 1.7% black. Almost no southern school during that term was more than 2% black. John Atwood et al., *Survey of Black Law Student Enrollment*, 16 STUDENT L.J. 18, 36, 37 (1971). Black enrollments today still vary a good deal, but there are few regional disparities (except in the Plains and Rocky Mountain states, which have very small black populations) and virtually all elite schools not operating under legal constraints have significant black enrollments. See generally LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, THE ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS: 2004 EDITION (2003) (reporting racial compositions for individual law schools) [hereinafter 2004 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS].

35. The ABA website reports 2066 first-year blacks in law schools in 1973-1974, see Am. Bar Ass'n, *Minority Enrollment 1971-2002*, *supra* note 10. Historically black law schools had total minority enrollments of 946 that year, and it is plausible that about 350 of these were first-year students. AM. BAR ASS'N, LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS: A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—FALL 1973, at 12, 18, 26, 33 (1974). The increase was easy for many schools because most of them were increasing their overall enrollments. Sharp rises in the number and quality of law school applicants, and an apparently booming legal market (characterized then, as now, by escalating salaries at the top end) led to a doubling in the number of law school graduates between 1970 and 1975, and the creation of many new law schools. See Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 445 tbl.8 (1989).

36. A good example of the prevailing view was Justice Douglas's opinion in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). In that case, a white applicant challenged admissions policies at the University of Washington Law School, contending that the school exercised illegal racial preferences in favor of blacks. *Id.* at 314. The Supreme Court held, per curiam, that the case had been mooted by DeFunis's impending graduation from law school, *id.* at 317, but Justice Douglas wrote a dissenting opinion addressing the merits, *id.* at 320. Justice Douglas expressed serious doubts about racial preferences, but condemned the LSAT as a culturally biased metric that gave many whites an unfair advantage. *Id.* at 340-41 (Douglas, J., dissenting). See *infra* Part IV for examples of arguments about LSAT bias, as well as my discussion of the validity of standardized tests.

approximately thirty percent, and this was despite special efforts to promote retention.<sup>37</sup> As one admissions officer commented in the mid-1970s:

When the nation's law schools initiated [affirmative action], while readily admitting that the admissions standards to be used for minority applicants were "different" or even lower, the schools also assured the bar that the same rigorous standards applied to white students would be applied to minority students. The schools were saying in effect, that while entrance credentials for minorities might be lower, retention and graduation standards would remain the same . . . . [But] the nation's bar watched with some dismay as the schools changed grading systems, altered retention rules, readmitted students dismissed for scholarship, and in some cases graduated students who clearly did not meet the past standards of the school.<sup>38</sup>

By 1975, however, law schools had moved into a "second generation" of affirmative action. Admissions officers and deans had concluded that the LSAT and undergraduate grades did, after all, tend to be good predictors of the eventual success of nonwhite students.<sup>39</sup> Many schools moved away from dependence on CLEO to develop their own outreach programs and their own standards for admission. At the same time, the pool of black and other nonwhite college graduates applying to law school had expanded and deepened enough to enable schools to maintain or expand minority enrollments even as they toughened standards. Black enrollment stabilized at around two thousand first-year students; Latino and Asian enrollment grew steadily as the applicant pools grew.<sup>40</sup>

Despite the heavier reliance on academic indices for minority admissions during the mid- and late 1970s, the great majority of law schools continued to use separate racial tracks to evaluate candidates and applied very different standards to whites than to nonwhites. Perhaps the most complete description of law school affirmative action practices at the time comes in the 1977 amicus curiae brief submitted by the AALS in *Regents of the University of California v. Bakke*, in which the Supreme Court considered the use of racial quotas for

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37. Minority attrition rates are based on comparisons of first- and third-year enrollments. During this same period, white retention rates—buoyed by the strengthening of the applicant pool—were rising to average levels of around ninety percent (based on comparison of first-year enrollment and degrees awarded). AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 51 LAW SCHOOLS & BAR ADMISSION REQUIREMENTS: A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—FALL 1976, at 47-48 (1977).

38. Michael D. Rappaport, *The Legal Educational Opportunity Program at UCLA: Eight Years of Experience*, 4 BLACK L.J. 506, 516 (1975).

39. *Id.* at 507; Brief Amicus Curiae for the Association of American Law Schools, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), reprinted in 3 ALLAN BAKKE VERSUS REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE SUPREME COURT OF THE UNITED STATES 379, 393-96 (Alfred A. Slocum ed., 1978) [hereinafter AALS *Bakke* Brief].

40. SUSAN WELCH & JOHN GRUHL, AFFIRMATIVE ACTION AND MINORITY ENROLLMENT IN MEDICAL AND LAW SCHOOLS 56-58, 56 fig.2.6 (1998).

admission to UC Davis's medical school.<sup>41</sup> The brief argued that LSAT score and undergraduate GPA were the best predictors of success in law school,<sup>42</sup> and that they were not biased<sup>43</sup> (so that no alternative indicators would do a better job of assessing minority candidates), but that the number of minority applicants with academic numbers comparable to the best whites was insignificant. "This has led to the creation of 'special admissions programs' designed to produce decisions different from those that would be produced if the process were conducted in a racially neutral way."<sup>44</sup> These special admissions tracks had two characteristics: they compared academic strengths among candidates within each racial group, thus insulating them from direct competition with whites; and they looked a little harder at nonnumerical indicia of academic promise.<sup>45</sup> To place all applicants in direct competition with one another, the brief contended, would "exclude virtually all minorities from the legal profession."<sup>46</sup>

Recognizing that there was legal precedent for temporary race-conscious programs to correct specific conditions of discrimination, the AALS brief emphasized that "[t]he premise of these special admissions programs is that, in time, they will disappear. They are essentially a transitional device to correct a time lag."<sup>47</sup> Boalt Hall,<sup>48</sup> for example, had already eliminated its temporary

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41. AALS *Bakke* Brief, *supra* note 39 (submitted for the 1976-1977 Term of the Supreme Court, although the Court did not issue its decision until June 1978).

42. *Id.* at 14-15.

43. "We know . . . that the test is not racially biased. Five separate studies have indicated that the test does not underpredict the law school performance of blacks and Mexican-Americans." *Id.* at 13.

44. *Id.* at 20. The brief noted that, of course, all law schools also used "soft" factors (such as letters of recommendation) in admissions. But greater weight on "soft" factors was not a solution to minority underrepresentation unless minority students had stronger "soft" qualifications than whites, and the brief argued that "there is not the slightest reason to suppose that [this is the case]; indeed, there is no reason to suppose that such subjective factors are distributed on other than a random basis among applicants of different races." *Id.* at 34. This is an overstatement, since certainly measures of socioeconomic disadvantage, for example, are not distributed randomly across racial groups; but it is surely true that no "super-index," based on both academic and nonacademic factors, could select minorities as efficiently, and with so little overall academic cost, as separate admissions tracks. *See Sander, supra* note 5.

45. AALS *Bakke* Brief, *supra* note 39, at 22-27.

46. *Id.* at 2. The brief went on to quantify this claim with some specific estimates: if all law schools used race-neutral criteria, black enrollment would fall by 60% to 80% and Chicano enrollment would fall by 40% to 70%. *See id.* at 28. The estimates were based on comparisons of the LSAT and undergraduate GPA (UGPA) distributions of all law school applicants, as documented in Franklin R. Evans, *Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976*, in 3 REPORTS OF LSAC SPONSORED RESEARCH: 1975-1977, at 551. I examine these claims more closely in Part VII.

47. AALS *Bakke* Brief, *supra* note 39, at 26.

48. Boalt Hall is the law school of the University of California at Berkeley.

preferences for Japanese-Americans; other preferences would be eliminated as the minority pools broadened and deepened.<sup>49</sup>

The AALS brief is notable for its clarity and honesty; it is the most detailed assessment I have found of law school affirmative action in the 1970s. It concludes its argument that special admissions programs are necessary to maintain a minority presence in law schools with a passage that is hard to read now without some sense of painful irony:

The suggestion [in the lower court decision in *Bakke*] that professional schools abandon special minority admissions programs in favor of programs for the disadvantaged or that they seek to maintain minority enrollments by reducing reliance on quantitative predictors of academic performance may rest upon the premise that either of these alternatives would permit race to be taken into account *sub rosa*.<sup>50</sup> We do not imply that the court below meant to invite such an interpretation of those suggestions, but there are others who have suggested that in the effort to achieve racial equality "we cannot afford complete openness and frankness on the part of the legislature, executive, or judiciary." It need hardly be said in response that a constitutional principle designed to be flouted should not be imposed on schools dedicated to teaching the role of law in our society.<sup>51</sup>

The Supreme Court's *Bakke* decision in June 1978 invited exactly this type of deception. As most readers know, the Supreme Court divided deeply in *Bakke*. Justices Brennan, White, Marshall, and Blackmun held, as the AALS urged, that racial preferences to correct general societal discrimination should be permitted, temporarily, in higher education;<sup>52</sup> Justices Stevens, Stewart, Burger, and Rehnquist held that any consideration of race violated Title VI of the 1964 Civil Rights Act.<sup>53</sup> The ninth Justice, Lewis Powell, wrote the deciding opinion, drawing on the conservative camp to find the University of California's racial quota illegal, but drawing on the liberal camp to hold that universities were not completely precluded from considering race in admissions decisions. Race, he found, could be used as one of many factors taken into account by a university in pursuit of its legitimate desire to create a diverse student body:

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49. AALS *Bakke* Brief, *supra* note 39, at 27.

50. *Sub rosa* literally translates as "under the rose" from Latin, but is used here to mean "in secrecy." See BLACK'S LAW DICTIONARY 1441 (7th ed. 1999).

51. AALS *Bakke* Brief, *supra* note 39, at 38 (citation omitted).

52. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 369 (1978) (Brennan, White, Marshall & Blackmun, J.J., concurring in the judgment in part and dissenting in part) (finding that "a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large").

53. *Id.* at 413 (Stevens, J., concurring in the judgment in part and dissenting in part) (stating that Title VI of the Civil Rights Act of 1964 "stands as a broad prohibition against the exclusion of *any* individual from a federally funded program 'on the ground of race'").



[R]ace or ethnic background may be deemed a “plus” in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.<sup>54</sup>

All of this seemed to preclude quotas and segregated admissions tracks, but there was a logical flaw at the heart of Powell’s opinion. The careful calibration of the “weight” given to membership in a specific racial group could produce highly predictable admission numbers. The lack of any clear test in *Bakke* to distinguish illegal discrimination from the legal pursuit of diversity left schools free to evade Powell’s intent.

The AALS, which had been forthright in advocating for racial preferences, now faced the task of providing nuanced instruction to member schools in the art of *sub rosa* preferences. “It is difficult to see how an admissions officer or committee can exercise any degree of preference in a race-conscious program without some notion of how many minority applicants are desired in the final mix of the student body,”<sup>55</sup> an AALS report noted, but *Bakke* seemed to permit schools “extremely broad discretion.”<sup>56</sup> The difference between a pre-*Bakke* quota and a post-*Bakke* “plus,” an AALS lawyer noted, is “nothing more than a smirk and a wink.”<sup>57</sup>

The response of law schools—and indeed, of higher education in general—was to go underground. Racially separate admissions tracks were draped with fig leaves of various shapes and sizes to conceal actual practices, which changed hardly at all. Enrollments also remained constant. An exhaustive study by political scientists Susan Welch and John Gruhl found that *Bakke* had no noticeable overall effect on minority law school enrollment.<sup>58</sup> A survey of law school admissions officers in the late 1980s found that only 1% of the

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54. *Id.* at 317 (opinion of Powell, J.).

55. WELCH & GRUHL, *supra* note 40, at 63 (quoting AM. COUNCIL ON EDUC., ASS’N OF AM. LAW SCH., *THE BAKKE DECISION: IMPLICATIONS FOR HIGHER EDUCATION ADMISSIONS* 33 (Wayne McCormack ed., 1978) [hereinafter ACE-AALS]).

56. *Id.* (quoting ACE-AALS, *supra* note 55, at 21).

57. *Id.* at 6.

58. *Id.* at 131-32.

respondents felt that *Bakke* had a “significant” impact on policies<sup>59</sup> (even though a large majority conceded that *other* law schools had had racial quotas before *Bakke* and 23% agreed that their own school had had at least racial “goals” before *Bakke*<sup>60</sup>). The number of black first-year law students fell about 2% from 1978 to 1979, but the number of Hispanic first-years grew that year, and black matriculation reached an unprecedented high in 1981.<sup>61</sup> The most concrete practical effect, according to a number of schools, was a broadening of the range of racial and ethnic groups designated to receive “plus” consideration, in line with Justice Powell’s emphasis on the value of diversity.<sup>62</sup>

The UCLA School of Law’s response to *Bakke* was probably more formal and elegant than that of the typical law school, but it captured the general approach. The school created a faculty committee led by distinguished constitutional scholar Ken Karst. The resulting study, which became known as the “Karst Report,” discussed *Bakke* carefully, and, following Powell’s controlling opinion, identified ten types of “diversity” which were important to legal education at UCLA, only one of which was race.<sup>63</sup> The report recommended that UCLA split its admissions process in two. Sixty percent of the seats would be awarded based on the academic strength of students (measured primarily with conventional quantitative indices). Forty percent of admissions decisions would blend a consideration of academic strength with the types of diversity each applicant could potentially bring to the school. The Karst Report sounded like a dramatic retreat from the earlier, race-based policies—enough to provoke angry student protests. The students need not have worried; even under the admissions regime inspired by the Karst Report, which was promptly adopted by the faculty and which guided law school admissions policy from 1979 to 1997, race was the preeminent diversity factor, determining 80% to 90% of all admissions under the diversity program. Nonwhite enrollment at UCLA substantially increased in the years after *Bakke*.<sup>64</sup> But the operation of preferences was invisible to the outside eye.<sup>65</sup>

59. *Id.* at 61, 75.

60. *Id.* at 70-71.

61. Am. Bar Ass’n, *Minority Enrollment 1971-2002*, *supra* note 10.

62. WELCH & GRUHL, *supra* note 40, at 76-77.

63. Report from the UCLA Law School Admissions Task Force, 1978-79, to the Faculty (Nov. 21, 1978) (on file with author).

64. Enrolled “Minority Group” students as a percentage of total enrollment at UCLA went from 23% in 1978 to 31% in 1982. *Compare* SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS’N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1978, LAW SCHOOLS & BAR ADMISSION REQUIREMENTS 9 (1979), *with* SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS’N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1982, LAW SCHOOLS & BAR ADMISSION REQUIREMENTS 6 (1983). I return to the operation of UCLA’s diversity system in Part II.

65. One distinguished constitutional scholar has suggested to me that shifting from obvious quotas to “invisible” weightings of diversity factors was Justice Powell’s real objective all along. In a similar vein, another prominent constitutional scholar suggested to

Other schools, more candid or less artful about what they were doing, occasionally encountered legal difficulties. Boalt Hall preserved racially segregated admissions reviews and waiting lists until an investigation by the first Bush administration's Department of Education forced it to abandon the practices in 1992.<sup>66</sup> Stanford Law School and the law schools at the University of Michigan, University of Texas, and the University of Wisconsin all maintained admissions processes that were racially segmented in one way or another for many years after *Bakke*.<sup>67</sup>

What has been consistent since *Bakke* throughout the world of legal education is a code of silence on preferential policies. Schools have been loath to disclose the degree to which they depend on numerical indicators and have been even more secretive about the extent to which they take racial factors into account. The relatively vibrant research and discussion about affirmative action that characterized the late 1960s and 1970s almost totally disappeared in the 1980s and 1990s.<sup>68</sup> When law school deans, in various contexts, have been asked point-blank about the extent of racial preferences, they have suggested that such preferences were either minimal or nonexistent.<sup>69</sup>

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me that Justice O'Connor similarly cared deeply about schools engaging in a ritual of individualized assessment even if the results were identical to those produced by numerical formulas. These observations remind me of a creationist argument I once heard to the effect that God created fossils to fool skeptics into believing in evolution—not a logically impossible argument, but a hard view for an empiricist like me to address.

66. Boalt's consent agreement and a description of the offending admissions procedures are contained in its report to the U.S. Department of Education's Office of Civil Rights. RACHEL F. MORAN ET AL., STATEMENT OF FACULTY POLICY GOVERNING ADMISSION TO BOALT HALL AND REPORT OF THE ADMISSIONS POLICY TASK FORCE (1993).

67. WELCH & GRUHL, *supra* note 40, at 154. For example, at the University of Texas, minority applicants were first considered by a special minority subcommittee, which would then offer its recommendations to the full admissions committee. By 1992, minority applicants were no longer selected by the full committee—the minority subcommittee simply delivered its report to the full committee, which chose the number of minorities to admit, but left the individual admissions decisions up to the subcommittee. See the district court opinion in *Hopwood v. Texas*, 861 F. Supp. 551, 558-60 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996).

68. For one of the few comparatively candid discussions of law school affirmative action in the post-*Bakke* era, see Leo M. Romero, *An Assessment of Affirmative Action in Law School Admissions After Fifteen Years: A Need for Recommitment*, 34 J. LEGAL EDUC. 430 (1984).

69. An associate dean of Washington University School of Law claimed that “[t]est scores and grades are weighed heavily for admission to the [law school]” and that “[r]ace, gender, age and family background come into play when students are borderline.” Lorraine Kee, *Debate Rages over Affirmative Action*, ST. LOUIS POST-DISPATCH, Sept. 21, 1997, at 01A. Ronald Hjorth, former dean of the University of Washington School of Law, once denied that his school “maintain[s] a quota, saying instead that race is merely used as a ‘plus factor’ in admissions decisions, considered as part of an applicant’s ‘background and life experiences’ that may add diversity to the student body.” Robyn Blummer, *Law School Dean Runs from the Truth*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Sept. 11, 1998, at 75A.

As we shall see in Parts II and III, racial preferences in American law schools were quite large during this period. The size of preferences probably changed little after *Bakke*, or possibly even shrank at some schools; but for other reasons, black law school enrollment began a second period of growth in the mid-1980s. Between 1985 and 1994, the number of first-year black law students doubled, rising from eighteen hundred to thirty-six hundred students (and from 4.4% to 8.1% of total ABA first-year enrollment).<sup>70</sup> The increase reflected several developments: an 8.7% increase in overall law school enrollment over the same period;<sup>71</sup> an increasing acceptance of racial preferences at schools that had previously avoided them (particularly in the South); a growing number of black applicants; and a narrowing of the overall gap in black-white academic credentials.<sup>72</sup>

The nonblack minority groups, such as Hispanics, Asians, and American Indians, were an even faster-growing presence in law school diversity programs. In 1971, blacks accounted for 67% of all nonwhites enrolled at ABA-accredited schools. By 1991, this had dropped to 42% (and was to fall further, to 36%, by 2001).<sup>73</sup> It was not that black enrollment fell; quite the contrary, as we have seen. The shift instead reflected three trends: the rapidly growing non-European immigrant population of the United States,<sup>74</sup> the rise in Hispanic college enrollment,<sup>75</sup> and the shift of second-generation Asian-Americans away from the “hard” sciences toward “softer” areas like the law.<sup>76</sup>

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70. Total first-year enrollment figures for ABA-approved law schools for the years 1947-2002 are available from the ABA at Am. Bar Ass'n, First Year Enrollment in ABA Approved Law Schools 1947-2002 (Percentage of Women), at <http://www.abanet.org/legaled/statistics/femstats.html> (last visited Nov. 22, 2004) [hereinafter Am. Bar Ass'n, First Year Enrollment]. First-year enrollment figures for blacks from 1971-2002 are also available from the ABA in Am. Bar Ass'n, Minority Enrollment 1971-2002, *supra* note 10.

71. See Am. Bar Ass'n, First Year Enrollment, *supra* note 70.

72. On these last two points, see *infra* Table 8.1.

73. Blacks accounted for 3744 out of 5568 nonwhites enrolled in any year of law school in 1971, 8149 out of 19,410 nonwhites in 1991, and 9412 out of 26,257 nonwhites in 2001. Am. Bar Ass'n, Minority Enrollment 1971-2002, *supra* note 10.

74. In 1970, there were fewer than three million nonwhite immigrants (including Hispanics) in the United States. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981, at 34 tbl.40 (1981). By 1999 that number had risen to over nineteen million. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 44 tbl.43 (2001) [hereinafter 2001 CENSUS STATISTICAL ABSTRACT].

75. In 1970, the U.S. Department of Education's Office for Civil Rights counted 102,788 “Spanish-surnamed” students enrolled in all American undergraduate colleges and universities. BROWN ET AL., *supra* note 18, at 17. In 1999, there were 1,300,000 Hispanics enrolled in college, an increase from 2% to 8% of the total student population. 2001 CENSUS STATISTICAL ABSTRACT, *supra* note 74, at 168 tbl.268.

76. See *supra* note 17. The percentage of doctoral degrees in the physical sciences received by Asians declined somewhat, from 6.9% to 6.6%, between 1980 and 1990. NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2002, at 347 tbl.303 (2003). The percentage of engineering degrees granted to Asians declined from 20% to 17.4%. *Id.* at 354 tbl.300. Over the same period of time, the percentage of law degrees awarded to Asian

Asians were rare enough in the 1970s and 1980s that many law schools explicitly included them in preference programs; as time passed and the Asian pool grew, many schools eliminated Asian preferences altogether, while others eliminated preferences for well-established Asian-American groups like Japanese-, Chinese-, Indian-, and even Korean-Americans, but kept preferences for less-prosperous Asian-American groups such as Filipino-, Vietnamese-, and Cambodian-Americans.

Although racial preferences were no doubt pervasive throughout higher education in the years after *Bakke*, law schools were unusually vulnerable to legal challenges over what they did. In few areas was the reliance on numerical indices as extreme as in law school admissions, and the schools admitted large enough classes to make disparities easy to demonstrate statistically. And, of course, law schools are uniquely familiar to lawyers and policy advocacy groups. So it is only a little surprising that when affirmative action in higher education reemerged as a potent political issue in the 1990s, law schools were at the center of the debate.

In Michigan, Texas, and Washington, rejected students (assisted or recruited by more organized opponents of affirmative action<sup>77</sup>) brought lawsuits challenging the admissions practices of public law schools.<sup>78</sup> In each case, the plaintiffs contended that race was a predominant factor in admissions, questioned whether Justice Powell's "diversity" goal was a compelling interest under the Constitution, and argued that even if diversity was a compelling goal, the school policies were not narrowly tailored to achieve it in a constitutionally appropriate way. In essence, they argued that the schools were letting race trump other forms of diversity to create de facto racially segregated admissions.

The three cases followed very different paths. In the 1994 case of *Hopwood v. Texas*, the district court upheld the use of racial preferences in principle, but found that the law school's 1992 practice of having a separate admissions committee process minority applications violated the Fourteenth Amendment; however, since the school had abandoned this practice at the outset of the litigation, the court found no need for further corrective

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students increased from 1.1% to 2.3% (a 112% increase). Am. Bar Ass'n, *Minority Degrees Awarded*, *supra* note 13. More informal evidence comes from Arthur S. Hayes, *Asians Increase at Big Firms*, NAT'L L.J., Dec. 18, 2000, at A1 ("Asian-American lawyers say that their disproportionately large numbers at IP firms reflect the choice of more second- and third-generation Asian-Americans to pursue careers outside engineering and science.").

77. The Center for Individual Rights provided funding and staff support for all three lawsuits, according to David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1551 (2004).

78. Public law schools were more attractive targets for several reasons. First, they were under clear constitutional as well as statutory (Title VI) bans on discriminatory practices; second, they were covered by state "freedom of information acts" (FOIAs) that made it easier to do data reconnaissance before filing suit; and third, there was more public hostility to the use of preferences by public universities than by private ones.

measures.<sup>79</sup> On appeal in 1996, the Fifth Circuit went much further, concluding that Justice Powell's diversity rationale in *Bakke* had been effectively discarded by later Supreme Court decisions, and that it could no longer be used to justify racial preferences.<sup>80</sup> When the Supreme Court declined to grant certiorari on *Hopwood* that same year,<sup>81</sup> many commentators viewed it as a sign that the Court favored the abolition of racial preferences in admissions.

A year later, in *Smith v. University of Washington Law School*, the plaintiffs, again white students denied admission to law school, tried to build upon the *Hopwood* precedent.<sup>82</sup> Pointing out that the school acknowledged that it used race as a factor in admissions, the plaintiffs sought a summary judgment ruling that the school's consideration of race was per se unconstitutional. Both the district court and the Ninth Circuit rejected this argument, finding that *Bakke* was still the controlling law and clearly permitted some use of race.<sup>83</sup> The Supreme Court also let this judgment stand.<sup>84</sup> Further proceedings in district court about the actual operation of the law school's practices had been rendered largely moot by Washington voters' adoption of Initiative Measure 200 in 1998, which prohibited the use of race in state programs.<sup>85</sup>

The last of this trio of cases, *Grutter v. Bollinger*, was brought against the University of Michigan Law School in 1997, more or less simultaneously with a challenge to the undergraduate admissions process at the University of Michigan (*Gratz v. Bollinger*).<sup>86</sup> The district court followed *Hopwood* in finding that Justice Powell's diversity rationale in *Bakke* was not controlling and that, as a general matter, the use of race to assemble a diverse student body was not a compelling state interest.<sup>87</sup> It further found that, even if it was, the school had not narrowly tailored its use of race in pursuit of the diversity

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79. *Hopwood v. Texas*, 861 F. Supp. 551, 553-54, 578-79, 582 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996).

80. *Hopwood v. Texas*, 78 F.3d 932, 944-46 (5th Cir. 1996). The court also found that the school's admissions program went well beyond what would be justified under Powell's diversity rationale even if that still applied.

81. *Texas v. Hopwood*, 518 U.S. 1033 (1996). Justice Ginsburg's concurrence with the denial of certiorari argued that because the 1992 admissions policy contested in *Hopwood* was no longer being used by the law school, there was no live issue to rule on; she distinguished between the Fifth Circuit's *judgment*, which found the 1992 policy to be in violation of the Fourteenth Amendment, and the Fifth Circuit's *rationale*, which rejected the use of race in admissions when based on a diversity rationale, and reminded the petitioners that the Court "reviews judgments, not opinions." *Id.* (Ginsburg, J., concurring in the denial of certiorari) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

82. 233 F.3d 1188 (9th Cir. 2000).

83. *Id.* at 1196, 1200-01.

84. *Smith v. Univ. of Wash. Law Sch.*, 532 U.S. 1051 (2001) (denial of certiorari).

85. *Smith*, 233 F.3d at 1192-93.

86. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

87. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 847, 849, 872 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

goal.<sup>88</sup> In 2002, the Sixth Circuit, in a 5-4 en banc decision, reversed on both counts, agreeing with the Ninth Circuit that *Bakke* was still viable, and sanctioning for the first time a specific, post-*Bakke* admissions system that took substantial account of race.<sup>89</sup> This time, the Supreme Court decided to take the issue up, granting review to both *Grutter* and *Gratz*.

In June 2003, the Court handed down deeply split opinions in both *Grutter* and *Gratz*.<sup>90</sup> Justice O'Connor stepped into the role previously played by Justice Powell, siding with five Justices to rule against the University of Michigan in *Gratz*, but agreeing with four Justices to rule in favor of the University of Michigan Law School in *Grutter*. Justice O'Connor found in *Grutter* that Powell's opinion was still good law: diversity in a university environment was a compelling state interest.<sup>91</sup> The boundary between the acceptable and unacceptable use of race lay in the degree to which race was considered in a "mechanical," or automatic, fashion, as opposed to an "individualized" process in which race was one of many relevant factors.<sup>92</sup> The college's use of race was impermissible because minorities were assigned twenty points for their race in the construction of an admissions scale.<sup>93</sup> The law school, however, did not explicitly factor race into its admissions index at all; instead, according to the school and Justice O'Connor, the school made its race-blind index the starting point of a deeper inquiry into each student's potential contribution to the school's intellectual strength and diversity, a process that included consideration of applicant race.<sup>94</sup> This more nuanced process, Justice O'Connor suggested, was exactly what Justice Powell had had in mind in *Bakke*.<sup>95</sup>

So the matter stands. Justice O'Connor agreed that consideration of race was undesirable and should be eliminated in the long run, and she explicitly suggested that the "long run" in this case meant twenty-five years.<sup>96</sup> Only two questions seemed unresolved. First, what exactly was the touchstone of acceptably "individualized" admissions? Was the law school's admissions process, in truth, fundamentally different from the point system used by the college, or was the difference between permissible and impermissible policies

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88. *Id.* at 853, 872.

89. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

90. *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244.

91. *Grutter*, 539 U.S. at 325.

92. *Id.* at 337.

93. *Gratz*, 539 U.S. at 270.

94. *Grutter*, 539 U.S. at 315-16.

95. *See id.* at 337 (equating the law school's "race-conscious admissions program" with the Harvard plan Justice Powell approved of in *Bakke*, and noting that both "adequately ensure[] that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions").

96. *See id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

still the difference between “a smirk and a wink”? And second, was the consideration of race producing the good results that had been advanced on its behalf?

## II. DEFINING THE ROLE OF RACE IN LAW SCHOOL ADMISSIONS

The Supreme Court’s two great examinations of affirmative action in higher education both turned on the views of a single Justice. In each case, a moderate Justice determined that racial preferences were permissible under some circumstances but not others. But these parallels belie a basic difference. In *Bakke*, all members of the Court fundamentally agreed on what the defendant University of California was doing at the UC Davis Medical School: it had a quota for underrepresented minorities.<sup>97</sup> The Court disagreed not on the facts of the case but on what the law allowed. Four Justices thought the need to overcome the legacy of societal discrimination legitimated a temporary use of racial preferences;<sup>98</sup> four Justices thought that any use of preferences was inappropriate where no history of institutional discrimination justified and could guide a specific, limited remedy.<sup>99</sup> Justice Powell split the Gordian knot with his diversity rationale: universities had a compelling interest in diversity, and race could be a legitimate “plus” factor in that quest.

In contrast, most of the debate in the Court’s 2003 Michigan decisions revolved around empirical questions. A comfortable majority of Justices seemed to subscribe to the diversity rationale (or at least to accept it as the Court’s standard), which provides a compelling state interest for the consideration of race. The Michigan debate concerned what use of race is sufficiently narrowly tailored to survive scrutiny. As we have seen, Justice

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97. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 288-89 (1978) (opinion of Powell, J.) (finding the “semantic distinction” between a goal and a quota to be “beside the point” because “[t]he special admissions program is undeniably a classification based on race and ethnic background”); *id.* at 374 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage . . . of otherwise underrepresented qualified minority applicants.”); *id.* at 412 (Stevens, J., concurring in the judgment in part and dissenting in part) (“The University, through its special admissions policy, excluded Bakke from participation in its program . . . because of his race.”).

98. See *id.* at 369 (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (finding that “a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large”).

99. See *id.* at 413 (Stevens, J., concurring in the judgment in part and dissenting in part) (finding that Title VI of the Civil Rights Act of 1964 “stands as a broad prohibition against the exclusion of any individual from a federally funded program on the ground of race”) (quotation marks omitted) (emphasis omitted).



O'Connor drew a sharp distinction between the undergraduate college's system of assigning "points" to minority applicants (impermissible), and the law school's system of "individualized assessment" that includes a consideration of applicant race among many other factors in the construction of a diverse class (permissible). It seems, though, that Justice O'Connor was the only member of the Supreme Court who thought this difference truly significant. Chief Justice Rehnquist pointed out that the proportion of the law school's admittees from each of three underrepresented groups (blacks, Hispanics, and Native Americans) closely tracked the proportion of each group in the law school's total applicant pool.<sup>100</sup> This looked to the Chief Justice a lot like the setting of quotas or "racial balancing" (setting different thresholds for different underrepresented groups), a practice that he notes Justice O'Connor described as "patently unconstitutional."<sup>101</sup> Justice Kennedy thought that the law school's pursuit of a "critical mass" of minorities looked much like a quota, with underrepresented minorities making up between 13.5% and 13.8% of each enrolled class from 1995 through 1998.<sup>102</sup> Justice Thomas observed that the school's heavy reliance on academic credentials to maximize its elite standing among law schools meant that its quest for racial diversity was necessarily heavy-handed.<sup>103</sup> Justice Souter, who was on the side of racial preferences in both cases, gave an equally pointed critique of Justice O'Connor's empiricism:

Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review" . . . .

. . . .

Without knowing more about how the [undergraduate admissions committee] actually functions, it seems especially unfair to treat the candor of the admissions plan as an Achilles' heel . . . .

. . . Equal protection cannot become an exercise in which the winners are the ones who hide the ball.<sup>104</sup>

Justice Ginsburg implicitly agreed that the undergraduate college's admissions system was substantively the same as and ethically preferable to the law school's: "If honesty is the best policy, surely Michigan's accurately described,

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100. *Grutter*, 539 U.S. at 383 (Rehnquist, C.J., dissenting). For all three groups, the admitted members as a percentage of admittees never diverged by more than one percent from the applicant members as a percentage of applicants over the six admissions cycles from 1995 to 2000. *See id.* at 383-84, tbls.1-3.

101. *Id.* at 383 (quoting *id.* at 330 (opinion of the Court)).

102. *Id.* at 389 (Kennedy, J., dissenting).

103. *Id.* at 361 (Thomas, J., dissenting).

104. *Gratz*, 539 U.S. at 295-98 (Souter, J., dissenting).

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fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”<sup>105</sup>

It is not surprising that the Supreme Court’s debate in *Gratz* and *Grutter* was an empirical one. After all, as we saw in Part I, Powell’s diversity rationale proved so malleable that, after *Bakke*, law schools were able to pursue nearly any policy they liked, so long as it was correctly named. In dealing with the Michigan cases, the Justices were of course jousting over ways to limit or protect affirmative action, but they were also struggling to find meaningful ways to define permissible and impermissible practices.

This Part has three goals: first, to suggest a way of thinking rigorously about the operation of racial preferences in an admissions system; second, to evaluate the University of Michigan Law School’s system by the implicit standards of *Grutter* and *Gratz*; and third, to consider how representative the University of Michigan Law School is of law school admissions systems generally.

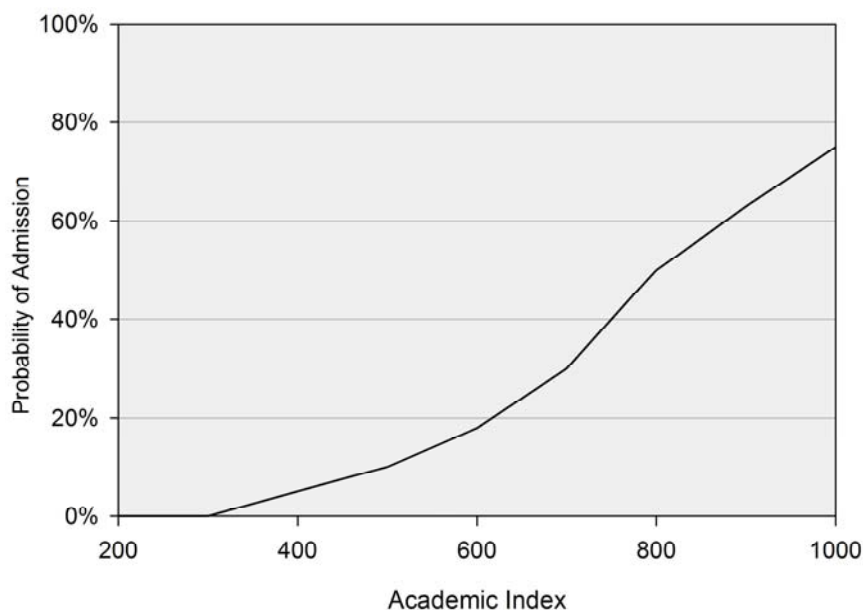
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Debates on racial affirmative action always involve heated exchanges on the role of test scores and general academic “numbers” in evaluating candidates. How useful are they? How important should they be in admissions? How heavily are they, in reality, relied upon by admissions officers? The first two questions are fundamental, and I return to them in Part IV. But for now let us focus on the third question. Figure 2.1 shows a simple mechanism for illustrating the role of academic numbers in admissions.

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105. *Id.* at 305 (Ginsburg, J., dissenting).

FIGURE 2.1: A HYPOTHETICAL ADMISSIONS CURVE



The horizontal axis of this box is an index that summarizes the academic “numbers” of an applicant in a single number. Most institutions of higher education have an explicit index of this sort—generally a linear combination of an applicant’s test scores and GPA. At law schools, a common version of this number is

$$\text{Academic Index} = 0.4 (\text{UGPA}) + 0.6 (\text{LSAT}),$$

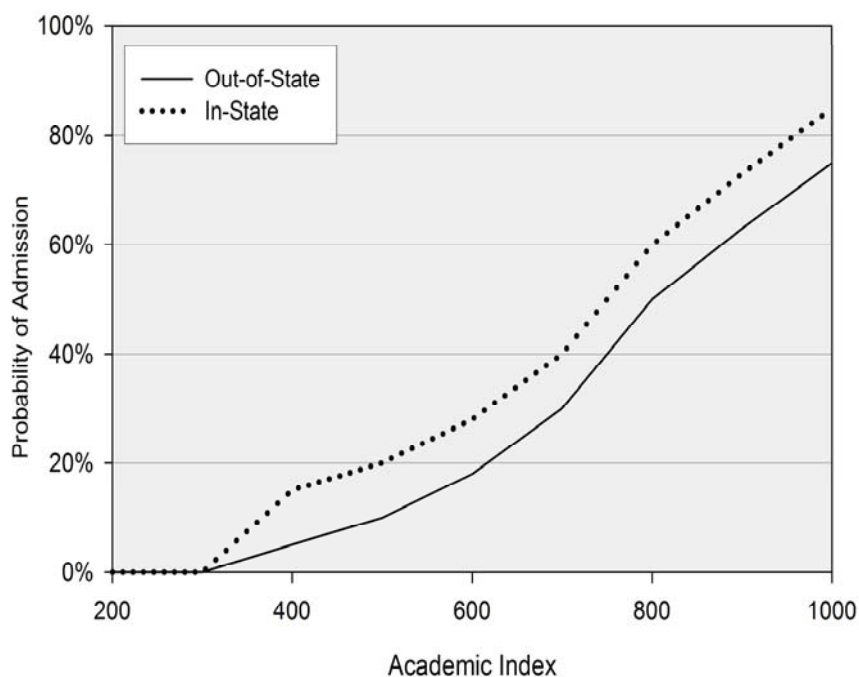
with both UGPA and LSAT normalized to a one-thousand-point scale, so that an Academic Index of one thousand would denote a perfect LSAT score and 4.0 GPA, and an Academic Index of five hundred would denote a 2.0 GPA and a midrange LSAT.<sup>106</sup> Even schools that do not have an explicit index of this sort, however, have some implicit method of jointly evaluating the weight of grades and test scores. To facilitate much of the discussion in this Article, I will use the term “academic index,” the standard scale from zero to one thousand, and the above formula as uniform shorthand to compare and analyze the credentials of law school students and applicants.

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106. I base this claim on analyses of raw 2002 and 2003 admissions data from eight law schools, which I secured through FOIA requests. Logistic regression analysis of admissions outcomes suggests that something close to a 60/40 relative weight of LSAT and UGPA is quite common.

The vertical axis in Figure 2.1 is a candidate's probability of admission. By inspecting any school's admission records, one can calculate the likelihood of an applicant's admission given her academic index. The importance of academic indices varies from one institution to another, and with this simple device, one can get a sense of how much admissions decisions turn on academic credentials. If there is any factor that a university assigns a systematic "plus" value in admissions, applicants who possess that factor will have a separate admissions curve. For example, if a state university favors in-state applicants over those from outside the state, then the admissions curve of in-state applicants will lie to the left of and above the curve for out-of-state applicants. In other words, an in-state applicant will have a higher probability of admission than an out-of-state applicant with the same academic numbers. If the preference is formalized as an award of "points," like the undergraduate admissions system at Michigan, then we will observe a fixed gap between the in-state and out-of-state admissions curves—the two will be a more or less constant horizontal distance apart, as illustrated in Figure 2.2.

FIGURE 2.2: HYPOTHETICAL ADMISSIONS CURVES UNDER A FORMALIZED POINT SYSTEM

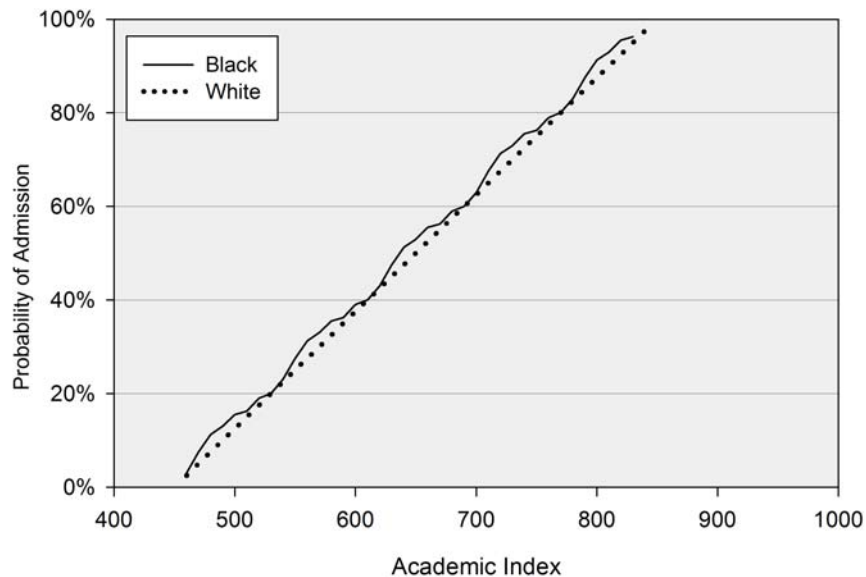


Similarly, one can examine the role of race—and racial preferences—in an admissions system by separately plotting out the admissions curves of different

racial groups. The result gives us both vivid illustrations and a quantitative method to capture how different preference systems operate. Let us consider how some hypothetical admissions policies would translate into this sort of analysis.<sup>107</sup>

*Scenario One: A multifaceted admissions process where race is a “tie-breaker.”* The more varied the criteria to which an admissions office gives serious attention, the lower will be the slope of its admissions curve. Using race simply as a tie-breaker between otherwise indistinguishable black and white candidates means that at many index levels, the black probability of admission is slightly higher than that for whites, though not necessarily at every point (a gap will show up only when there exists a pool of blacks and whites who are, in nonracial terms, interchangeable). Figure 2.3 illustrates this approach.

FIGURE 2.3: HYPOTHETICAL MULTIFACETED ADMISSIONS CURVES WHEN RACE IS A TIE-BREAKER

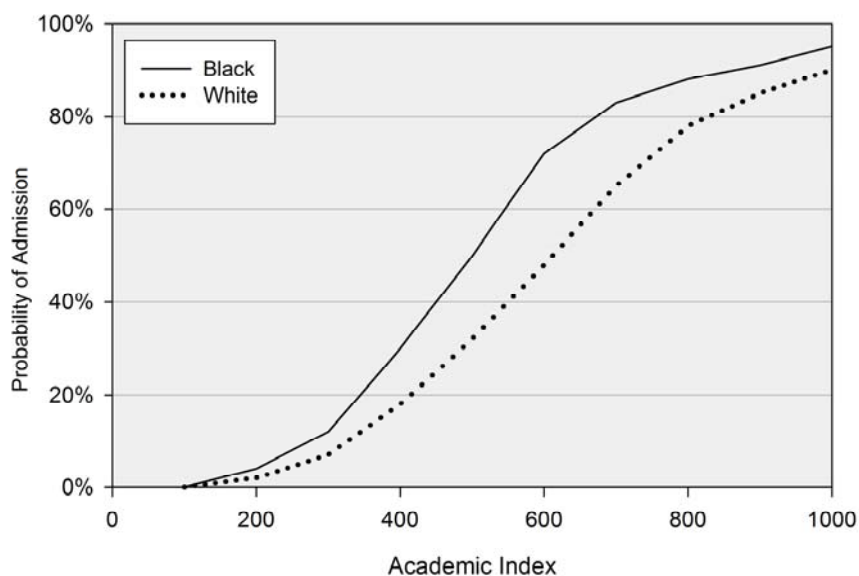


107. This approach of graphing the admissions probabilities of blacks and whites by academic index has been used by a number of scholars studying affirmative action, including Bowen and Bok as well as Kinley Lartz (a plaintiff's expert in the Michigan cases). See BOWEN & BOK, *supra* note 2, at 27; Fourth Supplemental Expert Report of Kinley Lartz, Ph.D. at 25-33 figs.3-10, *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 847, 849, 872 (E.D. Mich. 2001) (No. 97CV75928-DT).

*Scenario Two: A multifaceted admissions process that relies heavily on subjective criteria and considers race, if at all, as one of many diversity factors.* If a school relies heavily on letters of recommendation, evidence of community service, work experience, demonstrated leadership ability, and other similar factors, and relies only moderately on academic indices, the index coefficient of its admissions curve will again be relatively low. If, for a given index level, the typical black applicant has stronger nonacademic credentials than the typical white applicant (e.g., better community service, lower socioeconomic status), then we will see a black admissions curve that lies consistently a bit above the white admissions curve.

If we add to this multifaceted admissions system a preference for blacks based on race, then the gap in the two groups' admissions curves would be even larger. For example, consider Figure 2.4. In this admissions scheme, there is a minimum academic index threshold (approximately one hundred) all applicants must meet to be considered admissible. All groups have a 0% probability of admission below this threshold. Above the threshold, the likelihood of admission rises for both blacks and whites, though an index alone is enough to guarantee admission only at the highest levels. At an index level of six hundred, whites have about a 50% chance of admission and blacks have an 80% chance of admission. Blacks and whites in this range are truly competing with one another for seats in the school; the "plus" given to blacks is enough to substantially improve their chances of admission, but it does not insulate them from the competition of whites with similar academic credentials.

FIGURE 2.4: JUSTICE O'CONNOR'S INDIVIDUALIZED ASSESSMENT MODEL WITH RACE AS THE PRIMARY DIVERSITY CRITERION



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This seems to be the type of system Justice O'Connor finds permissible, and the type of system she believes the University of Michigan Law School operates. To be constitutional, says Justice O'Connor, "universities [cannot] insulate applicants who belong to certain racial or ethnic groups from the competition for admission."<sup>108</sup> It is permissible to give race greater weight than other nonacademic factors, but not permissible to consider blacks only vis-à-vis one another, or to give them a fixed, predetermined bonus. "[A] university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."<sup>109</sup>

Justice O'Connor's guidelines, translated into the logic of the graph, imply three essential features of a constitutional admissions system that incorporates racial preferences. First, while race might be the single most important nonindex factor, other nonindex factors must be given significant weight—enough weight so that race is not the predominant nonacademic qualification for admission. Otherwise, "diversity" would simply be synonymous with "race," and an applicant's race would indeed be the defining nonacademic feature of her application. It follows that the greater the weight given to racial diversity, the more the weight given to other diversity factors must also go up (to avoid having race dominate all other factors). The weight given to academic indices must accordingly go down, and the slope of the admissions curve will therefore become flatter. Second, the probability of admission for blacks cannot be close to 100% at any index level where the probability of admissions for whites is substantially lower than 100%; if it were, this would mean that blacks at that level were not in any meaningful competition with academically comparable whites—for blacks in such ranges, their race alone would be making them indispensable. A third essential feature of the system is the converse of the second: the probability of admissions for whites cannot be close to 0% at any index level where the probability of admission for blacks is substantial—otherwise, again, blacks at that level would not be meaningfully competing with academically comparable whites. Graphically, Justice O'Connor's guidelines for the permissible use of race translate closely into the type of admissions curve shown in Figure 2.4.

*Scenario Three: An admissions program that relies primarily on the academic index and awards substantial "points" to black applicants aimed at offsetting the average lower academic numbers of blacks.* There are two obvious ways that an admissions program can clearly be unconstitutional under Justice O'Connor's standards even without the direct use of quotas. One way is to use the method adopted by the undergraduate college at Michigan, which simply awarded points to underrepresented minorities to offset their lower average academic credentials. When graphed as an admissions curve, the black

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108. *Grutter*, 539 U.S. at 334 (opinion of the Court).

109. *Id.* at 337.

and white curves will be a nearly fixed horizontal distance apart from one another, since each black applicant will have a fixed number added to her index. This sort of curve is reflected in Figure 2.5 below.

This method has an obvious appeal for a school where admissions are primarily determined by grades and test scores. Heavy reliance on the academic index (i.e., a high index coefficient) creates two dilemmas for a school: it makes the black-white gap more salient (since the racial gap in academic numbers is presumably greater than the racial gaps in factors like state residence and leadership activities), and it decreases the general role of other diversity factors. It thus makes it doubly hard for a school to achieve racial diversity without giving a unique and very large weight to race.

FIGURE 2.5: ADMISSIONS SYSTEM RELYING ON ADDING "POINTS" TO BLACK APPLICANTS TO EQUALIZE ADMISSIONS BY RACE

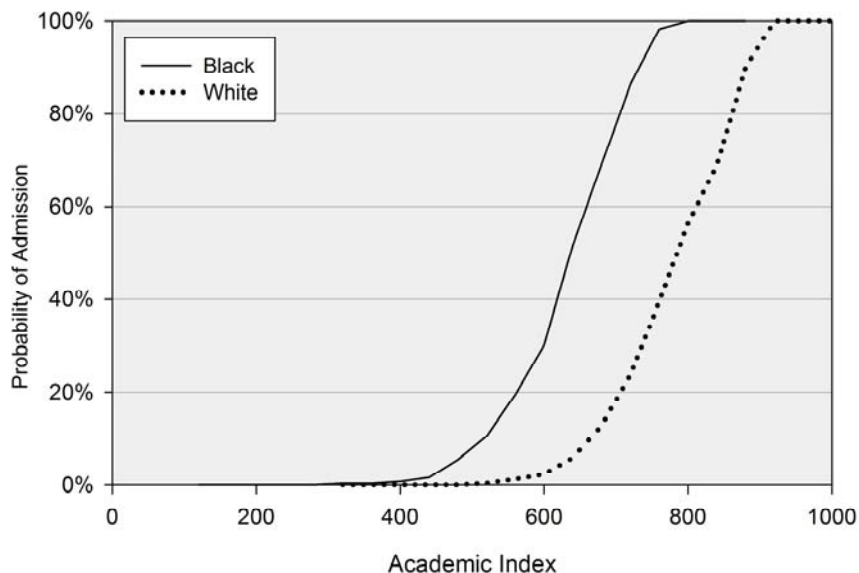
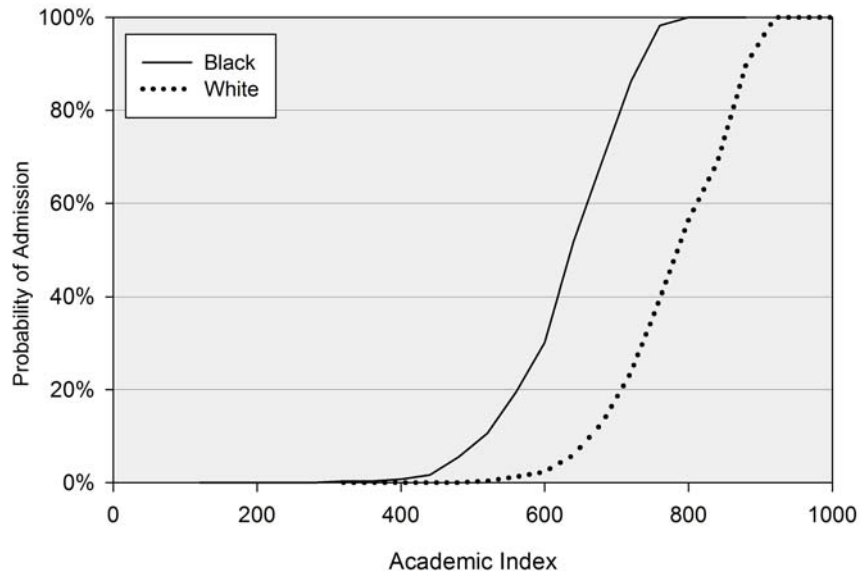




FIGURE 2.6: ADMISSIONS SYSTEM RELYING ON SEGREGATED BLACK AND WHITE ADMISSIONS TO EQUALIZE ADMISSIONS BY RACE



*Scenario Four: An admissions program that relies primarily on academic index but evaluates each racial group separately, admitting similar proportions from each racial pool of applicants.* The simplest and most predictable way to achieve racial diversity while maximizing the academic strength of an enrolled class is to simply divide the admissions pool into racial groups and admit the strongest applicants within each group. A school following this method and relying substantially, but not exclusively, on the academic index to determine admissions from each racial group would end up with admissions curves like those illustrated in Figure 2.6.

The reader may be struck that Figures 2.5 and 2.6 are identical. This is no accident. If the point boost awarded in Scenario Three is roughly equivalent to the average academic gap between white and black applicants, then Scenarios Three and Four are functionally identical systems. This point bears repeating: To an outside observer who can only examine the results of an admissions system—who cannot look inside the minds of the decisionmakers—there is no distinguishable difference between a system that “race-norms” academic scores by adding points to every black applicant and a system that simply segregates applicants within each racial group from competition with the other groups. The exact numbers admitted are likely to vary slightly under the two systems, but the substantive effect—proportional representation—is the same.

How do either of these approaches compare with a racial quota of the type prohibited under *Bakke*? They are a little bit different. A predetermined quota creates a good deal of rigidity, especially in an admissions system where large

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numbers of people are admitted with no certain knowledge of which admittees will actually choose to enroll. Setting a quota for an entering class of students probably necessitates making some last-minute admissions, once the complexion of the class is clearer; it also means that one cannot vary the representation of a minority group from year to year according to the strength of each year's applicant pool. But these logistical problems are probably not the main reason for the Supreme Court's rulings against quotas. The Court seems instead to focus on the idea that a quota overtly immunizes the minority group from competition with the majority group; a quota suggests either racially segregated admissions processes, or race-norming that puts each racial group primarily in competition with other members of the same group.<sup>110</sup> In this sense, the admissions dynamics captured in Scenarios Three and Four capture the legal essence of a quota as well.

Unlike an explicit quota, the "racial tracks" and "racial points" systems illustrated in Scenarios Three and Four do not produce exactly the same number of minority admits each year. The actual number will vary a little depending on the relative strength of admissions pools, the number of applicants from each racial group, and yield patterns. Of course, there is no practical reason why a school should care whether the number of underrepresented minorities fluctuates a few points above or below an average of, say, eighteen percent. Quotas are only useful when the party seeking a certain number of minority spots does not trust the party filling the spots—for example, in the context of a settlement agreement between an employer and previously excluded minorities. In the context of a law school, where faculty and deans set policy and admissions officers implement it, quotas per se would hardly make sense even if they were permissible.

Of course, Scenario Four (racially segregated admissions) is as unconstitutional as Scenario Three (race-norming index scores) under the O'Connor rules. Schools are not permitted to insulate minority applicants from competition with other candidates. Because of the black-white academic index gap, the only methods available to schools that want to achieve something close to proportional admissions for blacks while allowing a major role for academic factors seem equally barred by *Grutter* and *Gratz*.

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Let us now start to consider some real-world admissions systems, beginning with what we know about the University of Michigan systems litigated before the Supreme Court. The "points for race" approach of the undergraduate system is, as we have said, captured by Scenario Three. But what exactly does it look like when charted out? The college's system went

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110. See *id.* at 334; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.).

through several iterations during the 1990s. In 1999, according to Justice O'Connor, the system awarded a maximum of 150 points; up to 110 could be awarded for academic performance.<sup>111</sup> Ten points were awarded for Michigan residency, alumni children received four points, outstanding essays could garner their authors three points, and special personal achievements could earn up to five. Twenty points were assigned to blacks and Hispanics. On the one-thousand-point scale of our admissions curve figures, this would translate to a minority boost of something over one hundred points. Graphically, the black and white admissions curves would look like those in Figure 2.5.

The *Gratz* litigation disclosed admissions grids for undergraduate admissions for several admissions years. The grids show the distribution of applicants by categories of high school GPA and SAT scores, and also show how many of the applicants in each box of the grid were admitted by Michigan's undergraduate college. For several years, including 1999, the university disclosed separate grids for "underrepresented minorities" and other applicants, and also separated in-state and out-of-state applicants.

With the data in these grids, it is possible to compute index scores for applicants, assigning each applicant the middle value for the grid she is in and then plugging the assigned GPA and SAT scores into an index formula similar to the one offered earlier.<sup>112</sup> Table 2.1 tabulates the admissions rates for out-of-state applicants, comparing underrepresented minorities (mostly blacks) with all other applicants (mostly whites).

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111. The data in Justice O'Connor's concurrence can be found in *Gratz v. Bollinger*, 539 U.S. 244, 277-78 (2003) (O'Connor, J., concurring).

112. For college applicants, the formula would be  $Index = [(Combined\ SAT - 400)/2] + 100 * High\ School\ GPA$ , with GPA measured on a 4.0 scale.

TABLE 2.1: COMPARATIVE UNDERGRADUATE ADMISSION COHORTS AT THE UNIVERSITY OF MICHIGAN, NONRESIDENTS ONLY, 1999

Admission Rate for Nonminority Applicants		Admission Rate for Underrepresented-Minority Applicants	
Index	Proportion of Cohort Admitted	Index	Proportion of Cohort Admitted
870 and Above	99.5%	750 and Above	99.3%
810-869	91%	690-749	93%
750-809	52%	630-689	64%
690-749	23%	570-629	29%
610-689	19%	Below 570	2.1%
570-609	10%		
Under 570	2.6%		

Source: Data disclosed by the University of Michigan Undergraduate College in the course of the *Gratz* litigation, available at <http://www1.law.ucla.edu/~sander/Data%20and%20Procedures/SuppAnalysis.htm>. I assigned each applicant to the college an index based on a weighting of high school GPA and SAT I scores. The weights are based on a logistic regression of actual admissions decisions by the college, and give SAT I scores about 50% more weight than high school GPA.

In this table, I compare the admissions rate for nonminority applicants across various ranges, setting them alongside index ranges for minority applicants that are, in the first four rows, 120 points lower. Inspection of the table reveals several clear patterns. First, the academic index plays a central role in admissions decisions. Nonminority applicants with index scores of 870 or higher are virtually assured admission; those with scores below 570 have almost no chance of success. Second, the admission rates on the two sides of the table track one another closely. We would expect this result, since the school is adding enough points to each minority application to erase the 120-point gap in index scores. Third, the minority and nonminority admissions rates converge upon one another at the lower ranges. It would seem that the college applies some general numerical cutoff for applicants of all races, so that minorities with scores below 570 have no better chance than others of being admitted.

FIGURE 2.7: ADMISSIONS CURVES FOR UNDERREPRESENTED MINORITIES AND OTHERS FOR UNIVERSITY OF MICHIGAN UNDERGRADUATE COLLEGE, 1999

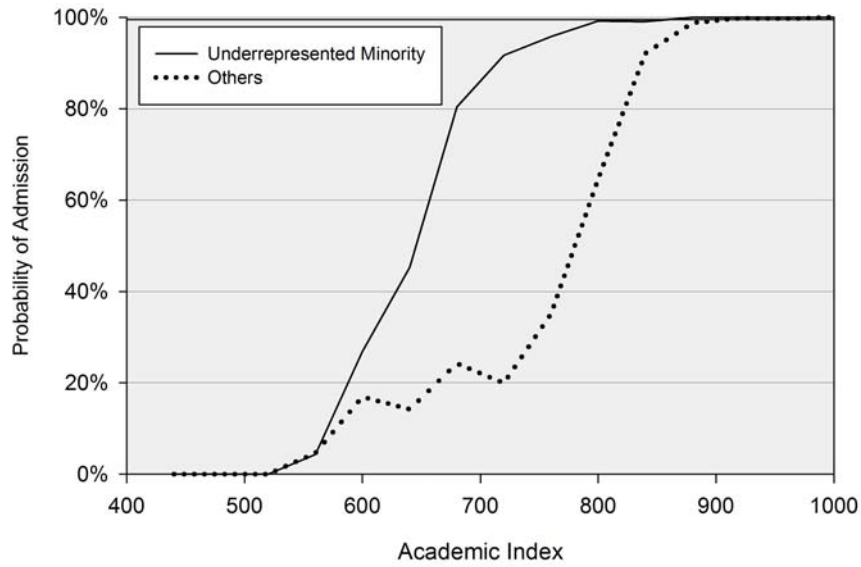
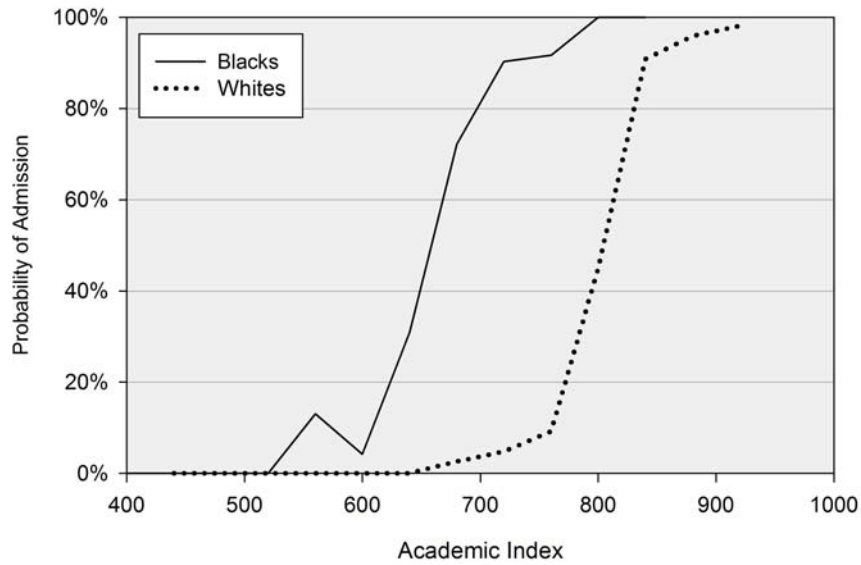


FIGURE 2.8: ADMISSIONS CURVES FOR BLACKS AND WHITES AT UNIVERSITY OF MICHIGAN LAW SCHOOL, 1999



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We can perform a nearly identical analysis for the University of Michigan Law School's admissions in the same year, 1999. In the case of the law school, the grids are broken down by race (allowing us to compare blacks and whites), but not for residents and nonresidents. I analyzed data on all black applicants and all white applicants for admission in 1999, and summarize the results in Table 2.2.

As a general matter, most readers should be struck by the general similarity between Tables 2.1 and 2.2. In both cases, admissions are heavily mediated by index score and by race. But closer inspection reveals several important differences. Though blacks in both tables appear to receive a large point boost to equalize their admissions chances with whites, the point boost that equalizes admissions chances is somewhat larger at the law school (140 points) than at the undergraduate college (120 points). Academic factors are even more decisive at the law school than at the college: a swing of one hundred points in the academic index knocks law school applicants of either race from a category where over 90% are admitted to one where 11% or fewer are admitted. And there is no convergence between whites and blacks in the lower academic reaches at the law school, as there is at the college; white law applicants with index scores below 720 had virtually no chance of admission, even though 90% of the black applicants in the 700-719 range received offers of admission. Figures 2.7 and 2.8, illustrating the admissions curves at the two schools, show both that the law school curves are steeper and that the black and white lines for that school are more symmetrical.

In other words, the law school operated an admissions system that gave greater weight to race, and less weight to nonindex factors, than the college's, and applied the race weights with more uniform results. If one accounts for the fact that the academic index here is based on approximate "ranges," and not exact values for each individual, and for the lack of data in our index on the quality or difficulty of each applicant's undergraduate college (which doubtless factors into the law school's assessment of each candidate's academic strength), then the law school's reliance on purely academic considerations is even more dominant than Table 2.2 implies.<sup>113</sup>

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113. Note, too, that our law school data is not broken down by state residency. Since the law school apparently counts Michigan residency for something, and this something would account for part of the limited attention given to nonacademic factors, this leaves even less scope for nonracial "diversity" factors.

TABLE 2.2: COMPARATIVE ADMISSION COHORTS AT THE UNIVERSITY OF MICHIGAN LAW SCHOOL, 1999

Admissions Rate for White Applicants		Admissions Rate for Black Applicants	
Index	Proportion of Cohort Admitted	Index	Proportion of Cohort Admitted
850 and Above	97%	710 and Above	96%
830-849	91%	690-709	90%
810-829	70%	670-689	72%
790-809	44%	650-669	38%
750-789	16%	610-649	22%
710-749	5%	570-609	11%
Under 710	2%	Under 570	0%

Source: Data disclosed by the University of Michigan Law School in the course of the *Grutter* litigation; available at <http://www1.law.ucla.edu/~sander/Data%20and%20Procedures/SuppAnalysis.htm>. Cells of data based on undergraduate GPA and LSAT scores have been converted to a 0-1000 index using this formula:  $(LSAT - 120) * 10 + (UGPA * 100)$ .

Considered in this light, it is difficult to see how Justice O'Connor could have thought the law school's system passed constitutional muster, or that blacks and whites were in any sense on the same "playing field" in admissions, being judged by a myriad of personal characteristics of which "race" was only one. Race is obviously given far more weight than all other "diversity" factors together. Blacks in any index range are clearly not competing against academically comparable whites. The law school's admissions are functionally identical to either racially segregated admissions or the type of race-norming followed by the undergraduate college. In every respect we can quantify, the law school's admissions process seems more violative of O'Connor's standards than the college's. In trying to interpret the meaning of *Grutter*, then, we are left with two possibilities: It may be that Justice O'Connor did not understand that the law school and college admissions systems were functionally identical in their treatment of race, due perhaps to weaknesses in the plaintiff's presentation. Or it may be that Justice O'Connor cared only about form, not substance. We should perhaps infer that racially segregated admissions, or large, fixed numerical boosts awarded on the basis of race, are fine so long as they are not specifically identified as such in the admissions office's public pronouncements (or in sworn testimony before a court).

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Admissions curves and tables of admissions rates can provide significant insight into the functional differences among admissions decisions, but they

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are, at heart, rather ad hoc tools, unsatisfactory for systematic comparisons. Is it possible to provide more formal and compact yardsticks to assess the role of race in an admissions system? Yes, no doubt it is, and I must plead limitations of space and capacity in not providing as complete a solution as a good mathematician could surely devise. What I present here are some initial steps toward a more thorough analysis of a challenging problem.

Logistic regression is a tool that allows the researcher to assess the reliability and power of some factors (independent variables) in predicting outcomes, like admissions decisions, that can take on only two “values” (in this case, “yes” or “no”). As we will see in Part V, logistic regression is quite useful in evaluating when some hypothesized causal factor does or does not matter to actual outcomes. Here I use it in a different way: to gauge how much weight is given to particular sets of factors in admissions decisions. We do not know all the contents of the “black box” of law school admissions processes, but we can estimate the importance of the unknown by weighing the importance of the known.

Thus, for example, we have no systematic information on how the University of Michigan Law School evaluated such diversity factors as work experience, leadership skills, letters of recommendation, hardships overcome, or written essays. We simply know the numerical part of an applicant’s credentials and her race. Using logistic regression to “predict” whether an applicant is admitted, we can estimate the proportion of admissions outcomes that can be successfully predicted by knowing the academic index and the race of applicants.<sup>114</sup> A measure called the “Somers’s D,” produced in logistic regressions, provides this metric of prediction.

Logistic regression analysis of the University of Michigan’s undergraduate admissions in 1999 shows that when one controls for each applicant’s academic credentials, residency status (in-state versus out-of-state) and race (“underrepresented” minorities versus others), the Somers’s D is .82. Knowing these facts about an applicant thus allows us to reduce the guesswork involved in predicting an individual’s admission by eighty-two percent. In other words, these three facts about applicants dominate the admissions process. The Somers’s D behind the simulated admissions curve shown in Figure 2.4, by contrast, is .35. A logistic regression of the University of Michigan Law School’s 1999 admissions, using only an applicant’s academic indices and her race (we do not have data on residency) yields a Somers’s D of .88. This is consistent with what we can infer from the admissions curves—the law school appears to rely even more heavily on academic factors (and thus less on “diversity” factors) than does the college. Moreover, recall that our estimates of the academic credentials of Michigan applicants are based on ranges, not actual numbers, and that we do not have information on the quality of each applicant’s undergraduate college—certainly a factor in the law school’s admissions. With

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114. For more on logistic regression, see *supra* notes 189-191 and accompanying text.



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more complete information, academic factors and race would produce a Somers's D even closer to 1. The scope permitted by this regime for "individualized assessment" is slight indeed.

One can gain insight into how a school treats race in the admissions process with two additional statistics. One of these is the simple admissions rate for blacks and whites. If the rates are very similar, despite the large black-white credentials gap, this is evidence that a school is engaged in race-norming credentials, segregating admissions, or using some other method that makes the racial gap irrelevant. The second tool is to conduct separate logistic regressions for black and white admissions. If a school claims that substantial black admissions result from the strength of black applicants in their "diversity" credentials (socioeconomic background, community service, etc.), then it should be much harder to predict black admissions based on academic factors than would be the case for white admissions.<sup>115</sup> If, on the other hand, blacks are not competing directly with whites for admission, and schools are effectively race-norming black credentials, then we would expect to see a similarly heavy reliance on academic numbers for blacks and whites.

The undergraduate college at the University of Michigan admitted 82% of the underrepresented minorities for whom we have admissions data, compared to 70% of other applicants. A logistic regression of admissions decisions for majority applicants, based on the academic and residency factors noted earlier, yields a Somers's D of .81. A parallel regression for underrepresented minority applicants yields a Somers's D of .85. Both of these tests thus reinforce what the university concedes—that it added points to minority applications to offset disparities in academic credentials. At the law school, admission rates for whites and blacks are nearly identical (43% and 39%, respectively), and separate logistic regressions for each race produce even more extreme Somers's D measures: .88 for whites, and .90 for blacks. Once again, the law school's admissions look more mechanical and less driven by nonracial diversity factors than the college's admissions.

Within the law school world, how typical are racially segregated admissions? One cannot learn about this, of course, by a formal poll of schools. As we saw in Part I, many schools were relatively candid about affirmative action in the 1970s, but after *Bakke* discussions largely went underground. Informally, when admissions officers gather at conferences and chat about what they do, the picture is much clearer. When Boalt was cited by the Justice Department in 1992 for running formal, racially segregated admissions tracks, the common view I heard expressed was not shock at Boalt's practices, but contempt for the school's stupidity in doing it so brazenly. In the mid-1990s, over a small lunch I attended with the dean of an elite law school and the

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115. Even if these other diversity factors are highly correlated with academic credentials, academic credentials should have less explanatory power in this part of the sample than they would otherwise, and this would be reflected in the Somers's D.

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school's chief admissions officer, the discussion worked around to *Bakke*. The dean turned to the admissions chief and casually observed that the numbers of blacks admitted in recent years had been too nearly identical from year to year. For appearances' sake, the dean went on, it would be best to vary the numbers a bit more.

As I noted in Part I, the UCLA School of Law, my home institution, established an elaborately justified "diversity" program in 1978-1979 to conform with *Bakke*. Internally, however, admissions operated on de facto separate racial tracks until the university and the state adopted formal bans on any kind of racial preferences beginning in the 1997 admissions year. The school's 1979-1997 system divided applicants into five racial groups—whites, Asians, Hispanics, blacks, and American Indians—and considered each group largely in isolation from the others. Admissions within each pool were driven overwhelmingly by the academic index (a combination of LSAT score, undergraduate grades, and strength of undergraduate institution), thus admitting the numerically strongest candidates within each racial pool. In one concession to "soft factors," the school allowed student committees (for years in the 1980s and early 1990s, the committees were separated by race) to comment upon and even interview minority applicants. The many other elements described in the school's "diversity" policy—nonracial factors such as socioeconomic disadvantage, disabilities, interesting work experiences, or advanced degrees in other fields—could be fed into the mix. But nonracial "diversity" admissions rarely accounted for more than four or five percent of all admissions. The admissions curves at the UCLA School of Law thus looked just like those at the University of Michigan School of Law, except steeper.<sup>116</sup>

While conducting research for this Article, my research associate and I submitted Freedom of Information Act (FOIA) requests to thirteen public law schools across the United States. We chose all of the elite public law schools and a random sample of other schools. In all, we collected data on twelve admissions cycles over 2002 and 2003 from seven law schools.

Table 2.3 summarizes data on the average admissions patterns of these schools, using the numerical techniques I applied to Michigan's undergraduate college and law school admissions. By the three measures I have suggested, all of these schools appear to follow much the same pattern as both Michigan schools. Blacks and whites are admitted at almost exactly the same rates,

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116. This picture is a slight oversimplification, in two respects. First, the "Asian track" became more complex and nuanced as the size and strength of the Asian admissions pool increased in the late 1980s and early 1990s. Japanese, Chinese, and Korean applicants gradually received less of a preference, while Asians from the Philippines and Southeast Asia continued to receive substantial preferences and be viewed as underrepresented minorities. Second, the segregation of admissions decisions by race coexisted with overall comparisons of racial pools. In a given year, the Hispanic pool might be particularly strong and the black pool particularly weak, so more Hispanics and fewer blacks than usual would be admitted. But these cross-racial comparisons were between groups, not individuals.

academic factors (and, in some cases, residency) drive nearly all admissions decisions, and academic factors are as predominant in black admissions as they are in white admissions.<sup>117</sup>

TABLE 2.3: STATISTICS CONCERNING TYPICAL ADMISSIONS PATTERNS AT VARIOUS HIGHER EDUCATION INSTITUTIONS

Institution and Year of Analysis	Somers's D in Logistic Admissions Model			Percentage of Applicants Admitted	
	All	Whites	Blacks	Whites	Blacks
University of Michigan, Undergraduate College, 1999-2000*	.81	.81	.85	70%	82%
University of Michigan, Law School, 1999-2000	.88	.88	.90	43%	39%
Seven U.S. Public Law Schools, 2002-2004**	.88	.88	.88	23.6%	24.3%

Source: Data disclosed by the University of Michigan Law School and Undergraduate College in the course of the *Grutter* and *Gratz* litigation, respectively, available at <http://www1.law.ucla.edu/~sander/Data%20and%20Procedures/SuppAnalysis.htm>; data disclosed by public law schools in response to FOIA requests from the author (on file with author).

\* For the college, the racial comparisons are between “underrepresented minorities” (mostly blacks and Hispanics) and everyone else.

\*\* Somers's D values are medians for the twelve admissions cycles at the seven schools.

I have thus far been unable to find a single law school in the United States whose admissions process operates in the way Justice O'Connor describes in *Grutter*. The academic index for applicants—however it might be constructed by individual schools—is always the dominant factor in admissions within each racial group; other “soft” factors play a prominent role only for those relatively few cases that are on the academic score boundary between “admit” and

117. One of the seven law schools that responded thoroughly to our FOIA request was Michigan's. It is interesting to note that in quantitative terms, the University of Michigan Law School was less rigidly bound by quantitative factors in its 2002 and 2003 admissions than it was in 1999 (and several earlier admissions cycles I studied). A regression of white admissions at Michigan shows a Somers's D of .80 in 2002 and .82 in 2003—among the lowest rates of all the schools I studied. Dean Evan Caminker told me that the school has made significant efforts in recent years to avoid the use of any formal academic index in admissions and to live up to the holistic practices it advertised in the *Grutter* litigation. This notwithstanding, the law school's black admissions are still overwhelmingly driven by numbers (Somers's D of .90 in 2002 and 2003) and it is still not possible to explain the school's pattern of racial admissions without resort to some race-norming or segregating mechanism.

“reject.”<sup>118</sup> And the gap between the black and white curves is quite large, ranging from 100 to 160 index points and averaging about 125 points. The steepness of the curves for both blacks and whites negates the possibility that there is some nonacademic, nonracial factor that is offsetting the black-white score gap. The only logical possibilities are that schools “race-track” admissions or add large boosts to black applications to erase the academic gap.

Note that when I say “all” of the law schools I examined had substantially disparate racial tracks to admission, I include several law schools outside the highest ranks. The system of racial preferences is not confined to elite schools. It is a characteristic of legal education as a whole. To the pattern behind this phenomenon we now turn.

### III. THE CASCADE EFFECT OF RACIAL PREFERENCES

The conventional wisdom about university-based affirmative action holds that it is largely confined to the most elite schools. William Bowen and Derek Bok observed that “[n]ationally, the vast majority of undergraduate institutions accept all qualified candidates,” estimating that only twenty to thirty percent of four-year colleges and universities are able to “pick and choose” among their applicants.<sup>119</sup> Justice Thomas seems to agree with this assessment. In his

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118. Despite my repeated suggestions that law schools engage in pervasive public dissembling about how their admissions systems operate, I would like to offer a word in defense of admissions officers. The numeric part of what they do—sorting applicants by race and index number, admitting the stronger and rejecting the weaker ones within each group—takes very little time, even if it ultimately accounts for ninety percent of their admissions decisions. The vast majority of an admissions director’s time is spent reviewing the relatively small number of intermediate cases, as well as screening out the tiny minority of high-number applicants who will be rejected and the equally small number of low-number applicants who will be admitted. From their perspective, engaging in a “holistic appraisal” of applicants is central to their job.

Admissions offices also frequently spend a great deal of time and effort on minority outreach, perhaps reasoning that the larger the applicant pool from which they can draw, the smaller the numeric boost they will have to give minority applicants to achieve the requisite racial diversity.

119. BOWEN & BOK, *supra* note 2, at 15. This statement certainly does not apply to law schools, the vast majority of which do use selective admissions. I doubt that it is true even for undergraduate schools. *Peterson’s Guide to Four-Year Colleges* (one of the sources cited by Bowen and Bok) ranks colleges by admissions selectivity. Seventy-five percent of all colleges place themselves in the top three categories (“most difficult,” “very difficult,” and “moderately difficult”); if the colleges are accurately describing their policies, these are all selective institutions. See PETERSON’S GUIDE TO FOUR-YEAR COLLEGES 1998, at 51-56 (28th ed. 1997); see also BOWEN & BOK, *supra* note 2, at 15 n.1.

Even if the “twenty to thirty percent” claim were true, it would be a highly misleading statistic. There are some three thousand colleges in the United States, but a great many of these are small and local and/or only grant intermediate degrees. A relatively small number of colleges and universities account for a large share of those seeking graduate education. A mere one hundred college-level institutions—about 3% of the total—account for about 40% of all law school applicants; the top two hundred feeder institutions—about 6% of the total—

dissenting opinion in *Grutter*, Thomas argued that a diverse student body does not constitute a compelling state interest justifying racial classifications because it could be achieved without recourse to race. Specifically, he suggested that “[w]ith the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination.”<sup>120</sup> He went on to suggest that Michigan’s reluctance to lower its admissions standards indicates that it cares more about its status as an “elite” law school than it does about the ethnic diversity of its student body. Many commentators have offered similar arguments.

The widespread assumption that racial preferences exist only at elite schools is based on faulty logic and poor empiricism. The logical argument runs something like this: The black-white gap in test scores and grades produces a shortage of blacks at the top of the distribution, so the most elite institutions must use racial preferences to recruit an adequate number of blacks. In the middle of the distribution, in contrast, there are plenty of blacks to go around. The logical misstep is not realizing that if enough midrange blacks are snapped up by elite schools, the midrange schools will face their own shortage of blacks admissible through race-blind criteria. The lack of good empiricism on this issue results from the tendency of researchers, public intellectuals, and the media to focus on the glamorous schools, and to give only passing attention to those in the trenches.

In fact, the evidence within the law school world shows conclusively that a very large majority of American law schools not only engage in affirmative action, but engage in the types of segregated admissions/racial boosting that I illustrated in Part II. I will also argue that the dynamics of affirmative action in law schools make these practices largely unavoidable. In other words, few American law schools feel that they have any meaningful choice but to engage in covert practices that, if made explicit, would probably not survive judicial scrutiny.

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American higher education relies heavily on quantifiable indicators of academic achievement, and probably nowhere in higher education is this reliance more complete and obvious than in law school.<sup>121</sup> There are both good

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account for 55% of law school applicants. See LAW SCH. ADMISSION COUNCIL, NATIONAL STATISTICAL REPORT 1997-98 THROUGH 2001-02, at A-13 (2003).

120. *Grutter v. Bollinger*, 539 U.S. 306, 361-62 (2003) (Thomas, J., dissenting) (citation omitted).

121. Medical schools widely use interviews in evaluating candidates, a luxury they can afford because of their high faculty-student ratios. Business schools frequently require and assess evidence of real-world organizational or business experience. Graduate schools in the arts and sciences rely heavily on letters of recommendation (which are more meaningful since the network of recommenders is relatively small and specialized) and assessments of

and bad reasons for this. The principal good reason is that academic indices based on the LSAT and undergraduate grades can be shown to be far more effective in predicting law school performance (and, for that matter, success on bar examinations) than any other factor that has been systematically tested.<sup>122</sup> The bad side of the focus on numbers is the law school ranking system. Legal academics rank their schools in some of the ways taken for granted in other fields—faculty publication records, peer citations, and so on—but rankings in the law school world have gradually come to be dominated by the annual lists generated by *U.S. News and World Report*. *U.S. News* relies on a variety of quantifiable and subjective sources, but the median LSAT scores of a school's students figure prominently in both the calculation of the ranking and the published reports on schools.<sup>123</sup>

As Russell Korobkin and others have pointed out, legal education in the United States has taken on some of the character of a large-scale signaling and sorting game.<sup>124</sup> High-prestige schools attract stronger students, and elite employers recruit from these schools in the hope of hiring the best students. It is often said that the main function law schools perform is not educating law students, but giving them a brand name, and big-firm employers—who send recruiters to elite schools and do most of their screening of law students when the students are less than halfway through law school—act in ways that confirm this impression.<sup>125</sup> I will argue in Part VI that employers value law school performance at least as much as they value law school prestige, but I have no doubt that most law school faculty and law students believe prestige is the be-and-end-all. Prospective students therefore tend to strive to attend the most elite school (measured by the *U.S. News* rankings) they can get admitted to, and law school deans strive to maximize the median LSAT of their students to increase

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prior written and research work—again, a more subjective process that is facilitated by smaller numbers of applicants.

122. See Part IV for a substantial elaboration of this point. See too my discussion in the Conclusion about improving admissions methods; my own research suggests that we can and should diversify admissions criteria in law schools beyond the traditional LSAT and UGPA, so long as we can properly validate new methods.

123. In their analysis of law school ranking by *U.S. News and World Report*, Stephen Klein and Laura Hamilton find that

even by itself, the student selectivity factor explained about 90% of the differences in overall ranks among schools (i.e., percent of total variance). Since LSAT is the major driver of student selectivity (and is highly correlated with UGPA), ranking schools on LSAT alone will do a very good job of replicating the overall ranks *U.S. News* publishes.

Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools* (Feb. 18, 1998), at <http://www.aals.org/validity.html> (last visited Nov. 22, 2004) (on file with author).

124. Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 *TEX. L. REV.* 403, 409-10 (1998).

125. As we shall see in Part VII, the job market for graduates takes at least as much account of a student's performance in law school as it does of her school's brand name. The point here is that both law schools and students behave as though brand name is transcendently important.

their eliteness. A dean who can lift her school's median LSAT a couple of points can not only impress alumni, but may be able to attract still stronger students to the school.<sup>126</sup>

The rankings game may have led schools to place more emphasis on numbers than they had in the past—in particular, to give more weight to LSAT scores. It has certainly led students to place more emphasis on school ranking. Students seem to attach importance even to trivial differences in prestige (e.g., Stanford versus NYU, or Ohio State versus Tulane), and will almost always uproot themselves to enroll in the highest tier that will have them.<sup>127</sup> The law school admissions market is therefore national, especially at its higher reaches, so much so that elite state schools matriculate most of their student bodies from out of state. When law schools extend admissions offers, applicants with higher numbers tend to turn the offer down (since their numbers got them into another, still higher-ranked school, which they decide to attend) and applicants with lower numbers tend to accept (since they probably do not have offers from more or equally attractive alternatives).<sup>128</sup>

Now, suppose we add affirmative action into the mix. Suppose that an elite school such as Yale wants to admit an academically strong class, but also wants to enroll a significant number of black students (Yale's student body is regularly around 8% to 9% black<sup>129</sup>). Even at the top of the distribution of undergraduate performance and LSAT scores, there is a significant black-white gap. The blacks that Yale admits, on our 1000-point index scale, will tend to have indices of perhaps about 750, while the white admits will tend to have

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126. For a deeper discussion of the idea that law students and law school deans often behave as though the main purpose of law school is to create a credentialing "signal" to employers, see Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235 (2001), an expanded version of which was reprinted in 2 NYU SELECTED ESSAYS ON LABOR AND EMPLOYMENT LAW (David Sherwyn & Michael J. Yelnosky eds., 2003).

127. Korobkin, *supra* note 124, at 408, 414. The LSAC distributes each year, to any accredited law school that asks for it, a "matriculation" report, which shows how the school fared against other schools in competing for students. The data is striking: ninety percent of students admitted to both a tenth-ranked and a fifteenth-ranked school will choose the more elite school.

128. To offer one illustration drawn essentially at random, consider Boalt's 2003 admissions. Boalt assigns each applicant an index (apparently based on UGPA and LSAT); most index figures are between 180 and 260. For whites admitted in 2003 with a Boalt index under 240, 34 of 48 enrolled (71%). For whites with a Boalt index of 250 or higher, 4 out of 107 enrolled (4%). The correlation between an admitted white applicant's index score and his probability of enrolling is  $-.85$ . This result emerges from data disclosed by the University of California, Berkeley, in response to a FOIA request; I currently have this data on file.

129. 2004 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 34, at 820; LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, THE ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS: 2003 EDITION 812 (2002) (reporting Yale's student body as 8.8% African American); LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, THE ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS: 2002 EDITION 800 (2001) (reporting Yale's student body as 9.7% African American).

indices of perhaps about 875. Cornell Law School would be happy to have almost any of the students Yale admits (and does admit them when they apply), but a large majority of these students will choose to attend Yale (or one of the other top ten schools), and Cornell will thus have to admit students with lower numbers to fill its class. For whites, Cornell will admit down into the ranks of the low 800s; for blacks, it will admit down into the high 600s. The enrolled classes at Cornell and Yale will show remarkably little overlap in index numbers—within racial groups.<sup>130</sup> Cardozo School of Law will face the same challenges vis-à-vis Cornell that Cornell faces vis-à-vis Yale, and Syracuse University College of Law will be to Cardozo as Cardozo is to Cornell.

If the number of blacks admitted to the higher tiers of law schools was substantially smaller than blacks' proportionate number in the applicant pool, then the black-white gap in credentials would narrow as one moved further down the hierarchy of schools. But in fact blacks made up 7.1% of the enrolled first-year classes at the top thirty law schools in 2002—a percentage that has been quite stable for over a decade.<sup>131</sup> The proportion of blacks in all ABA-approved first-year law school classes in 2001 was 7.7%<sup>132</sup>—also a quite stable figure. As a result, the academic index gap between whites and blacks should, as a matter of logic, tend to remain about the same as one moves down the hierarchy of law schools.

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The admissions data from the handful of law schools examined in Part II tended to confirm this pattern of a nearly constant black-white index gap at different points along the admissions chain. But it would be nice to have some more systematic information. Fortunately, such a source exists. From 1991 through 1997, the LSAC gathered systematic data on one national cohort of law students for its Bar Passage Study (LSAC-BPS).<sup>133</sup> The study is remarkable

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130. For the entering class of 2002, for example, the twenty-fifth to seventy-fifth percentile range at Yale Law School was 168-174; the twenty-fifth to seventy-fifth percentile range at Cornell was 164-166. 2004 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 34, at 227, 821. If one could compute an index for each school, incorporating undergraduate grades and college quality, the ranges would be even tighter and would overlap even less.

131. Calculation by the author based on the figures for each school given in 2004 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 34.

132. See Am. Bar Ass'n, *Minority Enrollment 1971-2002*, *supra* note 10; Rosenlieb Memorandum, *supra* note 10.

133. LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY (1998) [hereinafter WIGHTMAN, LSAC-BPS]. The LSAC sought participation of all U.S. accredited law schools and all students at those schools. Over 160 law schools agreed to participate, and some eighty percent of the first-year students at those schools signed consent forms and completed the initial questionnaire, creating a sample size of over twenty-seven thousand students. See WIGHTMAN, USER'S GUIDE: LSAC NATIONAL LONGITUDINAL DATA FILE 6 (1999) [hereinafter WIGHTMAN, USER'S GUIDE]. The sample appears to closely



because the LSAC secured the cooperation of about ninety-five percent of the nation's accredited law schools and most of the state bar examiners.<sup>134</sup> The LSAC was thus able to track some twenty-seven thousand law students from their entry into law school in the fall of 1991 through their eventual success (or failure) in passing the bar two or three years after graduation. The LSAC-BPS collected a wide array of information about the study participants: responses to several questionnaires, data on law school performance, bar passage, and—of immediate relevance here—data on race, LSAT score, and undergraduate GPA. The disadvantage of the LSAC-BPS data is that it is somewhat disguised to prevent researchers from identifying individual institutions. We can only examine schools within “clusters” that correspond roughly to tiers of law school prestige.<sup>135</sup>

For each person in the LSAC-BPS data set, I assigned an “admissions index” value using the method outlined in Part II. The index is a linear combination of LSAT (weighted 60%) and undergraduate GPA (weighted 40%) that scales all students on a range from one to one thousand. Table 3.1 presents data on all the students who enrolled at Tier 1 schools (which appear to include the most elite schools in the nation), separated by race.

TABLE 3.1: BLACK-WHITE ACADEMIC INDICES AT TIER 1 INSTITUTIONS, 1991 MATRICULANTS

<b>Student Race</b>	<b>Number of Enrolled First-Year Students in Sample</b>	<b>Mean Academic Index</b>	<b>Median Academic Index</b>	<b>Standard Deviation</b>
Black	147	709	705	90
White	1843	864	875	74

Source: LSAC-BPS Data, *supra* note 133.

The racial gap in the mean academic index is 155 points; the gap in the median index is 170 points. The standard deviation of the index is comparatively small—strikingly small, considering that the schools in this

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resemble the overall law student population (though since it excludes unaccredited schools, the “bottom” of the law school distribution is underrepresented). *Id.* at 5. Follow-up surveys were administered to a subsample which overrepresented minority students (to preserve an adequate sample size of different races). *Id.* at 6. The LSAC-BPS data itself is available on the Internet at Law School Admission Council, Bar Passage Study, <http://bpsdata.lzac.org/> (last visited Dec. 3, 2004) [hereinafter LSAC-BPS Data].

134. See WIGHTMAN, LSAC-BPS, *supra* note 133, at 5 (stating that “[a]mong the 172 U.S. mainland ABA-approved law schools invited to participate in this study, 163 [95%] agreed to do so,” and that data from those schools is presented in the study); WIGHTMAN, USER’S GUIDE, *supra* note 133, at 1-11. The LSAC and Wightman were fairly successful at getting bar outcome data (from law schools and published lists) even when state bars did not cooperate.

135. See WIGHTMAN, LSAC-BPS, *supra* note 133, at 8.

group are spread across the top twenty in rank, ranging perhaps from Yale to Vanderbilt. This means that nearly all of the whites admitted to any of the Tier 1 schools come from a fairly narrow credentials band. Collectively, only about three percent of the whites at these schools have academic indices as low as the median black matriculant.

Table 3.2 summarizes similar data for the full range of law schools that participated in the LSAC-BPS. It is hard to conclude from this data that the racial gap, or affirmative action, disappears at lower-tier schools. Except for the seven law schools that have historically served minorities—obviously a special case—the black-white gap is nearly constant.

TABLE 3.2: BLACK-WHITE ACADEMIC INDEX GAP IN SIX GROUPS OF AMERICAN LAW SCHOOLS, 1991 MATRICULANTS

Law School Group	Median Academic Index		Black-White Gap	Standard Deviation in Index for Whites
	Blacks	Whites		
Group 1: Very Elite Schools (n = 14)	705	875	170	74
Group 2: Other "National" Schools (n = 16)	631	805	174	89
Group 3: Midrange Public Schools (n = 50)	586	788	202	75
Group 4: Midrange Private Schools (n = 50)	560	725	165	75
Group 5: Low-Range Private Law Schools (n = 18)	493	665	172	73
Group 6: Historically "Minority" Schools (n = 7)	516	641	125	103

Source: LSAC-BPS Data, *supra* note 133.

Affirmative action thus has a cascading effect through American legal education.<sup>136</sup> The use of large boosts for black applicants at the top law schools

136. The theory that a cascade effect should exist was deduced by Clyde Summers at the outset of the affirmative action experiment and advanced by him as an important reason why large-scale racial preferences could be self-defeating. Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. TOL. L. REV. 377, 401. In the

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means that the highest-scoring blacks are almost entirely absorbed by the highest tier. Schools in the next tier have no choice but to either enroll very few blacks or use racial boosts or segregated admissions tracks to the same degree as the top-tier schools. The same pattern continues all the way down the hierarchy.

Because of the cascade effect, the only schools that truly benefit from the preferential policies are those at the top—perhaps the top forty law schools. In a race-blind system, the numbers of blacks enrolling in the top twenty schools would be quite small, but the numbers would be appreciable once one reached schools ranked twentieth to thirtieth, and blacks would steadily converge toward a proportional presence as one moved down the hierarchy of schools.<sup>137</sup> At the bulk of law schools, the very large preferences granted to blacks only exist in order to offset the effects of preferences used by higher-ranked schools.<sup>138</sup>

So what of Justice Thomas's contention that a school can achieve racial diversity simply by lowering admissions standards for whites? In the current regime, this strategy simply would not work. Consider the University of Michigan Law School, where, as we saw in Part II, the school in 1995 admitted most whites with academic indices over 830, and almost no whites with academic indices below 750; for blacks, presumptive acceptance required an index score of 690 and few were admitted with scores below 610. If Michigan started applying its "black" thresholds to all applicants, it would initially be flooded with students. Based on 1995 acceptance patterns, the first class admitted under the relaxed and race-blind standard would grow from 350 students to about 1500. Black enrollment would stay a little above 20 students,<sup>139</sup> so the percentage of black students in the first year would fall from 7% to 1.4%. The school might introduce a lottery to control class size, but if it were race-blind the black presence would still be only 1.4%. And after the first year of the experiment, dynamics would change quickly. Michigan would no longer be seen, by employers and students (and to a lesser extent by other law schools' faculties), as a law school of the highest academic standards. Its brand name would steadily fall in the rankings into a range occupied by other strong,

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1980s, Robert Klitgaard elaborated on similar ideas in his remarkable book on admissions. ROBERT KLITGAARD, *CHOOSING ELITES* 173-75 (1985). Stephen Cole and Elinor Barber refer to similar ideas in their recent book. STEPHEN COLE & ELINOR BARBER, *INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS* 203-05 (2003).

137. In a forthcoming book, Patrick Anderson and I work through detailed simulations of the distribution of students by race across different school strata, under a variety of admissions scenarios.

138. More detail on this point is available from the author, and will be published in our forthcoming book on affirmative action in law schools.

139. This follows because the admissions standard vis-à-vis blacks does not change at all, so black admissions and matriculations in the first year of the experiment should also remain constant.

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but not “elite,” midwestern law schools, such as Ohio State or the University of Illinois. And its black students—previously among the strongest in the nation—would mostly migrate to other elite institutions still aggressively pursuing affirmative action, such as Cornell, Northwestern, or the University of Virginia. To maintain its former black presence, the now-third-tier Michigan would have to reinstitute racial boosts or segregated admissions—but now at a significantly lower part of the academic spectrum.

It is important to understand that a nearly identical dynamic process would follow the decision of any but the lowest-tier American law schools to become “race-blind” in admissions. If the school treated all students according to its existing “white” standards, it would lose almost all of its black students because blacks admitted under these standards would have far more attractive offers from higher-ranked schools. If the school treated all students according to its existing “black” standards, it would fall in the rankings and, again, eventually lose its black students to higher-ranked schools.<sup>140</sup>

In this sense, affirmative action in American law schools is not so much a set of policies adopted by individual schools, but instead a *system* in which the freedom of action of any single school is largely circumscribed by the behavior of all the others. Nearly any school that switched to truly race-neutral practices would find its number of enrolled blacks rapidly dropping toward zero.<sup>141</sup> And any school that did so voluntarily would not only appear to be racist—how could this school be segregated when every other law school has something approaching proportional representation?—but would also find itself under intense pressure from all of its constituency groups to enroll more blacks and Hispanics.

#### IV. AN ASIDE ON THE VALUE OF ACADEMIC INDICES

Parts II and III effectively demonstrated, I hope, three basic points: (a) law school admissions offices rely primarily on academic indices in selecting their students; (b) because the number of blacks with high indices is small, elite law schools achieve something close to proportional representation either by maintaining separate black and white admissions tracks or by giving black applicants large numerical boosts; and (c) the use of these preferences by elite schools gives nearly all other law schools little choice but to follow suit. The result is a game of musical chairs where blacks are consistently bumped up

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140. Klitgaard recognized this phenomenon in *Choosing Elites*. He even constructed a “yield curve” showing the size of the black-white gap in admissions standards necessary to enroll specified black populations of students. KLITGAARD, *supra* note 136, at 172-74.

141. Clear examples are provided by Boalt Hall and the University of Texas School of Law, which both saw the number of black matriculants fall to nearly zero after each institution fell under bans on the use of race in admissions (Proposition 209 and *Hopwood*, respectively). Both schools were able to later raise black enrollments by finding ways around the legal constraints they faced.

several seats in the law school hierarchy, producing a large black-white gap in the academic credentials of students at nearly all law schools.

Defenders of affirmative action say that the credentials gap has little substantive significance. They are supported by an eclectic band of critics who have attacked the reliance on academic numbers in general, and standardized tests in particular, as misguided and unfair. Let us consider several of their principal criticisms.

*Predictive indices (like the LSAT/UGPA index I have used in Parts II and III) don't predict very well.* The correlation (usually denoted by "r") of such indices with first-year law school grades at individual schools ranges from about .25 to .50. The square of the correlation coefficient (the "r<sup>2</sup>") describes how much of the variation in the outcome variable (in this case first-year grades) is explained by the measurement variable (in this case the academic index). Since the squares of 0.25 and 0.50 are, respectively, 0.0625 and 0.25, one can argue that these predictive indices are only explaining 6% to 25% of the individual variation in law school performance. If that's as good as the indices are at predicting first-year grades, presumably they are even less able to predict more distant events—third-year grades, bar exam results, or future careers. Why should we take so seriously numbers that provide such crude guides to future outcomes? These arguments can be called the "usefulness" critique.

*American standardized tests are unfair to non-Anglos in general and blacks in particular.* It is intrinsically unreasonable to weigh a test taken in a few hours as much as or more than four years of college work. The exams are biased because they largely test knowledge of culture-specific vocabularies.<sup>142</sup> The widespread perception that blacks perform badly on such tests has produced a "stereotype threat" among blacks that further hinders performance.<sup>143</sup> Affluent whites, meanwhile, enroll in expensive coaching

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142. A recent, well-done example of this point is Roy O. Freedle, *Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 HARV. EDUC. REV. 1 (2003). Freedle finds that when one controls for SAT verbal score, blacks tend to do better on hard verbal questions and worse on easy verbal questions than do comparable whites. He argues plausibly that this is because the hard questions measure book learning while the easy questions measure cultural learning, an area where many blacks have a social disadvantage. In spite of very enthusiastic write-ups of Freedle's work in places like the *Atlantic Monthly*, it is important to keep two points in mind: Freedle's reconfigured scores close the black-white gap by only about five percent for test-takers at the median black score or higher, and the revised scores do not appear to have yet been validated as superior predictors of college performance.

143. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in THE BLACK-WHITE TEST SCORE GAP 401 (Christopher Jencks & Meredith Phillips eds., 1998). Steele and Aronson theorize that the performance of blacks on tests is worse when they perceive those tests to be measures of "intelligence" or "cognitive skills," because they are aware of the general pattern of lower black performance on such tests. Fear of conforming to the "stereotype" decreases their concentration and confidence during the test.

classes to maximize their scores.<sup>144</sup> Actual scores are highly correlated with socioeconomic status.<sup>145</sup> The tests simply perpetuate privilege and are illegitimate. These arguments can be called the “fairness” critique.

The battlefield staked out by these two critiques is bloody and littered with corpses. For the most part, my approach in this Article is to sidestep the field by presenting new, real, and systematic data on the actual consequences of affirmative action (and impatient readers can move directly to Part V to start digesting the data).<sup>146</sup> If we actually know black-white differences in law school grades, retention rates, and bar passage, theoretical arguments about predictive indices become in some sense moot. However, since many of the arguments just outlined are so widely believed, are so often repeated, and have gained so much apparent legitimacy in recent years, I offer a few comments here on the main points of dispute.

*The usefulness critique.* The so-called validation studies that assess the power of academic indices to predict first-year law school grades are intrinsically invalid *when used for that purpose*.<sup>147</sup> Since the students at any given school are chosen largely on the basis of the academic indices themselves, they represent a seriously skewed sample. Their scores are, as we have seen, fairly compressed (creating the “restriction of range” problem) and, to the extent that nonindex factors are used in admissions, persons with lower academic scores often have offsetting strengths. When a correction is made for these problems, grade correlations with academic indices tend to go up about 20 points, to a range of .45 to .65.<sup>148</sup>

Another way to avoid the weaknesses of conventional validation studies is to use academic indices to predict performance on bar exams. Bar exams are taken by a broad cross-section of law graduates of many different schools, which greatly reduces the restriction-of-range and biased-selection problems. Little research has been done because bar authorities tend to jealously guard exam data. However, some recent validation studies have succeeded in

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144. For an example of this argument, see David M. White, *An Investigation into the Validity and Cultural Bias of the Law School Admission Test*, in *TOWARDS A DIVERSIFIED LEGAL PROFESSION* 66, 129-32 (David M. White ed., 1981).

145. See Karl R. White, *The Relation Between Socioeconomic Status and Academic Achievement*, 91 *PSYCHOL. BULL.* 461 (1982), cited in Larry V. Hedges & Amy Nowell, *Black-White Test Score Convergence Since 1965*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 143, at 149, 161 n.14.

146. As I note in the Conclusion, I have little doubt that law schools and other institutions can improve their admissions criteria by developing other validated measures of capacity, but that opinion is not inconsistent with believing that most of the criticisms of the LSAT are greatly overblown.

147. Single-school validation studies can nonetheless be helpful in comparing the performance of groups within a school, or in assessing the effects of other influences on academic performance; they are simply invalid as a way of measuring the total utility of academic measures in predicting academic outcomes.

148. KLITGAARD, *supra* note 136, at 201 tbl.A1.3.

matching undergraduate grades and LSAT scores with raw scores on the California bar exam. The studies find the predictive power of the LSAT is quite good. LSAT scores have a .61 correlation with multistate exam scores (even though the tests are usually taken four years apart), and a correlation of .59 with overall exam results (including the eight-hour essay exam and eight-hour practice exam).<sup>149</sup> Adding undergraduate grades to the predictor produces a further, modest increase in correlations. The  $R^2$  of these academic indices with bar results is, therefore, well over 35%.<sup>150</sup>

Explaining 35% of individual variance may sound mediocre, but I find it impressive for a number of reasons. No other predictor tested for admissions purposes (e.g., interviews) has been able to explain more than 5% of individual variance in school performance.<sup>151</sup> In research I conducted in 1995 with Kris Knaplund and Kit Winter (and the aid of many law schools around the country), thousands of first-year law students completed questionnaires on their school experiences and their schools provided data on their first-semester grades and predictive indices.<sup>152</sup> Although we did not set out to study predictors of academic performance, I was nonetheless struck that the simple LSAT/UGPA index was several times stronger at predicting first-semester

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149. STEPHEN P. KLEIN & ROGER BOLUS, GANSK & ASSOCS., REPORT DR-03-08, ANALYSIS OF THE JULY 2003 EXAM: REPORT TO THE COMMITTEE OF BAR EXAMINERS, STATE BAR OF CALIFORNIA 4 (2003). Klein and Bolus's analysis is based on nearly seven thousand cases. I would also note that when an individual law school's index captures important "soft" variables (like the difficulty of the applicant's undergraduate college) and the school's students have a wide range of index scores (limiting the restriction-of-range problem), predictive indices can be powerful even within that school. The UCLA School of Law met both of these criteria, and an analysis I conducted of nine classes of law students found that entering credentials achieved the following  $R^2$  values for subsequent grades: for first-semester GPA, .35; for second-semester GPA, .39; for first-year GPA, .44; for cumulative GPA upon graduation, .44. Note that the predictive power of credentials was as strong for graduation GPA as for first-year GPA.

150. The attentive reader may notice that I sometimes capitalize the  $r$  in  $r^2$ . Formally, an  $r^2$  measures the amount of variation in a dependent variable accounted for by one independent variable, while an  $R^2$  measures the amount of variation in a dependent variable accounted for by *multiple* independent variable measured simultaneously.

151. KLITGAARD, *supra* note 136, at 182-86; *see also* John Monahan, Risk and Race: An Essay on Violence Forecasting and the Civil/Criminal Distinction (2003) (unpublished manuscript, on file with author).

152. Knaplund, Winter, and I have complete data (background data provided by schools as well as questionnaires completed by students) for twenty participating law schools and over four thousand students. This database, known as the 1995 National Survey of Law Student Performance, is available on CD from the author. The overall response rate among first-year students at these schools was seventy-eight percent. Kris Knaplund, Kit Winter & Richard Sander, 1995 National Survey of Law Student Performance CD-ROM [hereinafter 1995 National Survey Data].

grades than direct information on how much students said they were studying, participating in class, completing the reading, or attending study groups.<sup>153</sup>

Correlations based on individual behavior almost always sound unimpressive, largely because individuals are extremely complex and their behavior is shaped by a literal multitude of factors. Even though we know cigarette smoking causes cancer and takes years off the average smoker's life, the individual-level correlation between smoking and longevity is only about .2 (generating an  $r^2$  of 4%).<sup>154</sup> Even though we know that the opportunities we have in life are heavily shaped by the environment in which we grow up (and by our genes), the correlation between the incomes of adult brothers is also only about .2.<sup>155</sup>

In such cases, the modest strength of the individual correlation belies what is, when applied to large numbers, a powerful and highly predictive association. The fate of individual cigarette smokers is hard to predict, but the comparative fates of large numbers of smokers and nonsmokers can be foreseen with great accuracy. In the same sense, the individual-level correlation of an academic index with first-year grades at a law school may be only .41; but if we make predictions about groups of twenty students based on academic indices, the correlation between predictions and actual performance jumps to .88. If we make predictions about groups of one hundred students, the correlation is .96.<sup>156</sup>

Just as the predictive power of a correlation increases when it is applied to larger groups, so it increases when it is applied to larger disparities. Predicting outcomes for persons in the middle of a distribution (where people are usually most thickly clustered) is hard; outcomes at the high and low ends follow more regular patterns. For example, consider blacks who took bar exams in the "Far West" region who were captured by the LSAC-BPS during the mid-1990s.<sup>157</sup>

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153. For the schools collectively, the results were an  $r^2$  of .21 (with the restriction-of-range problem) for LSAT/UGPA alone and an  $R^2$  of .27 when data on studying, participation, etc. was added. See 1995 National Survey Data, *supra* note 152.

154. One of the earliest and best-known efforts to collect systematic data on the relationship between smoking and life expectancy was published in 1938 by Johns Hopkins biologist Raymond Pearl. If one assigns a large number of nonsmokers, light smokers, and heavy smokers the distribution of life expectancies measured by Pearl, the correlation of the three levels of smoking with life expectancy is -.177, even though the heavy smokers, as measured by Pearl, lived an average of seven years less than the nonsmokers. If one leaves out the category of light smokers (heightening the contrast), the correlation of heavy smoking with life expectancy is -.214. For the original data, see Raymond Pearl, *Tobacco Smoking and Longevity*, 87 *SCIENCE* 216 (1938).

155. KLITGAARD, *supra* note 136, at 89 (citing CHRISTOPHER JENCKS ET AL., WHO GETS AHEAD? 57 (1979)).

156. These numbers are from actual simulations with data from 1995 National Survey Data, *supra* note 152.

157. I selected this area because it comes closest, within the LSAC-BPS data, to representing a single bar (California's), thus minimizing the problem of trying to compare a variety of state bar standards within the same statistic.



For those whose pre-law school academic index was 720 or higher (out of 1000), the first-time bar passage rate was 97%. For those whose academic index was 540 or lower, the first-time bar passage rate was 8%.<sup>158</sup>

When a law school admits a class, it is making judgments about large numbers of people—how to select a few hundred students from several thousand applicants. Even though the success of any individual applicant is largely guesswork, the average success of groups of applicants with similar academic credentials is highly predictable. This is why it is legitimate—indeed, essential—for schools to pay attention to academic numbers.<sup>159</sup>

*The fairness critique.* There are a number of small answers to arguments that academic indices are unfair to blacks. The available evidence suggests that most students do not take test-preparation courses, blacks are more likely than whites to enroll in such courses, and the courses have very modest effects on performance.<sup>160</sup> Under the most generous assumptions, test cramming could not explain more than one or two percent of the black-white credentials gap.<sup>161</sup> Testing agencies have made substantial efforts to make the verbal and reading portions of their tests more culturally inclusive; but in any case, the racial gaps on mathematical and analytical portions of standardized tests are as large as

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158. Admittedly, the sample sizes are small, but one observes similar patterns throughout the bar data. Calculation by the author from LSAC-BPS Data, *supra* note 133.

159. Indeed, even small differences in numbers are quite powerful when applied to large numbers of people, a point often overlooked by admissions officers and even by the LSAC, which has officially suggested “banding” LSAT scores to avoid giving an undue impression of precision. “Banding” or otherwise placing applicants in broad index categories simply throws information away. One hundred persons with an LSAT score of 161 are highly likely to have higher law school grades and higher pass rates on the bar than one hundred persons with an LSAT score of 160.

160. For example, a methodologically careful study by Donald Powers and Donald Rock found among a large random sample of SAT takers, only twelve percent “attended coaching programs offered outside their schools.” DONALD E. POWERS & DONALD A. ROCK, EFFECTS OF COACHING ON SAT I: REASONING SCORES 2 (College Entrance Examination Board, Report No. 98-6) (1998). Whites were significantly underrepresented among coached students, while blacks were mildly overrepresented. Powers and Rock compared a control group of several thousand students who took the SAT twice, without participating in a coaching program, with an experimental group who also took the SAT twice, but participated in a coaching program (for the first time) between the two tests. Students in both groups generally did somewhat better on the second test; for the coached students, the average net improvement over the control students was eight points on the verbal SAT and eighteen points on the math SAT (an overall gain of about one-eighth of a standard deviation). *Id.* at 13.

161. Suppose, for example, that the prep courses were twice as powerful as research suggests—in other words, suppose prepping could increase scores by a quarter of a standard deviation. Suppose further that instead of blacks being more likely to take cramming courses than whites (as the research cited in note 160 finds), whites were twice as likely as blacks to take such courses (say, 16% of whites but only 8% of blacks took the courses). Then the “test prep” disparity could account for  $0.25 * 0.08$ , or 0.02 of a standard deviation in the black-white SAT gap. Since the actual score gap is around one standard deviation, our “prep gap” hypothetical, generous as it is, would explain only 2% of the black-white gap.

those on verbal portions. “Stereotype threat” does appear to exist, but it is hard to pin down how much of the black-white gap proponents believe it explains.

There is a more fundamental problem with the fairness critique. If it were true that academic indices generally understated the potential of black applicants, then admitted black students would tend to outperform their academic numbers. But this is not the case. A number of careful studies, stretching back into the 1970s, have demonstrated that average black performance in the first year of law school does not exceed levels predicted by academic indicators.<sup>162</sup> If anything, blacks tend to underperform in law school relative to their numbers, a trend that holds true for other graduate programs and undergraduate colleges.<sup>163</sup>

One might respond that law school exams and bar exams simply perpetuate the unfairness of tests like the LSAT—they are all timed and undoubtedly generate acute performance anxiety. But almost all first-year students take legal writing classes, which are graded on the basis of lengthy memos prepared over many weeks, and which give students an opportunity to demonstrate skills entirely outside the range of typical law school exams. My analyses of first-semester grade data from several law schools shows a slightly *larger* black-white gap in legal writing classes than in overall first-semester grade averages.<sup>164</sup>

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162. See, e.g., W.B. Schrader & Barbara Pitcher, *Predicting Law School Grades for Black American Law Students*, in 2 REPORTS OF LSAC SPONSORED RESEARCH 451 (1976); W.B. Schrader & Barbara Pitcher, *Prediction of Law School Grades for Mexican American and Black American Students*, in 2 REPORTS OF LSAC SPONSORED RESEARCH, *supra*, at 715; see generally LAW SCH. ADMISSION COUNCIL, 3 REPORTS OF LSAC SPONSORED RESEARCH (1977).

163. KLITGAARD, *supra* note 136, at 162-64.

164. I found this pattern in two different data sets. In the 1995 National Survey of Law Student Performance, four of the twenty schools graded legal writing courses in the first semester; for those schools as a whole, the black-white gap was somewhat larger in legal writing classes than in other first-semester courses. The sample size is small, however, and the finding of a greater gap in legal writing classes is not quite statistically significant. Note, too, that for these four schools, most of the fifty-eight blacks in the sample came from a single school. See 1995 National Survey Data, *supra* note 152. The UCLA Academic Support Dataset, which Kris Knaplund and I used in our studies of academic support, contains data on law student performance over a nine-year period, including legal writing grades for two years, 1990-1991 and 1991-1992. If we compare the black-white grade gap for the 362 whites and 49 blacks in those two classes, the gap is 7.1 points in legal writing classes and 6.2 points in overall first-year averages. (At the time, the UCLA School of Law had a 0 to 95 grading system with a mean of 78 and a standard deviation of between 4 and 5 points.) Again, the larger black-white gap in legal writing classes is almost but not quite statistically significant, which is not surprising given the small sample size. Note that legal writing classes are generally not graded anonymously (as other first-year courses normally are), which introduces the added factor of possible bias. While I would not completely discount the influence of personal biases among professors, I believe that in the generally progressive world of law schools the net effect of bias is unlikely to be a net disadvantage for blacks.

None of this is to deny the value of exploring alternative methods of identifying talent for law school, nor to deny the importance of increasing the class diversity of our meritocracy.<sup>165</sup> The point I suggest here is that academic indices currently used by law school admissions officers are not biased and are far from meaningless. The black-white credentials gap is real. Therefore, admitting law students whose academic credentials vary dramatically by race is likely to have dramatic effects in law school.

#### V. EFFECTS OF AFFIRMATIVE ACTION ON ACADEMIC PERFORMANCE IN LAW SCHOOL

In many discourses, the point of affirmative action is to give someone the chance to prove herself. Individuals who receive preferences, it is said, are being given the opportunity to get a better education than they would receive under a race-blind system.<sup>166</sup> Since many of the beneficiaries of affirmative action suffered from low-quality, underfunded schooling in the past, the second chance provided by affirmative action is an opportunity to blossom.

Such is the argument, and it is far from implausible.<sup>167</sup> In the preceding Parts, I have pointed out that blacks benefiting from affirmative action receive much larger preferences than are generally acknowledged, and that the academic indices used to sort candidates for admission are both strong and unbiased predictors of law school performance. Nonetheless, one could reasonably argue that those blacks who have received the fewest opportunities in the past might outperform their credentials.

One could conversely argue, with equal plausibility, that with such large credentials gaps at the outset of law school, it will be particularly difficult for

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The larger point—that the black-white gap is not simply a function of exams involving time-pressure—is further reinforced by the finding in Part V that the black-white grade gap is slightly larger in the second and third years of law school than in the first year. Since upper-year courses in most schools employ a much wider array of evaluative methods (e.g., clinical exercises, seminar papers) than first-year courses, the fact that the black-white gap remains undiminished suggests that the gap is not a mere by-product of timed examinations.

165. My own, unpublished research suggests that a talented young person of any race growing up in a low-to-modest socioeconomic environment has a better chance of reaching the upper-middle class through ordinary capitalism than through a graduate degree, such as a law degree. If this is true, it suggests that a key goal of our public education and university system—to promote opportunity and bring talent to the fore—is not working. For reasons of effectiveness, utility, and fairness, discussed both in this Article and in Knaplund & Sander, *supra* note 4, simply providing racial preferences in college and graduate school admissions is too simple a fix.

166. For a representative example of this attitude, see BOWEN & BOK, *supra* note 2, at 280-86.

167. Indeed, I think this theory is undoubtedly true in many contexts. See, e.g., LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES* (2000) (showing the educational benefits to black children whose parents are enabled to migrate from inner-city public housing to suburban school districts).

blacks to stay afloat. The question of how affirmative action beneficiaries actually perform in law school is, therefore, of great practical and conceptual interest. Remarkably, I have been unable to find any study published in the past thirty years that has tried to systematically document an answer. Even researchers who have had access to systematic data have avoided publishing it, or, worse, have given misleading accounts of what the data shows.

\* \* \*

The LSAC-BPS data, which I discussed in Part III,<sup>168</sup> provides a uniquely comprehensive resource for examining law school performance. The 163 schools that participated in the study provided grade data for over twenty-seven thousand 1991 matriculants.<sup>169</sup> Although the data does not identify individual schools, the LSAC converted each student's first-year GPA and graduation GPA into a number standardized for each school, in which the mean GPA at the school has a value of zero and other grades are measured by the number of standard deviations they lie above or below the mean. It is a simple matter, then, to compute any student's class standing.

Table 5.1 below shows the distribution of first-year grades among black and white students at the "Tier 1" schools in the LSAC-BPS. Students are broken down into "deciles," each representing one-tenth of all first-year students at each school. The data shows that blacks are heavily concentrated at the bottom of the grade distribution: 52% of all blacks, compared to 6% of all whites, are in the bottom decile. Put somewhat differently, this means that the median black student got the same first-year grades as the fifth- or sixth-percentile white student. Only 8% of the black students placed in the top half of their classes.

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168. See *supra* note 133 and accompanying text.

169. The discerning reader may notice that the various n figures in Table 3.2 sum to 155, not to 163. This is because eight of the schools in the LSAC-BPS data were not included in these six clusters. In total, these schools only comprised fewer than two hundred data points out of a data set of over twenty-seven thousand, so their exclusion is not especially troubling.

TABLE 5.1: DISTRIBUTION OF FIRST-YEAR GPAS AT “ELITE” SCHOOLS, SPRING 1992, BY RACE

Class Decile	Proportion of Students in Each Group Whose First-Year GPAs Place Them in Each Decile <sup>170</sup>		
	Black	White	All Others
1st (Lowest)	51.6%	5.6%	14.8%
2d	19.8%	7.2%	20.0%
3d	11.1%	9.2%	13.4%
4th	4.0%	10.2%	11.5%
5th	5.6%	10.6%	8.9%
6th	1.6%	11.0%	8.2%
7th	1.6%	11.5%	6.2%
8th	2.4%	11.2%	6.9%
9th	0.8%	11.8%	4.9%
10th (Highest)	1.6%	11.7%	5.2%
Students in Sample	126	1525	305

Source: LSAC-BPS Data, *supra* note 133.

Based on the regression illustrated in Table 5.2 below, low black performance is not a result of test anxiety (the gap is similar or greater in legal writing classes) or some special difficulty blacks in general have with law school. It is a simple and direct consequence of the disparity in entering credentials between blacks and whites at elite schools. If we try to predict grades at law schools based on the entering credentials of students, we get the regression results summarized in Table 5.2.

170. Here, and in other tables of this type, some columns do not sum to 100.0% because of rounding.

TABLE 5.2: PREDICTED COEFFICIENTS OF INDEPENDENT VARIABLES  
 PREDICTING FIRST-YEAR LAW SCHOOL GRADES AT A  
 CROSS-SECTION OF LAW SCHOOLS<sup>171</sup>

Independent Variable	Standardized Coefficient	t-Statistic	p-Value
ZLSAT	0.38	25.98	< .0001
ZUGPA	0.21	14.92	< .0001
Asian	-0.007	-0.52	.61
Black	-0.007	-0.48	.63
Hispanic	-0.011	-0.79	.43
Other Race	-0.021	-1.49	.14
Male	0.018	1.29	.20
n for Model: 4258			
Adjusted R <sup>2</sup> for Model: .19			

Source: 1995 National Survey Data, *supra* note 152. The regression includes all schools in the database that provided complete LSAT and UPGA data on participating students.<sup>172</sup>

This is the first of several sets of regression results the reader will encounter in this Article, so a few explanatory comments are in order.<sup>173</sup> “Standardized coefficients” tell us how much a change in an independent variable influences the dependent variable. In the table, the 0.38 coefficient for ZLSAT means that if two students are comparable in all other respects but their LSAT score, the student with the higher score will tend to have first-year grades that are 0.38 standard deviations higher for each standard deviation advantage in the LSAT score (one standard deviation on the LSAT is about ten points). The “t-statistic” tells us how consistent or reliable a relationship is, with a higher t-statistic indicating a stronger, more reliable association. T-statistics generally increase as a function of the standardized coefficient and the

171. It can be problematic to assume that blacks are on the same regression line as whites if a wide gulf separates their credentials. However, Table 5.2, by comparing respondents of all races, bridges the gulf. Moreover, a separate regression using only black respondents produces almost identical—indeed, slightly stronger—results (R<sup>2</sup> of .21, standardized coefficients of 0.41 for ZLSAT and 0.25 for ZUGPA).

172. The reader may reasonably wonder why I have used a different data set to test how well entering credentials predict first-year grades. The answer is straightforward: The LSAC-BPS data set standardizes grades for each participating law school, but does not standardize the entering credentials of students according to the law school they attended. Nor does the data set permit the researcher to make such a standardization. Without this standardization, regression results would be meaningless at best and highly misleading at worst. The 1995 National Survey is a smaller database, but all of its variables can be identified by individual law school and the sample size is large enough to provide reliable results.

173. For a more detailed explanation of multiple regression, see Knaplund & Sander, *supra* note 4, at 208-24.

size of the sample. T-statistics above 2.0 are usually taken to signify that the independent variable is genuinely helpful in predicting the dependent variable. A t-statistic of less than 2.0 indicates a weak, inconsistent relationship—one that might well be due to random fluctuations in the data. The “p-value” contains the same information as the t-statistic, but it has a more intuitive, accessible meaning. A p-value of .05 (which corresponds to a t-statistic of 1.96) means, literally, that if one had millions of data points but did regressions with small subsamples of observations, one would get a coefficient as large or larger than the one shown about five percent of the time even if there were, in fact, no systematic relationship between the dependent and independent variables.

As we saw in Part III, the main criteria used by most law schools are LSAT scores, undergraduate GPA (often adjusted for school difficulty), and the race of applicants. The regression in Table 5.2, which includes these various admissions factors, tells us three things. First, LSAT and UGPA are strongly associated with first-year grades (even though, for the reasons discussed in Part IV, the  $R^2$  for a model like this is low). Second, when we control for the LSAT and UGPA variables, none of the “race” variables (or the gender variable) is even close to being statistically significant (all the p-values are well above .05). This means that when we control for academic credentials, blacks, whites, Hispanics, and Asians all get pretty much the same grades.<sup>174</sup>

In other words, the collectively poor performance of black students at elite schools does not seem to be due to their being “black” (or any other individual characteristic, like weaker educational background, that might be correlated with race). The poor performance seems to be simply a function of disparate entering credentials, which in turn is primarily a function of the law schools’ use of heavy racial preferences. It is only a slight oversimplification to say that the performance gap in Table 5.1 is a by-product of affirmative action.<sup>175</sup>

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174. It is true that other researchers have found that black students’ grades are lower than predicted by equations using background credentials. Bowen and Bok, for example, found substantial black “underperformance” in elite colleges. BOWEN & BOK, *supra* note 2, at 76-78, 383 tbl.D.3.6. Such findings are generally due to three factors: (a) the inadequate measurement of background credentials (e.g., Bowen and Bok use very crude measures of high school grades and no measure of high school quality); (b) misspecification of appropriate statistical forms (depending on grading systems, curvilinear functions may be more appropriate than linear ones); and (c) the omission of factors related to affirmative action itself that depress performance (e.g., discouragement). Since my data does not show any net underperformance by blacks, I will not belabor the potential measurement problems that sometimes show up in other data sets.

175. In other words, the data show that if blacks were admitted to law school through race-neutral selection, they would perform as well as whites. As I have noted, there is nonetheless a very large black-white credentials gap among those applying to law school, and this gap does not disappear when one uses simple controls for such glib explanations as family income or primary-school funding. Researchers have made great strides over the past generation in accounting for the black-white gap in measured cognitive skills. The dominant consensus is that: (a) the gap is real, and shows up under many types of measurement; (b) the gap is not genetic, i.e., black infants raised in white households tend to have the same or

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Since, as we have seen, large racial preferences at the top of the law school hierarchy reproduce themselves at the vast majority of other law schools, we would expect to see similar patterns of black performance across most of the spectrum of legal education. Table 5.3 confirms that this is so. In the second, third, fourth, and fifth groups of law schools identified in the LSAC-BPS data, blacks are heavily concentrated at the bottom of the grade distribution.<sup>176</sup> Generally, around fifty percent of black students are in the bottom tenth of the class, and around two-thirds of black students are in the bottom fifth. Group 3, with the largest credentials gap, also has the worst aggregate performance among blacks. Only in Group 6, made up of the seven historically minority law schools, is the credentials gap, and the performance gap, much smaller.

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higher cognitive skills as whites raised in the same conditions; and (c) there are a variety of cultural and parenting differences between American blacks and whites (e.g., time children spend reading with parents or watching television) that substantially contribute to measured skill gaps. On these points, see the excellent essays in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 143, particularly chapters one through five. Jim Lindgren has pointed out that in the National Survey data analyzed in Table 5.2, the “race” coefficients become at least weakly significant (and negative) if one does not include those not reporting race with white students. So far as I can determine (from other data provided by some participating schools), students not reporting race were predominantly white or Asian, which supports the approach taken in this table. In any case, the race effects are still extremely weak. Under any formulation, academic outcomes for all racial groups are dominated by academic credentials, not race.

176. Note that I have renumbered the groups so that numbers descend with eliteness. In the LSAC-BPS codebook, our Group 1 is called “Cluster 5,” Group 2 is called “Cluster 4,” and so on.



TABLE 5.3: FIRST-YEAR GRADE PERFORMANCE OF BLACK STUDENTS

Decile	Proportion of Black Students in Each Decile Within Each Group of Schools				
	Group 2: Other "National" Schools	Group 3: Midrange Public Schools	Group 4: Midrange Private Schools	Group 5: Lower-Range Private Schools	Group 6: Historically Minority Schools
1st	44.8%	49.9%	46.3%	51.6%	14.0%
2d	22.1%	19.0%	18.9%	12.6%	12.1%
3d	11.4%	9.3%	11.3%	9.5%	12.8%
4th	4.0%	8.1%	9.2%	8.4%	10.5%
5th	7.8%	5.1%	5.7%	4.2%	12.4%
6th	3.7%	3.6%	2.1%	3.2%	8.2%
7th	1.1%	2.2%	2.6%	2.1%	10.1%
8th	2.6%	1.4%	1.9%	3.2%	6.9%
9th	1.5%	1.0%	1.2%	2.1%	7.5%
10th	1.1%	0.4%	0.7%	3.2%	5.6%
Corresponding White Percentile of Median Black Student	7th	5 <sup>th</sup>	8th	7th	24th
Black-White Index Gap (from Table 3.2)	174	202	165	172	125
Black Students in Sample	272	505	423	95	306

Source: LSAC-BPS Data, *supra* note 133.<sup>177</sup>

These distributions give us a more vivid idea of what the debate over predictive indices means in real terms. If we imagined the distribution of predictive indices among black and white students enrolling at a particular school, we would see two largely separate and only slightly overlapping humps (see Figure 5.1). If we look at the distribution of first-year grades among these same students, the two humps have spread out, in both directions (see Figure 5.2). Some black students (about 5%) will do as well as the median white student because they came with strong entering credentials (the right tail of the left hump in Figure 5.1). Other black students (about 10%) will significantly outperform predictions based on their credentials, and will also be in the middle of the class or higher. Some white students with low credentials, and other

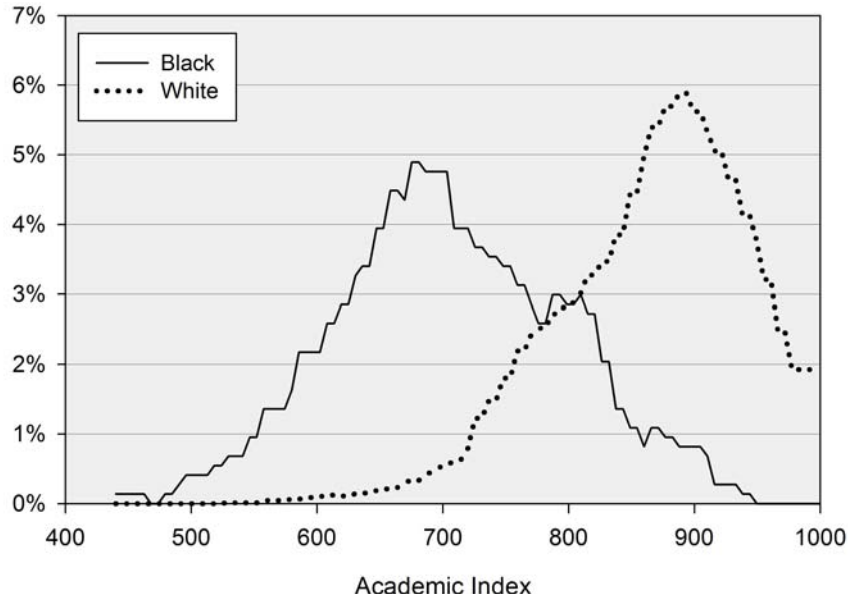
177. See also WIGHTMAN, LSAC-BPS, *supra* note 133. Two relevant explanatory notes on Table 5.3: (a) even though the black distribution is much more evenly distributed in Group 6 schools, the black percentile distribution is low relative to the percentile distribution of whites because there are a smaller number of whites and they are concentrated in the higher deciles; and (b) the Group 5 schools seem to be more heterogeneous in affirmative action policies, which would explain why there is a concentration of blacks at the high and low ends at those schools.

whites who significantly underperform their credentials, will fall into the bottom quarter of the distribution. But the distance between the middle of the two humps—the average gap between blacks and whites—remains essentially unchanged. And the gap is large. When professors talk about what the grades they give mean in terms of actual student understanding, they tend to say that there is a broad middle section in which the distinctions of understanding are relatively minor. There is a top group—perhaps 10-15% of the total—that shows real mastery and goes beyond the material, and a bottom group, again 10-15% of the total, that seems fundamentally to miss the point. In other words, there are likely to be very real educational consequences when the performance gap is as large as what Table 5.1 and Table 5.3 show. As we will discuss more fully in Part VI, the low grades that are a by-product of affirmative action have a deeper significance beyond the ranking game.<sup>178</sup>

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178. The size of the black-white gap in law school performance closely matches the size of the gap at highly selective undergraduate colleges, as reported by Bowen and Bok in *The Shape of the River*. They observed that the college grades of black students “present a . . . sobering picture.” BOWEN & BOK, *supra* note 2, at 72. They report that the *average* class rank of black matriculants was at the twenty-third percentile. *Id.* I find that the black average percentile at the most elite law schools was at the twenty-first percentile. Of course, averages are raised disproportionately by a few students with very high grades—hence my general reliance on distributions and medians in reporting grade data. The implication of the statistic reported by Bowen and Bok is that the “typical” or “median” black student at elite American colleges has a class rank close to the tenth percentile and is outperformed by 94-95% of the white students.

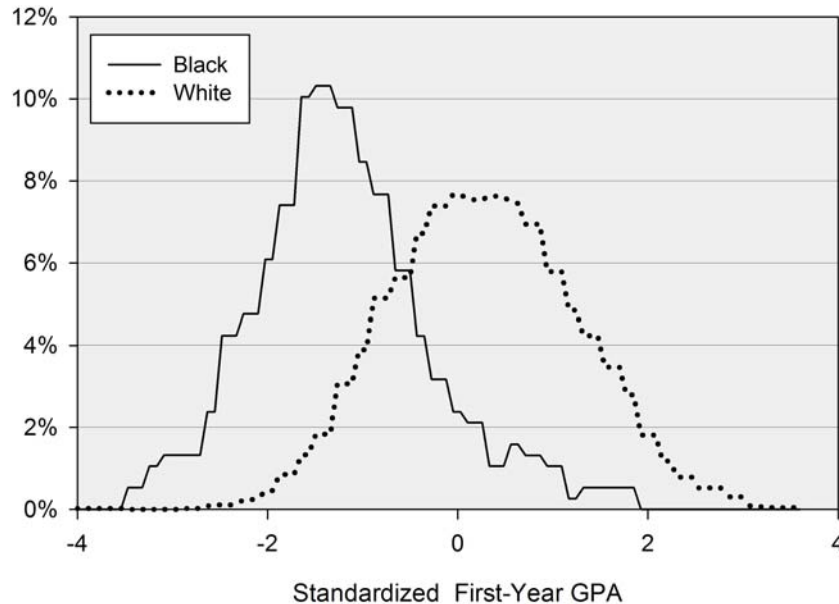
FIGURE 5.1: DISTRIBUTION OF BLACK AND WHITE STUDENTS AT “ELITE” SCHOOLS BY ACADEMIC INDEX, 1991 COHORT<sup>179</sup>



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179. This figure is derived from calculations by the author from LSAC-BPS Data, *supra* note 133.

FIGURE 5.2: DISTRIBUTION OF BLACK AND WHITE LAW STUDENTS AT  
 “ELITE” SCHOOLS BY STANDARDIZED FIRST-YEAR GPA,  
 1991 COHORT<sup>180</sup>



\* \* \*

During the second and third years of law school, we might well expect the grade gap between blacks and whites to narrow significantly, for a variety of reasons. As we have noted, a common premise of affirmative action programs is that the more time disadvantaged students have to “catch up” with more advantaged peers, the better they will do. And in law school, changes in the environment in the second and third years provide particularly good opportunities for students in academic difficulty to catch up: competition is less intense;<sup>181</sup> fewer courses are curved (which generally means fewer low grades); and students have far more discretion in choosing subjects. Not least, professors’ methods of grading students are probably more heterogeneous in the second and third years of law school than in the first, so timed exams probably play a less critical role.<sup>182</sup>

180. This figure is derived from calculations by the author from LSAC-BPS Data, *supra* note 133.

181. Gulati et al., *supra* note 126, at 239.

182. William Henderson has recently shown that (at least at the two schools he studied) student LSAT scores predict law school performance best on timed, in-class exams; they are significantly poorer predictors of performance when professors use papers or take-home

The LSAC-BPS data includes the cumulative GPA of students at the end of their first year and at the time of law school graduation. Comparing the total grade distribution for all students in the data set would be misleading, because many of the weakest students drop out after the first year of school. Table 5.4 therefore includes only black students who actually completed law school, and compares the class standing of these students at the end of the first year and at the end of the third year.

TABLE 5.4: GPA DISTRIBUTION OF BLACK STUDENTS  
AT THE END OF THEIR FIRST AND THIRD YEARS,  
FOR ALL LAW SCHOOLS IN THE LSAC-BPS

Decile	Proportion of Black Law School Graduates with Grades in Each Decile	
	1st Year GPA	3d Year (Cumulative) GPA
1 <sup>st</sup>	41.4%	42.5%
2 <sup>d</sup>	17.4%	18.0%
3 <sup>d</sup>	11.3%	11.2%
4 <sup>th</sup>	8.2%	9.0%
5 <sup>th</sup>	6.5%	5.8%
6 <sup>th</sup>	4.3%	5.0%
7 <sup>th</sup>	3.3%	2.5%
8 <sup>th</sup>	3.3%	2.5%
9 <sup>th</sup>	2.3%	1.8%
10 <sup>th</sup>	2.0%	1.7%
n of Black Students in Sample: 1385		

Source: LSAC-BPS Data, *supra* note 133.<sup>183</sup> The universe on which the deciles are calculated is just those students who graduated from law school and had, in the LSAC-BPS data, valid first-year and cumulative third-year GPAs (a total of 22,969 students). The difference between the means of the first- and third-year grade distribution is small but highly significant ( $p < .001$ ). Because dropouts are excluded from the analysis, this table somewhat overstates the performance of all blacks who complete the first year of law school.

exams. I suspect Henderson is right; indeed, my own data (from 1995 National Survey Data, *supra* note 152) show a similar pattern. I do not find, however, that the widespread use of timed exams in law schools explains the black-white gap. The data in Table 5.4 provides some indirect evidence on this point; my data on the black-white gap in legal writing classes, (discussed *supra* note 164), shows even more directly that the gap is as large or larger in nontimed classes. My legal writing samples are small, however, and I believe more research on this point is needed. See William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 986, 1043-44 (2004).

183. See WIGHTMAN, LSAC-BPS, *supra* note 133.

In relative terms, the grades of black law students actually go down a little from the first to the third year. The average drop is a little less than one-fifth of a standard deviation. The weaknesses in black performance engendered by the large gap in entering credentials—in turn engendered by large admissions preferences based on race—are not an artifact of the first year. They do not shrink over time. Indeed, for reasons I will explore more at the end of Part VI, they grow a bit.

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The most immediate danger posed by poor performance in law school is withdrawal or expulsion from law school. As we saw in Part I, attrition was a major problem facing blacks admitted during the early years of affirmative action. Schools sometimes adopted special policies for minority students to minimize attrition, and overall attrition rates at schools dropped sharply between the late 1960s and the 1980s. Over the past fifteen years, overall law school attrition rates (at accredited schools<sup>184</sup>) have bounced between 6% and 12%.<sup>185</sup> Much of the attrition these days is voluntary. Consequently, the problem of minority attrition generally, and black attrition in particular, is now rarely discussed.

Nonetheless, what attrition remains falls disproportionately upon blacks. In the LSAC-BPS data, 8.2% of the white students, but 19.2% of the black students, who started law school in 1991 had not graduated by the end of the study five years later.<sup>186</sup> What role do racial preferences—and the consequently low performance of blacks in law school—play in this disparity? Without the benefit of systematic data, one could make a reasonable argument that preferences actually reduce black attrition. The argument would run like this: More elite schools have higher graduation rates than less elite schools; thus, giving blacks an extra hand into more elite schools puts them at lower risk of attrition. If blacks nonetheless are less likely to graduate, this is because of nonacademic factors like fewer financial resources.

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184. The unaccredited law schools, most of them located in California, have essentially open admissions and far higher attrition rates, partly because California requires students at unaccredited schools to take a “baby bar” at the end of their first year.

185. The aggregate ABA data for the entering class of 1991 suggests that about 8.7% of that class did not graduate; the LSAC-BPS data suggests that 9.2% of the students in their sample did not graduate, which I take as further evidence of the comprehensiveness and reliability of the LSAC-BPS data. See LSAC-BPS Data, *supra* note 133. Neither estimate, however, is completely reliable. The ABA data does not track individual students, but merely lets us estimate attrition by comparing the number of graduates for a given year (e.g., 1994) with the number of students entering three years earlier. The LSAC-BPS lost track of some students who dropped out of the study. Moreover, if we include non-ABA schools (which are absent from both data sources), attrition rates are somewhat higher.

186. Calculations by the author from LSAC-BPS Data, *supra* note 133.

Part of this argument is true: in general, the more elite the law school, the higher the graduation rate. Table 5.5 illustrates this with the LSAC-BPS data.<sup>187</sup> Among the law students matriculating in 1991, 96.2% of the Group 1 students eventually got law degrees, compared to only 87% of the Group 5 students. Black attrition rates are higher than white rates, and the gap grows as one moves down the spectrum of schools.

TABLE 5.5: PROPORTION OF MATRICULATING STUDENTS NOT GRADUATING, BY LAW SCHOOL GROUP

Law School Group	Proportion of Matriculants in Each Group Not Graduating from Law School Within Five Years		
	Whites	Blacks	All Students
Group 1: Most Elite Schools	3.3%	4.7%	3.8%
Group 2: Other "National" Schools	5.4%	12.1%	6.2%
Group 3: Midrange Public Schools	8.6%	19.7%	9.6%
Group 4: Midrange Private Schools	9.1%	22.5%	10.3%
Group 5: Low-Range Private Schools	11.7%	34.0%	13.0%
Group 6: Historically Minority Schools	8.2%	21.8%	15.5%
Total for All Law Schools	8.2%	19.3%	9.3%
n of Students Matriculating in 1991: 27,300			

Source: LSAC-BPS Data, *supra* note 133.<sup>188</sup> Figures above are based on all reported cases in the LSAC-BPS study.

But as we have seen, the more prestigious addresses provided blacks through racial preferences come at a cost—lower performance in law school.

187. The reader should bear in mind that the LSAC-BPS "clusters," from which the six groups used in this analysis are drawn, were not created by the LSAC-BPS investigators simply to measure eliteness. If it were possible to create a more hierarchical ranking with this data, it would presumably show an even stronger association of eliteness with graduation rates.

188. See WIGHTMAN, LSAC-BPS, *supra* note 133.

The question, then, is which is more important in preventing attrition from school: getting respectable grades or going to an elite school?

Table 5.6 examines this question with another regression analysis. Unlike the regression reported in Table 5.2, where the dependent variable (first-year grades) could take on many values, the dependent variable we are now considering can take on only two values: a one if the study participant graduated from law school, and a zero if she did not. With such dichotomous (i.e., two-value) variables, the proper tool is logistic regression rather than ordinary linear regression. The standardized coefficients in a logistic regression measure the relative strength of the independent variables in predicting the outcome of interest for each individual—in this case, whether they will graduate. The Wald Chi-Square values measure the reliability of each estimate,<sup>189</sup> and the p-statistics put an intuitive gloss on the Wald Chi-Square value, demarcating independent variables into those that have a “significant” or a “nonsignificant” association with the graduation variable.<sup>190</sup> The “Somers’s D” is a measure of the model’s effectiveness in predicting outcomes. A model has a Somers’s D of zero if it does not improve our ability to predict a typical individual’s outcome; it has a value of one if it perfectly predicts every individual’s outcome.<sup>191</sup>

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189. The square root of the Wald Chi-Square value is comparable to the t-statistic in a linear regression.

190. As in linear regression, “statistical significance” is generally attributed to independent variables with a p-value under .05, but this is somewhat arbitrary. The lower a p-value (and the higher the Wald Chi-Square value), the more likely it is that the association is more than accidental.

191. For example, if 10% of our sample did not complete law school, we could guess any given person’s graduation chances with 90% accuracy simply by consistently guessing that each person would graduate. A Somers’s D of 0 in a model for predicting whether a person would graduate would thus indicate a model with that same 90% accuracy rate; a Somers’s D of 1 would indicate a model with 100% accuracy; a Somers’s D of .645, like the actual model above, would indicate a model with an accuracy of approximately 96.45%.



TABLE 5.6: RELATIVE POWER OF ALTERNATE PREDICTORS OF LAW SCHOOL GRADUATION, 1991-1996

Factor	Standardized Coefficient	Wald Chi-Square	Chi-Square p-Value <sup>192</sup>
Law School GPA (First Year)	0.764	1452.36	< .0001
Law School Eliteness	0.218	156.40	< .0001
Part-time	-0.128	96.95	< .0001
Family Income	0.037	5.39	.02
Male	-0.027	2.71	.10
Black	0.019	2.29	.13
Asian	0.004	0.08	.77
Other Nonwhite	-0.007	0.18	.67
Hispanic	0.009	0.36	.55
n of Students in Model: 24,809			
Somers's D: .645			

Source: LSAC-BPS Data, *supra* note 133.<sup>193</sup> The dependent variable is whether a matriculating first-year secures a law degree during the five years of the study. Law school eliteness is measured on a scale of 1 to 6, corresponding to the six groupings of schools in the LSAC-BPS data (but I have assigned 6 to the most elite group, 5 to the next most elite group, and so on, so that the coefficient is easier to interpret). For racial variables, whites are the implicit control group. For men, women are the implicit control group. A Wald Chi-Square value over 3.9 is generally considered indicative of "statistical significance," and corresponds to a p-value (reported in the right-hand column) of .05 or less.

This table tells us several things. Law school GPA is by far the principal determinant of whether a student in the LSAC-BPS study failed to graduate. School eliteness is a relevant factor, but it is overshadowed by the importance of academic performance.<sup>194</sup> Part-time status is important but affects a relatively small proportion of students;<sup>195</sup> higher family income appears to play

192. The meaning of the p-value here is analogous to its earlier definition; specifically, it represents the probability that the Wald Chi-Square test statistic would be as high as this or higher, assuming that there is no relationship between the variable in question and likelihood of passing the bar.

193. See WIGHTMAN, LSAC-BPS, *supra* note 133.

194. A better way of including eliteness as a variable in this regression would be to have a series of dummy variables, each corresponding to a different level of eliteness. But having run such a regression and finding that it produces very similar results, I opted for this simpler regression form to make the results more accessible..

195. The proportion of part-time students in the LSAC-BPS sample is 9.5%. Calculation by the author from LSAC-BPS Data, *supra* note 133.

a marginal but measurable role.<sup>196</sup> Race is irrelevant, or nearly so; blacks are no more or less likely to drop out (or to be flunked out) of law school than other students with similar grades in a school of similar prestige.<sup>197</sup> And if race is not a significant predictor of attrition, this implies that there is no correlate of race (e.g., discrimination) that causes blacks to drop out at disproportionate rates.<sup>198</sup>

This conclusion is borne out by looking at the individual records of students who failed to get a degree. Nearly 90% of black students in the LSAC-BPS data who only completed their first year (and thus presumably failed to graduate) placed in the bottom 10% of their classes. The median class rank of black students leaving law school between the first and third year was between the second and third percentile.

All of this implies that racial preferences—boosting black applicants into higher-tier schools—ends up hurting the chances that these students will actually get law degrees. Those who receive preferences derive some benefit (in terms of graduation rates) from going to a more elite school, but they get much lower grades because of the preferences, and, on balance, that significantly hurts their chances of graduating.

To test this idea directly, we can compare attrition rates for black and white students who have similar pre-law school credentials. Table 5.7 makes this comparison. Each row examines the attrition rates of a narrow band of black and white students—students who would, in the absence of affirmative action, attend similar law schools. Black attrition rates are substantially higher than

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196. Admittedly, the LSAC's measure of family income is vague and self-reported. However, if family income were an important factor, we would expect more high-GPA students to drop out, unless the two were very highly correlated.

197. I say this because the Wald Chi-Square value for blacks is short of statistical significance. This is also true if we omit part-time status and family income from the regression. It is possible that multicollinearity between the black dummy variable and one or more of the explanatory variables (particularly law school GPA, as a result of affirmative action) may be affecting the variable's standard error, and therefore lowering its apparent statistical significance. However, this seems unlikely to be a problem for two reasons: First, the sample size is large, which compensates for the potentially reduced power of the estimators. Second, we would not expect multicollinearity to bias the estimators, only to increase their standard errors. In both regressions, to the extent that there is a relationship, it appears that blacks may be *more* likely to remain in law school than other students with similar characteristics. If so, this strengthens the argument that preferences and the consequent low grades are behind the higher black attrition.

198. Unless, of course, if discrimination against blacks were already reflected in their law school grades, quality of school, family income, etc. However, by far the most influential explanatory variable in predicting graduation rates is a student's law school grades. If blacks were getting lower grades in law school because of discrimination, we would expect the regression represented in Table 5.2 to have a strongly negative value for the black dummy variable; this is not the case. The quality of a student's school is the next most important factor, and affirmative action systematically raises these values. As such, it seems unlikely that there is some sort of animus-based systemic discrimination causing the elevated dropout rates among blacks.

white attrition rates at all but the very highest academic levels. With this data, we can flesh out a pretty complete picture of what is going on. At the most elite schools (the schools attended by the one-eighth of black students with index scores above 700), the advantages of low institutional attrition entirely offset lower grades. But across most of the range of index scores, black attrition rates are substantially higher than white rates, simply because racial preferences advance students into schools where they will get low grades. Attrition for both races, of course, goes up as index level goes down. Racial preferences appear to have an effect on black attrition roughly equivalent to lowering the index of the typical black student by sixty to eighty points. Put more simply, affirmative action has a moderately negative net effect on the rate at which blacks complete law school.

TABLE 5.7: PROPORTION OF WHITE AND BLACK 1991 MATRICULANTS NOT GRADUATING, BY ACADEMIC INDEX LEVEL

Index Range	Proportion of Matriculants Not Graduating Within Five Years		Number of Blacks in LSAC Sample
	Whites	Blacks	
Under 400	N/A*	39.6%	96
400-460	22.2%	33.1%	139
460-520	19.7%	25.6%	320
520-580	16.4%	21.1%	417
580-640	12.1%	15.4%	370
640-700	9.6%	10.7%	280
Over 700	7.1%	7.5%	239

Source: LSAC-BPS Data, *supra* note 133.<sup>199</sup>

\* There are too few whites at this level to make a meaningful comparison.

To be more specific, affirmative action has two separate negative effects on black graduation rates. The first result—our main focus in this discussion—is the boosting of blacks from schools where they would have had average grades (and graduated) to schools where they often have very poor grades. For blacks as a whole, this phenomenon adds four to five points to the black attrition rate. The second result follows from the cascade effect. Lower-tier schools admit blacks who would not be admitted to any school in the absence of preferences. These are the students with very low index scores (low 400s and below), who have very high attrition rates (33% to 40% in Table 5.7).<sup>200</sup> This second phenomenon adds another six or seven points to the overall black attrition rate.

199. See WIGHTMAN, LSAC-BPS, *supra* note 133.

200. It is true that a few whites are admitted to law schools with index scores below 460, but they are comparatively rare. In the LSAC-BPS database, there are 201 black law students with indices below 460 (11% of all black matriculants), but only 40 white law students (0.2% of all white matriculants). See LSAC-BPS Data, *supra* note 133.

Together, these results account for the eleven-point gap between white and black attrition rates we have seen in the LSAC-BPS data.<sup>201</sup>

These attrition effects are disturbing, but by themselves they may strike many readers as not all that important. The two effects impact only one black law student in nine. It turns out, however, that these mechanisms merely foreshadow a much larger effect: the consequences of racial preferences for black performance on bar exams.

## VI. EFFECTS OF AFFIRMATIVE ACTION ON PASSING THE BAR

The formal power to license professionals in America resides with the state. In some fields, parts of the licensing process effectively have been turned over to national professional boards, which establish standards and administer examinations. This has gradually happened to a degree in the law. Nearly all states require prospective lawyers to secure a law degree from a law school accredited by the ABA and to take an examination created by the National Commission of Bar Examiners. But to this “multistate” test (which is a multiple-choice exam on general knowledge of legal doctrine), each individual state adds its own exam, usually a series of essay questions and sometimes a simulation of real-life practitioner problems, and each state sets its own threshold for passage and subsequent admission to the bar.

In most states and for most students during the 1980s and 1990s, passing the bar was regarded as a relatively modest hurdle. In the LSAC-BPS data (covering 1994-1996), about 88% of accredited law school graduates taking the bar for the first time passed it.<sup>202</sup> The eventual passage rate for this cohort was approximately 95%.<sup>203</sup> Since each state has its own threshold, however, these rates vary significantly.<sup>204</sup>

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201. See Table 5.5, *supra*.

202. In the LSAC-BPS data (mostly for students who graduated in 1994) the first-time pass rate was 88.7%. See LSAC-BPS Data, *supra* note 133. My own analysis of the first-time bar passage data in the *Bar Examiner* for the 1994-1995 cycle yielded a lower number: 82.3%. See *1994 Statistics*, B. EXAMINER, May 1995, at 7, 12-14. The discrepancy potentially can be explained by underreporting in the LSAC-BPS sample, varying definitions of “first-time” takers, and the exclusion of graduates of nonaccredited law schools (whose considerably lower passage rates significantly decrease California’s overall passage rate) in the *Bar Examiner* data. Recently, however, bar passage rates have been declining throughout the United States. See discussion *infra* note 286 and accompanying text.

203. The LSAC-BPS data tracked participants’ attempts to pass the bar through five bar administrations (summer 1994 through summer 1996). The proportion of takers passing over this period was 94.8%. Calculation by the author from LSAC-BPS Data, *supra* note 133. It is likely that some very small number of additional graduates in the cohort passed the bar later.

204. California is widely thought to have the most difficult bar—in 1994-1995 only 74% of first-time takers passed—but this is somewhat misleading, since California permits students from unaccredited law schools to take the bar. Bar-takers from unaccredited law schools accounted for approximately 35% of total bar-takers in California in 1994-1995 and

For blacks, the bar exam poses a substantially higher hurdle. Only 61.4% of black takers in the national LSAC-BPS study passed the bar on their first attempt—blacks in this cohort were four times as likely to fail on their first attempt as whites.<sup>205</sup> The pass rate for blacks through five attempts was 77.6%; the black failure rate through five attempts was more than six times the white rate.<sup>206</sup>

The fact that there are large racial disparities in bar passage rates will not come as news to most observers in legal academia (though the magnitude of the gap may surprise some). Most deans and law professors seem to have rather wearily accepted the idea that blacks “have trouble” on the bar.<sup>207</sup> The evidence in this Part suggests that blacks have trouble with the bar for reasons that have nothing to do with race, and everything to do with preferential policies.

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If we want to predict in advance who will pass a bar examination in a particular state, and who will fail, the overwhelming determinant of success is one’s law school GPA. For example, at my own law school (UCLA), students who are in the top 40% of the class upon graduation have a 98% bar passage rate, while those in the bottom 10% of the class have a 40% pass rate.<sup>208</sup> Among students at a single school, law school grades have a higher correlation with bar scores than any combination of the LSAT and undergraduate grades has with law school grades. If we use logistic regression to predict bar passage (using the LSAC-BPS data), we can directly measure the relative effectiveness of a variety of predictors.

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passed the bar at much lower rates. At the other extreme, states such as South Dakota consistently have first-time bar passage rates above 90%. These figures were arrived at by summarizing data presented in issues of the *Bar Examiner*. See *1994 Statistics*, B. EXAMINER, May 1995, at 7, 12, 14; *1995 Statistics*, B. EXAMINER, May 1996, at 23, 28, 30.

205. Calculation by the author from LSAC-BPS Data, *supra* note 133.

206. Calculation by the author from LSAC-BPS Data, *supra* note 133.

207. It is a testimony to the importance of diversity goals that law school deans across the country accept much lower bar passage rates for their schools—and consequent losses in prestige—because of racial-preference policies.

208. The statistics here are based on data for the July 1998 California bar provided by Sean Pine, Registrar of the UCLA School of Law (on file with author).

TABLE 6.1: RELATIVE POWER OF ALTERNATE PREDICTORS  
OF BAR PASSAGE, 1991-1996

Factor	Standardized Coefficient	Chi-Square Test Statistic	Chi-Square p-Value <sup>209</sup>
Law School GPA	0.76	808.16	< .0001
LSAT	0.28	158.28	< .0001
Law School Tier	0.17	56.74	< .0001
Undergraduate GPA	0.11	31.00	< .0001
Male	0.05	7.31	.007
Asian	-0.02	1.13	.29
Black	-0.01	0.54	.46
Other Nonwhite	-0.01	0.48	.49
Hispanics	-0.004	0.08	.78
n of Bar-Takers in Model: 21,425			
Somers's D: .763			

Source: LSAC-BPS Data, *supra* note 133.<sup>210</sup> The dependent variable is whether a person passes the bar on one of her first two attempts. For racial variables, whites are the implicit control group. For men, women are the implicit control group. A Wald Chi-Square value over 3.9 is generally considered indicative of some "statistical significance."<sup>211</sup>

If we know someone's law school grades, we can make a very good guess about how easily she will pass the bar. If we also know her LSAT score, her undergraduate GPA, and the eliteness of her law school, we can do even better (we could do still better if we knew in which state she took the bar, but this information is not in the LSAC-BPS data). When we control for these other

209. The meaning of the p-value here is analogous to its earlier definition; specifically, it represents the probability that the Wald Chi-Square test statistic would be as high as this or higher, assuming that there were no relationship between the variable in question and likelihood of passing the bar.

210. See WIGHTMAN, LSAC-BPS, *supra* note 133.

211. Because the majority of black law students have significantly lower law school GPAs than the average student (recall that the median black student GPA falls between the fifth and sixth percentile for white students' GPAs), one might expect that multicollinearity between these variables would be a significant problem. To a lesser extent, this issue also arises with respect to the LSAT variable, and perhaps with undergraduate GPA as well. However, multicollinearity should only increase the variance of the parameter estimations, not the estimates themselves. In other words, our estimated coefficients should still be accurate, but they may not be as precise. However, in this case this is not a significant problem for two reasons: First, the sample size is quite large, which counteracts the loss in precision from the multicollinearity. Second, the relative size of the coefficients is so different, particularly for the primary trade-off at issue here (Law School Tier versus Law School GPA) that even if some of the estimators were slightly off, it almost certainly would not meaningfully affect any of the subsequent analysis or conclusions.

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factors, men have a very slight advantage over women (their pass rate is about one-half of one percentage point higher). But knowing someone's race seems irrelevant—if we know the other information in this table. Blacks qua blacks, and Hispanics qua Hispanics, do no worse on the bar than anyone else.<sup>212</sup>

The implications of this regression—which hold up consistently under many different formulations<sup>213</sup>—are profound, though they take a while to digest. For most blacks benefiting from affirmative action by law schools, the issue is not whether they will get into a law school but, rather, how good of a law school. Going to a better school, we have seen, carries with it a higher risk of getting poor grades; going to a much better school creates a very high risk of ending up close to the bottom of the class. Prospective law students tend to assume automatically that going to the most prestigious school possible is always the smart thing to do, but we can now see that there is, in fact, a trade-off between “more eliteness” and “higher performance.” And the regression results in Table 6.1 mean that, if one's primary goal is to pass the bar, higher performance is more important. If one is at risk of not doing well academically at a particular school, one is better off attending a less elite school and getting decent grades.

If I am drawing the correct inferences from Table 6.1, then we should observe blacks doing worse on the bar than whites with similar pre-law school credentials. Blacks with an LSAT-UGPA index score of, say, 600 will tend to end up at much more elite schools than will whites with index scores of 600, but as a result the blacks will end up with lower law school grades. When they take the bar, they will get a small lift from going to a more elite school, but a big push down from getting lower grades. The net effect will be a markedly lower bar passage rate. Table 6.2 summarizes the actual bar results for those in the LSAC-BPS.

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212. The regression behind Table 6.1 is a robust test of this statement. The same conclusion has been reached by Stephen Klein, of the Rand Institute, in studies of specific bar examinations. See Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, B. EXAMINER, Nov. 1997, at 8, 15; cf. Stephen P. Klein, *Law School Admissions, LSATs, and the Bar*, ACAD. QUESTIONS, Winter 2001-02, at 33.

213. In particular, I found these results are not affected by including other background variables such as part-time status, family income, or parents' education.

TABLE 6.2: BAR PASSAGE RATES IN THE UNITED STATES FOR WHITES AND BLACKS, 1991-1996

Index Range	Proportion of Bar-Takers Failing on the First Attempt (for the Entire United States)	
	Whites	Blacks
400-460	52%	71%
460-520	34%	55%
520-580	26%	47%
580-640	19%	34%
640-700	13%	26%
700-760	9%	12%
760-820	5%	12%
Bar-Takers in Sample	19,112	1346

Source: LSAC-BPS Data, *supra* note 133.

The actual bar results closely follow the empirical “prediction” from the regression model. At a given index level, blacks have a much higher chance of failing the bar than do whites—apparently, entirely as a result of attending higher-ranked schools and performing poorly at those schools. Indeed, the consequences of affirmative action—in terms of passing the bar—seem to be roughly equivalent to subtracting 120 points from the academic index of the typical black student: blacks in the index range of 580 to 640 have the same bar passage rate as whites in the index range of 460 to 520; blacks in the range of 760 to 820 pass at the same rate as whites in the range of 640 to 700.<sup>214</sup>

One problem with this analysis is that I am aggregating bar results from fifty different jurisdictions—which, as noted earlier, all have particular idiosyncrasies in exam formats and passage rates. If blacks were concentrated in a few jurisdictions with unusually difficult bars, then the data in Table 6.2 would be misleading. The LSAC-BPS database does not, unfortunately, identify individual states, but it does identify in which of twelve regions each participant sat for the bar. I computed how many blacks would have passed the bar on the first attempt had they been distributed across regions in the same way as whites; the number was essentially identical to the actual reported total.<sup>215</sup> I also examined in detail the data from the “Far West” region, which in

214. Summarizing data in tabular form often masks small distortions. Since the overall distribution of blacks by index is lower than the distribution of whites, it is statistically likely that when we categorize blacks and whites by index (as in Tables 6.2 and 5.7), the average index of blacks in each category is a little lower than the average index of whites. Fortunately, this distortion has only a trivial impact on the results I report. In Table 6.2, for example, the average difference between black and white average index scores in each category is under four points.

215. The analysis showed that if black bar-takers had been distributed regionally like whites, there would have been 308 blacks not passing the bar after two attempts, compared



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this database is almost synonymous with California.<sup>216</sup> The sample size of blacks in this region is modest (121 bar-takers), so comparisons with whites are less statistically reliable, but the pattern is borne out. The weighted average black-white gap in passage rates for first-time bar-takers with comparable academic indices is 23.7 percentage points in the Far West region, compared to 16.7 percentage points in the nation as a whole, partly because failure rates are generally higher in California and partly because the gap is likely to be more stark when one is making comparisons within a single jurisdiction.

This data tells a powerful story: racial preferences in law school admissions significantly worsen blacks' individual chances of passing the bar by moving them up to schools at which they will frequently perform badly. I cannot think of an alternative, plausible explanation. If there were any other factor that somehow disadvantaged blacks—e.g., if blacks had more trouble affording bar-preparation classes and were therefore more likely to go it alone—then this would make being black an independently significant causal factor in bar passage rates. But it is not.

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As with attrition rates, the black-white gap in bar passage rates largely seems driven by two by-products of affirmative action. The first is the pattern I just discussed: blacks having lower passage rates because of low GPAs, which in turn are a function of racial preferences. The second is a by-product of the cascade effect: with blacks consistently pulled up the prestige ladder by preferences, low-tier schools must choose between having no blacks at all or admitting blacks with very low numbers. Most of these schools follow the latter course, with the result being that a large number of blacks enter law school with very low academic credentials. In the national LSAC-BPS study, 22% of black students matriculating in 1991 had an academic index of 500 or less; only 0.2% of whites had scores in this range. And among students of all races with scores in this range, over 60% fail the bar on their first attempt (and 42% do not pass after multiple attempts). Since the black students admitted in this range are also usually competing against higher-index peers, they also suffer the disadvantages of low GPAs. In other words, these students face very long academic odds indeed. In the LSAC-BPS study, only 22% of the blacks who started law school with academic indices below 500 ended up getting a law degree and passing the bar on their first attempt.

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to 306 in the actual data; this strongly suggests that the analysis in Table 6.2 is not biased (or, if anything, slightly understates the black-white gap).

216. The Far West region in the LSAC-BPS definition includes California, Hawaii, and Nevada. WIGHTMAN, *USER'S GUIDE*, *supra* note 133, at 14. However, California bar-takers account for almost all of that region's total. For example, in 2002, the total number of people taking the California bar accounted for 93% of test-takers in the Far West region. *See 2002 Statistics*, B. EXAMINER, May 2003, at 6, 6-7.

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We can disaggregate the black-white gap in bar passage rates by standardizing the black bar passage rate to the white rate at each index level. Out of the 1346 blacks in the LSAC-BPS sample who took the bar, 516 (nearly 40%) failed at least once—nearly five times the white failure rate. These 516 cases break down as follows:<sup>217</sup>

- About 99 blacks in the sample, nearly one-fifth of those who failed, were graduates with very low academic indices (470 or lower), who probably would not have been admitted to a law school in the absence of racial preferences.
- Another 235 blacks in the sample failed through the mechanism described in this portion of the paper: racial preferences elevated them to a school where they were at an academic disadvantage and performed poorly, lowering their chances of passing the bar.
- Approximately 107 blacks would have failed the bar one or more times had blacks as a group had the same failure rate as whites as a whole.
- The remaining 128 black failures on the bar can be attributed primarily to the lower average credentials blacks had in the 1991 cohort, even among those who would have been admitted to some law school in the absence of racial preferences. This group reminds us that the black-white gap on bar passage would not completely disappear in the absence of racial preferences. The gap would narrow dramatically, however.

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Many of the causal mechanisms underlying the findings in Parts V and VI have not been very mysterious. If one believes the regression results and accepts that academic credentials have a lot to do with ultimate performance, it is not hard to understand why admitting students with very poor credentials would lead to lower graduation rates and lower performance on the bar. And it makes sense that if racial preferences lead to lower law school grades for blacks, then they will experience higher attrition in law school. But it may not be obvious to many readers why it should be that black students with good credentials should lower their chances of passing the bar simply by attending a better school. Let us ponder this a little.

The basic idea is that a black student who, because of racial preferences, gets into a relatively high-ranked school (say Vanderbilt, ranked between fifteenth and twentieth in most surveys) will have a significantly lower chance of passing the bar than the same student would have had if she had attended a school that admitted her on the basis of academic credentials alone (say,

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217. Calculations by author from LSAC-BPS Data, *supra* note 133.

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University of Tennessee, ranked between fortieth and sixtieth in most surveys). As we have seen, the evidence shows that a student's race has nothing to do with her chances on the bar;<sup>218</sup> her law school grades have everything to do with it. This seems logical enough within an individual school. But why exactly should the same student have a lower chance of passing the bar if she gets Cs at Vanderbilt than if she gets Bs at the University of Tennessee?

One theory I have heard a number of times in casual conversation is that less elite law schools take more seriously the task of preparing their students for the bar. The argument goes that since students at these schools have a greater risk of failing the bar, their faculties deliberately focus more on black-letter law and less on theory, providing a better foundation that, other things being equal, helps their graduates on the bar. If this theory is true, it might explain why a student attending the University of Tennessee would have a higher chance of passing the bar than a similar student at Vanderbilt.<sup>219</sup> But the data in Table 6.1 cuts against this theory. When we control as best we can for the incoming credentials of student bodies, students at more elite schools have higher, not lower, success rates on the bar.<sup>220</sup> Something else is going on.

The hypothesis in the back of my mind when I started this research was that students simply learn less when they are academically mismatched with their peers. I drew on a painful personal experience to flesh out this idea. Foreign languages are my academic Achilles's heel. In my public high school, French was always my poorest subject, but I was a strong enough student generally that I did not labor under any special handicap in French and kept pace with my friends. A few years later, while an undergraduate at Harvard, a misplaced interest led me to sign up for elementary German. Although it was a beginning class, my basic aptitude was weak enough that I had great difficulty keeping up. Most of the class caught on with what seemed to me a nearly supernatural speed, and the teacher was soon racing along. As I fell behind, I felt more and more lost; soon I was attending class only to keep up appearances. My confusion fed upon itself all semester, and I came within a whisker of flunking out—not an easy thing to do in any Harvard course. There

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218. Klein & Bolus, *supra* note 212, at 15.

219. In other words, consider two students who had similar academic indices when applying to law school. One chooses to attend Vanderbilt, the other chooses the University of Tennessee. If each performs similarly well in law school, as measured by their law school GPA, this theory would suggest that the University of Tennessee student would have a higher expected chance of passing the bar than the Vanderbilt student. In Table 6.1, this would manifest itself in a negative coefficient on the Law School Tier variable. Since the coefficient of tier is, in fact, positive, this suggests that otherwise comparable students will do better on the bar if they graduate from more elite schools, so long as they don't get substantially lower grades at the more elite school.

220. I do not view this evidence as dispositive, since it is likely that differences in academic indices between school tiers understate actual differences in student ability. But the evidence of Table 6.1 at least throws substantial doubt on the idea that students at lower-tier schools have some intrinsic "edge" on the bar.

seemed little doubt to me that despite my weak linguistic skills, I would have learned far more German in a class with less talented peers.<sup>221</sup>

I observe a similar pattern as a law teacher. Students who stumble at the beginning of a course often become progressively more confused as the semester wears on. What is initially just a shaky handle on the course vocabulary becomes a serious handicap in remaining engaged with classroom discussion, and problems feed upon themselves. By the end of the semester, the gap I observe between the C finals and the B finals is more than just a matter of degree—many C students seem to have missed fundamentals. In a less competitive school, the same student might well thrive because the pace would be slower, the theoretical nuances would be a little less involved, and the student would stay on top of the material. The student would thus perform better in an absolute as well as a relative sense.

This “academic mismatch” hypothesis has struck a number of legal educators as a likely problem for students whose academic credentials are significantly weaker than those of their classmates. Many of these observers have articulated a causal mechanism much like the one I just described: an initial academic disadvantage can produce cumulative effects of substantially less learning.<sup>222</sup> Others have suggested that similar effects might come from slightly different causes. The “stress theory” suggests that students who are at a relative disadvantage in class will experience higher stress, and the stress will get in the way of learning.<sup>223</sup> The “disengagement theory” suggests that students who do poorly in a relative sense will initially be disappointed in themselves, but as they continue to struggle they will tend to blame the system—the professor, the school, or legal education generally—and will

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221. One might argue that had I stuck with German (or lived in Germany), immersion in a difficult environment would have given me a better command of German in the long run than taking German at a local community college. This might be true where withdrawal or disengagement is not an option. This does not seem to be true, however, for blacks benefiting from affirmative action. As we saw in Part V, the grade gap between blacks and whites increases from the first to the third years, despite the operation of other forces (such as taking fewer curved courses and regression to the mean) that should tend to narrow the gap over time. See also Rogers Elliott’s analysis of the “‘late bloomer’ hypothesis,” Rogers Elliott et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. HIGHER EDUC. 681, 695-96 (1996).

222. Clyde Summers, in his 1970 critique of affirmative action, articulated the problem with his usual clarity. Summers, *supra* note 136, at 392-93. Thomas Sowell articulated the mismatch problem as well and probably played the leading role in getting the idea into general circulation. See Thomas Sowell, *The Plight of Black College Students, in EDUCATION: ASSUMPTIONS VERSUS HISTORY* 130, 130-31 (1986); see also Paul T. Wangerin, *Law School Academic Support Programs*, 40 HASTINGS L.J. 771, 779 (1989).

223. For the relation between stress and learning, see B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 635 (1991). For the relation between low performance and stress, see Alfred G. Smith, *COGNITIVE STYLES IN LAW SCHOOL* 125 (1979) and Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 656 (1973).

reduce effort.<sup>224</sup> Both the stress and disengagement theories suggest plausible ways that doing worse in a relative sense leads to doing worse in an absolute sense.

Much of the evidence behind these theories is more anecdotal than systematic, but there are a few helpful studies. Linda Loury and David Garman found that the lower a black student's credentials are relative to the median student at his undergraduate college or university, the lower his grades are likely to be and the less likely he is to graduate.<sup>225</sup> Audrey Light and Wayne Strayer, in a separate analysis, found the same pattern.<sup>226</sup>

Rogers Elliott's study of minority student enrollment and persistence in science majors provides one of the clearest examples of the mismatch effect.<sup>227</sup> Elliott examined the standardized test scores and academic records of the white, Asian, black, and Hispanic students who enrolled at four Ivy League schools in 1988. His principal finding was that despite an expressed interest in science rivaling that of white and Asian students, non-Asian minority students were less likely to enroll and persist in science majors.<sup>228</sup> This increased attrition among non-Asian minorities, Elliott concluded, was not correlated with ethnicity per se, but rather "[i]t was the preadmission variables describing developed ability—test scores and science grades—that accounted chiefly both for initial interest and for persistence in science."<sup>229</sup>

However, it was not absolute test scores that mattered, but rather the location of a test score in the distribution of all test scores at a specific institution. To demonstrate this point, Elliott used data from eleven private colleges, some very selective, others less so, to examine the distribution of natural science degrees as a function of graduates' SAT Math scores (SATM).<sup>230</sup> After dividing the SATM distribution into terciles, Elliott found that at the most selective institution in this database, 53.4% of the science

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224. See Steve H. Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411, 431, 476-78 (1977); Michael I. Swygert, *Putting Law School Grades in Perspective*, 12 STETSON L. REV. 701, 702, 712 (1983).

225. Linda Datcher Loury & David Garman, *College Selectivity and Earnings*, 13 J. LAB. ECON. 289, 301, 303 (1995). Thomas Kane argues that Loury and Garman's graduation rate findings are due to the inclusion of historically black institutions in the data set, since these colleges traditionally "have low mean SAT scores but high graduation rates." Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 143, at 431, 445. Kane's critique, however, does not address Loury and Garman's hypothesis of GPA as a function of the difference between a student's SAT score and the median SAT score of the institution she attends. Loury & Garman, *supra*, at 300-01.

226. Audrey Light & Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?*, 35 J. HUM. RESOURCES 299, 301 (2000).

227. Elliott et al., *supra* note 221.

228. *Id.* at 699.

229. *Id.*

230. *Id.* at 701.

degrees were earned by the top third of the SATM distribution, with an average SATM of 753, while the bottom tercile, with an average SATM of 581, earned 15.4% of the science degrees.<sup>231</sup> The least selective of the eleven, a school with a top-tercile SATM mean of 569, exhibited an almost identical distribution, with the top third earning 55% of the natural science degrees and the bottom third (with a mean SATM of 407) earning 17.8%.<sup>232</sup> In other words, it was not the absolute ability of a student that determined staying power in the traditionally more difficult natural science majors, but rather the student's ability *relative to his or her peers*.

Where a student's numbers fall relative to his classmates depends, of course, upon the criteria used by the college admissions office to admit that student, a point Elliott does not hesitate to make:

The gap in developed ability between the white-Asian majority and non-Asian minorities, especially blacks, especially in science, results from institutional policies of preferential admission from pools differing in measures of developed ability and achievement at the point of entry into higher education . . . . That being the case, non-Asian minority students initially aspiring to science will continue for some time to bear a cost in lower grades and in altered academic and vocational goals.<sup>233</sup>

Since blacks receive the biggest bump up with respect to admissions, we would expect fewer blacks with an interest in science to persist in studying science beyond a certain amount of time. The breakdown by race for the Ivy League subjects in Elliott's study supports this hypothesis: "the combined effects of persistence, recruiting, and termination left 45.2% of the entire incoming group of Asians, 30.1% of whites, 27.8% of Hispanics, and 16.6% of blacks still majoring in science after 4 years."<sup>234</sup> In other words, being academically mismatched with one's peers has a powerful impact on one's ability to learn and to achieve one's academic goals.

Stephen Cole and the late Elinor Barber have found a very similar pattern in the academic aspirations of black undergraduates.<sup>235</sup> Their book, *Increasing Faculty Diversity*, aims to develop strategies to increase the presence of minorities in academia. They find that the use of large racial preferences by liberal arts colleges tends to place black students in schools where they will perform poorly.<sup>236</sup> Low grades, in turn, sap student self-confidence and may produce still lower grades by feeding "stereotype threat."<sup>237</sup> The net result is that "African American students at elite schools are significantly less likely to

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231. *Id.*

232. *Id.*

233. *Id.* at 702.

234. *Id.* at 695.

235. COLE & BARBER, *supra* note 136, at 187-212 (2003) (discussing the negative effect of academic mismatch on grades, self-confidence, and career aspirations).

236. *Id.* at 193-200.

237. *Id.* at 208-09.

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persist with an interest in academia than are their counterparts at nonelite schools”<sup>238</sup>—especially when one controls for credentials.

The 1995 National Survey of Law Student Performance provides some corroboration of the mismatch hypothesis from students’ self-reported experiences.<sup>239</sup> In the survey, first-semester black law students reported spending as much time studying as did white students,<sup>240</sup> but found themselves substantially less prepared for class. Seventy-one percent of white students said that they completed the assigned reading before “all or nearly all” of their classes, compared to 52% of black students.<sup>241</sup> In other words, even though black students gave the same effort as their white peers, competing against students with much higher credentials meant that this effort translated into a lower level of class preparation; this in turn plausibly led to greater difficulty following class discussions, and less overall learning. It is not hard to imagine the snowball effect.

Research on the “academic mismatch” phenomenon has not settled on an exact causal mechanism, but there is a growing consensus that the mismatch problem is real and that it is exacerbated by large racial preferences in admissions. The most conclusive way to demonstrate that law school racial preferences cause blacks to learn less and to perform worse would be an experiment comparing matched pairs of blacks admitted to multiple schools, with the “experimental” black student attending the most elite school admitting them and the “control” black student attending a significantly less elite school.<sup>242</sup> The problem with conducting such research is that just like students of other races, few blacks pass up the opportunity to go to more elite schools. The analysis I report here takes advantage of the fact that affirmative action policies place similar blacks and whites at very different institutions. These policies create an opportunity for a natural experiment on the effects of academic mismatch—an experiment that shows that it has large and devastating effects on blacks’ chances of passing the bar. It is clear enough that going to a school where one’s academic credentials are well below average has powerful

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238. *Id.* at 212.

239. 1995 National Survey Data, *supra* note 152.

240. The proportion of students who reported studying thirty or more hours per week was 57.8% for blacks and 58.6% for whites, and the overall mean value for blacks was slightly higher than for whites; neither difference is statistically significant. Calculation by author from 1995 National Survey Data, *supra* note 152.

241. We also found that student responses to the “class preparation” question strongly predict grades in the first semester. Calculation by author from 1995 National Survey Data, *supra* note 152.

242. Stacy Berg Dale and Alan Krueger have completed a study with this design using undergraduate students of all races matched for the schools that admitted them. They were primarily interested in job outcomes, not academic performance, but they found that attending more elite schools did not produce higher payoffs in the job market. Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College*, 117 Q.J. ECON. 1491, 1493 (2002).

effects on performance in law school and on the bar. This seems necessarily to imply that such a student is learning less than she would have learned at a school where her credentials were closer to average.

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We saw in Part V that blacks fail to complete law school at a disproportionate rate, for mostly academic reasons. We have seen in this Part that blacks fail the bar at a disproportionate rate. If we put these two patterns together, the emerging picture is discouraging. Of all the black students in the LSAC-BPS study who began law school in 1991, only 45% graduated from law school, took the bar, and passed on their first attempt. The rate for whites was over 78%. After multiple attempts, 57% of the original black cohort become lawyers. But this still means that 43% of the black students starting out never became lawyers, and over a fifth of those who did become lawyers failed the bar at least once.

If the systemic goal of affirmative action is to produce as many well-trained minority lawyers as we can, we have now seen several reasons to doubt that the system is working. Taken as a whole, racial preferences in law schools lower black academic performance and place individual blacks at a substantially higher risk of not graduating from law school and of not passing the bar. In the next two Parts, we will consider whether racial preferences in legal education help blacks in the job market or increase the overall number of black lawyers. Suppose, for the sake of argument, that we find that the system does work to achieve those goals for blacks in the aggregate; one must in any case pause here and ask, Are racial preferences fair to blacks as individuals? Do the blacks with good credentials understand that affirmative action places them at substantially higher risk? Do the blacks with low credentials understand the long odds against their ever becoming lawyers? Do we at least owe prospective participants in the system fuller disclosure about the bargain they are undertaking?

## VII. THE JOB MARKET

The most widely presumed benefit accruing to black students from affirmative action is the entrée they are given to more (and more elite) employers by virtue of going to higher-tier schools. Students attending Yale instead of Fordham, or Fordham instead of Brooklyn, will have many advantages. They will develop contacts with more fellow students who are going places; they may be befriended by better-known faculty members; more employers will come to interview at their law school. The name-brand status of their school is valuable to their employer and admired by future clients.

Again, the implicit question posed by a system of large racial preferences is whether the advantages of going to a more elite school offset the



disadvantage of probably not doing well there. Most observers think that the answer to this question is so obvious that it hardly bears asking. Undergraduates expend much sweat and energy to get into the “best” law school they can. Students who ace their first year of law school often try to transfer to a higher-ranked school; seldom, if ever, do they try to transfer to a lower-ranked one. The danger of not doing well once in a strong law school does not seem to trouble many minds.

Indeed, in a famous paper that probably figured in the *Grutter* decision, three distinguished academics argued that minorities<sup>243</sup> reap substantial benefits from attending a more elite school like the University of Michigan Law School without paying any obvious price. In *The River Runs Through Law School*, Richard Lempert, David Chambers, and Terry Adams studied surveys that they and the University of Michigan Law School gathered from decades of school alumni. They looked at three job outcomes—income, satisfaction, and public service—and concluded as follows:

Perhaps the core finding of our study is that Michigan’s minority alumni, who enter law school with lower LSAT scores and UGPAs than its white alumni and receive, on average, lower grades in law school than their white counterparts, appear highly successful—fully as successful as Michigan’s white alumni—when success is measured by self-reported career satisfaction or contributions to the community. Controlling for gender and career length, they are also as successful when success is measured by income.<sup>244</sup>

Since Lempert et al. also believe that law school prestige matters a lot,<sup>245</sup> the implication of their findings is that brand name means everything. The logical corollary for affirmative action is that it is intrinsically wrong to deny blacks something like a proportionate share of the best name brands, since they will obviously benefit from them as much as whites will.

*The River Runs Through Law School*, like its eponymous forebear, *The Shape of the River*, has had enormous impact because, in dealing with careers rather than test scores and exams, it seems much more grounded in the real world. After all, the supposed purpose of all the tests and all the sorting is to determine the potential contributions and abilities of people in jobs and in the

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243. By “minorities,” the authors meant blacks, Hispanics, and Native Americans—the groups that benefit from preferences in Michigan admissions. Lempert et al., *supra* note 2, at 399.

244. *Id.* at 496-97. The authors found that law school grades and entering credentials (an index of LSAT and UGPA) did not predict career satisfaction at all. *Id.* Law school grades were positively associated with *income*, but they explained less than five percent of the variation in alumni income. *Id.* at 501. And entering credentials, according to the authors, were actually negatively associated with future income once proper controls were introduced. *Id.* at 478 tbl.31 (showing a correlation of -.002 in Model 2A).

245. “Indeed, we are confident that neither the white nor minority graduates of schools substantially less prestigious than Michigan will do as well financially as Michigan graduates, and we expect from the literature on the legal profession that they will be less satisfied with their careers.” *Id.* at 503 n.74.

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profession. If career outcomes bear little relation to predictors, then what is the predictors' legitimate value? And what is the justification for using scores and other seemingly worthless indicia to allocate scarce seats in elite schools?

Of course, we sense in our day-to-day dealings with professionals that cognitive skill and subject mastery do matter. We value doctors, lawyers, and engineers who are smart, who can easily explain competing theories, who can remember minutiae about their fields, who are good problem-solvers. But perhaps it is the case that above some basic threshold, variations in these skills are less important to job performance and success than many other things, such as how conscientious, well-spoken, diligent, likable, or ethical someone is—things which possibly are only weakly correlated with cognitive skills and which are almost never measured along the path to becoming a lawyer.

The task in this Part is to explore what shapes job outcomes for lawyers. How much does school prestige matter? How much do grades matter? Can any of the “softer” qualities that are poorly captured by conventional credentials be linked to success on the job market? Until very recently, it would have been impossible to say much about any of these questions. But as it happens, we can now say a lot.

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For the past five years, I have been part of a team of researchers and institutions attempting to develop, for the first time, a systematic longitudinal portrait of the legal profession. Our project, known as “After the JD” (AJD), is attempting to track roughly ten percent of those who became lawyers in the year 2000 through the first ten years of their careers.<sup>246</sup> We finished the first wave of data collection in 2002 and early 2003, so the first real fruits of this project are detailed survey data on over four thousand attorneys in their second or third year of practice after law school. As with any large project serving many purposes, the data set has both strengths and limitations for studying a specific topic like affirmative action. People are only in our sample if they actually became lawyers, so law students who did not graduate, and graduates who did not pass the bar, are not visible. The LSAC provided us with approximate data<sup>247</sup> on the undergraduate grades and LSAT scores of

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246. My collaborators on AJD are Ronit Dinovitzer, Bryant Garth, Joyce Sterling, Gita Wilder, Terry Adams, Jeffrey Hanson, Bob Nelson, Paula Patton, David Wilkins, and Abbie Willard. We have been actively supported by the American Bar Foundation, the National Science Foundation, the LSAC, the National Association of Law Placement, the Soros Foundation, the Access Group, and the National Conference of Bar Examiners.

247. The LSAC provided the LSAT and UGPA of each person in our sample for whom they had data (about eighty-five percent of all respondents), but expressed the data in terms of standard deviations above or below the mean for the entire sample. We therefore cannot determine any individual's absolute LSAT score or UGPA; we can simply determine how each respondent compared to others in our sample—which, for our statistical purposes, is just as good.

participants, but for law school grades we relied on the participants themselves. Our law school GPA data is, accordingly, self-reported and incomplete,<sup>248</sup> and covers only cumulative grades, not the more standardized and reliable first-year grades. On the other hand, our data set includes the actual law school participants attended (not a general “cluster”), the actual college they attended, and a wealth of concrete data about participants’ backgrounds, law school experiences, job histories, hiring processes, work environment, and employers. Most importantly, the AJD project tracks a broadly representative sample of the entire national population of young lawyers, thus fitting with the key goal of this study—to examine affirmative action systemically, and not simply through the lens of elite schools.<sup>249</sup>

The AJD data is so rich that there are an almost unlimited number of ways to explore the workings of the job market for young lawyers. I will add a number of refinements to the discussion as I proceed, but let me start by examining a very simple question: is there any evidence that higher law school grades help students secure higher-paying jobs?<sup>250</sup> To make it particularly straightforward, let us initially consider only the sixty-five percent of lawyers in the AJD sample that were working in private firms. These firms range from small, two-lawyer offices where new associate salaries are often under \$50,000,

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248. The self-reported data do seem to be fairly reliable. I say this because we also asked respondents to tell us their undergraduate GPA, and when we compared this with the data provided by LSAC (which was originally collected from the undergraduate institutions themselves), the correlation was .86.

249. AJD actually includes two samples. The national sample includes just under four thousand attorneys from eighteen primary sampling areas who, in the aggregate, closely resemble the national population of new attorneys in geographic distribution, job type, gender, and race. A minority oversample added some six hundred black, Hispanic, and Asian attorneys from these sampling areas, so that the two samples combined include around four hundred respondents from each of these three major racial/ethnic groups. All participants were selected from lists of persons passing the bar in 2000 in the sampling areas. Of those located, seventy-one percent participated in either mail, phone, or web survey form. For more on the methods and the AJD sample, see Ronit Dinovitzer et al., *After the JD: First Results of a National Study of Legal Careers 89-90* (2004), available at <http://www.nalpfoundation.org/webmodules/articles/anmviewer.asp?a=87&z=2> (last visited Nov. 22, 2004). Those who are interested in further information on the AJD data should contact Paula Patton, CEO and President of the NALP Foundation for Law Career Research and Education, at [ppatton@nalpfoundation.org](mailto:ppatton@nalpfoundation.org) [hereinafter AJD Data].

250. There is an interesting prior question: do entering credentials of law students have any long-term predictive value in the job market? Lempert et al. claimed that an index of LSAT and UGPA was actually *negatively* correlated with the future income of Michigan graduates. See Lempert et al., *supra* note 2, at 478 tbl.31 (showing a correlation of -0.002 in Model 2A).

The AJD data shows that both LSAT and UGPA are correlated with postgraduate earnings. Of course, these credentials are highly correlated with the eliteness of the school students attend, so the correlation may simply be capturing this eliteness effect. When we run a regression similar to that in Table 7.1, controlling for eliteness, LSAT (but not UGPA) is highly predictive of future earnings. AJD Data, *supra* note 249; see also regression at <http://www1.law.ucla.edu/~sander/Data%20and%20Procedures/StanfordArt.htm>.

to megafirms and elite boutiques with starting salaries above \$120,000. Since the focus is on young lawyers with salaries, I exclude solo practitioners, partners, and others who appear to be nonsalaried employees.

Table 7.1 shows the results of this basic regression model. The dependent variable is the log of the lawyers' annual earnings. By "logging" earnings, we focus on proportionate rather than absolute differences (so the difference between \$40,000 and \$60,000 is equivalent to the difference between \$100,000 and \$150,000).<sup>251</sup> Using a logged dependent variable also means that the coefficients for each independent variable represent, in essence, the percentage increase in the dependent variable (in this case, lawyer income) that is associated with a one-increment change in the independent variable.

TABLE 7.1: SIMPLE REGRESSION OF EARNINGS OF SECOND-YEAR ASSOCIATE LAWYERS IN PRIVATE FIRMS<sup>252</sup>

Independent Variable	Raw Coefficient	Standardized Coefficient	t-Statistic
Market Area	0.134	0.408	21.8
School Prestige (2003 <i>U.S. News &amp; World Report</i> Rank Categories)	0.099	0.237	12.8
Law School GPA (4.0 scale)	0.471	0.347	19.1
Asian	0.012	0.007	0.41
Black	0.103	0.056	3.2
Hispanic	0.008	0.005	0.3
Other Nonwhite	-0.030	-0.012	-0.7
Male	0.102	0.11	6.4
n of Second-Year Associate Lawyers in Private Firms: 1778			
Adjusted R <sup>2</sup> of Model: .477			
Median Income of Respondents: \$90,000			

Source: AJD Data, *supra* note 249 (national sample and minority oversample, unweighted).

The model has an R<sup>2</sup> of over .47—relatively high for an earnings model. The most statistically reliable predictor of earnings variation is the "region" variable. The 0.137 coefficient on this variable means that, other things being equal, young lawyers working in New York earn about 14% more than those working in the next tier of legal markets (i.e., Washington, Los Angeles,

251. I also ran the model without logging income; the results are very similar, but the explanatory power of the model drops a little (as one would expect) and the coefficients are harder to interpret. Moreover, without logging, the influence on the model of those few people with very large salaries becomes unduly great.

252. The data in this table includes income from both salary and bonuses.

Chicago, and San Francisco); those in the second tier earn about 14% more than those working in the third tier (e.g., Atlanta, Houston, Minneapolis), and so on.<sup>253</sup> We can say it is the single most powerful predictor of earnings both because it has the highest t-statistic (a measure of how reliably the dependent variable fluctuates with that particular independent variable, controlling for other factors) and because it has the highest standardized coefficient. A standardized coefficient of 0.41 means that a single standard deviation change in market prestige corresponds to 41% of a standard deviation change in a respondent's earnings.

The second-most-powerful predictor of earnings is not school prestige (a distant third), but law school grades. Law school grades are here measured by the box a respondent checked on the survey form (asking about law school GPA, and providing boxes ranging from "below 2.25" to "3.75 to 4.0").<sup>254</sup> The prestige of a law school in this regression is measured by which of five tiers a school fell into in the *U.S. News & World Report* rankings of law schools in 2003. The t-statistic and the standardized coefficient of GPA, in this model, are nearly half again as large as the corresponding values for school prestige. Grades seem to be important indeed.

The model also shows interesting gender and race effects. The men in our law firm sample earn about 10% more than women, when controlling for the other factors in the model. This would not surprise most observers, but should not be taken as conclusive evidence of systemic discrimination without taking into account a number of other factors that might obviously vary by gender, like work sector, child-care leaves from work, average hours, and so on. With the controls in this model, blacks generally also earn about 10% more than whites;<sup>255</sup> the coefficients for Asians and Hispanics are not significant. This suggests that blacks experience significant preferences in the private firm job market, but that other racial groups do not—although again, not too much should be inferred from such a simple analysis.<sup>256</sup>

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253. The measures of market area and school prestige have a surprisingly low correlation of .243 for the AJD respondents. I therefore believe that the high coefficient for market area is, for the most part, not because those markets are dominated by high-prestige jobs, but because of cost-of-living differences. For example, the living expenses for a typical young attorney working in New York City are probably about 14% higher than the expenses of a comparable attorney working in Chicago or Los Angeles.

254. About seventy-five percent of respondents specified a GPA; many of the nonrespondents came from law schools that do not grade on a standard 4.0 scale (e.g., Yale, which uses "low pass," "pass," "honors," and "high honors").

255. When one is attempting to compare outcomes for several mutually exclusive groups (like men and women; north, south, and west; etc.), one leaves out one group (usually the numerically largest group), and that provides an implicit "base" for comparison against all the others. Whites are the excluded group in this model for racial comparisons; women are excluded for gender comparisons.

256. The variable "Other Race" is not a very helpful one. It includes American Indians, multiracial persons, and people of various races who declined to identify themselves racially.

One can get a more intuitive and accessible sense of the relative job market value of law school prestige and law school GPA through a simple cross-tabulation. Table 7.2 shows the median salary of all lawyers in the AJD who had a given combination of school prestige and GPA. The data show an unsurprising association between school prestige and income, though across the great middle range of schools (rank 21-100 and Tier 3, which extends to rank 149) the differences are modest. The relationship of grades and income is also very clear; in all schools outside the top ten, there is a large market penalty for being in or near the bottom of the class.

TABLE 7.2: GRADES, SELECTIVITY, AND MEDIAN SALARY

Law School GPA	Law School Tier				
	Top 10	Top 11-20	Top 21-100	Tier 3	Tier 4
3.75 – 4.00	\$130,000	\$135,000	\$100,000	\$93,000	\$79,000
3.50 – 3.74	\$140,000	\$127,460	\$90,000	\$90,000	\$79,000
3.25 – 3.49	\$135,000	\$105,000	\$80,000	\$65,000	\$57,000
3.00 – 3.24	\$125,000	\$100,000	\$63,000	\$55,820	\$60,000
2.75 – 2.99	—	\$56,000	\$51,025	\$55,000	\$50,000
2.50 – 2.74	—	\$49,000	\$51,500	\$51,000	\$50,000

Source: Dinovitzer et al., *supra* note 249, at 44 tbl.5.3 (2004). Tiers are from the 2003 *U.S. News & World Report* rankings.

It is clear enough that law school grades are quite important, perhaps more important than law school prestige in determining who gets what jobs. If true, this suggests that affirmative action may pose a bad trade-off for blacks: the better brand names they secure through preferential admissions may not offset the lower grades they get (on average) as a consequence.<sup>257</sup>

Still, one should not be hasty. On reflection, one can see reasons why this analysis might be deceptively simple. For one thing, law school grades here are measured on an absolute scale—a 3.0 at Stanford is treated the same way as a 3.0 at Southwestern—even though more elite schools give proportionately more As and fewer Cs to their students than do less elite schools.<sup>258</sup> This measure of GPAs is thus subtly conflated with school prestige, and may be

257. This argument makes sense in terms of economic theory. I say in the analysis of bar results in Part VI that going to a more elite school and getting low grades had the net effect of increasing blacks' chances of failing the bar; indeed, it was as if one had lopped over one hundred points off the entering credentials of the typical black student in predicting her bar performance. *See supra* Table 6.2. If the bar measures something about future job performance that employers value, then a market operating with perfect information should attach lower value to a more elite graduate with bad grades than a somewhat less elite graduate with higher grades.

258. In the actual data, the "top ten" schools had a mean reported GPA of 3.42 in our data, while ten schools pulled from the middle of the distribution had a mean reported GPA of 3.23.

indirectly measuring benefits that are properly attributed to prestige. My measure of prestige is also rather crude—a single, numbered index based on a disputed methodology<sup>259</sup>—that may not be picking up actual patterns of employer preference.

To deal with the grading problem, I standardized law school GPA among the students at each school—that is, I measured each respondent's GPA by her distance, in standard deviations, above or below the mean reported GPA at her school if the data set contained at least ten valid grades from that school.<sup>260</sup> Since this method tosses out schools with fewer than ten valid observations, and since the procedure significantly modifies the raw data, I include in the next set of regressions one analysis with “raw” GPA and one with “standardized” GPA.

To better capture the effects of prestige, I used a standard statistical procedure for capturing the differing influences of a variable whose effects may change from one category to another: I used a series of “categorical” prestige variables. I split schools into eight categories, based on their median student LSATs and their academic rankings.<sup>261</sup> The lowest prestige category is omitted as the “control” category; the other categorical variables essentially measure the earnings benefit of being in that category of schools as compared to being in the lowest category.<sup>262</sup>

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259. See Klein & Hamilton, *supra* note 123; Korobkin, *supra* note 124, at 403, 405-07; see also David E. Rovella, *A Survey of Surveys Ranks the Top U.S. Law Schools*, NAT'L L.J., June 2, 1997, at A1; M.A. Stapleton, *Push Is on for Unranked Guide to Schools*, CHI. DAILY L. BULL., Jan. 10, 1997, at 3.

260. This is hardly an ideal measure. We don't know the actual mean GPAs at particular schools, and the GPAs we do have are only from those who passed the bar, who participated in our survey, and who answered the question on GPA—all effects that probably bias the mean upward. In addition, the sample sizes for a few schools were small. However, the limitations of this measure are very different from (and do not overlap with) the limits of using raw GPA. So, if similar effects come from this measure, it serves its purpose of providing an effective check.

261. I computed rankings for individual law schools by averaging two other rankings: first, the school's academic reputation among other academics, as measured by *U.S. News & World Report* in 1997 (the last year, I believe, that *U.S. News & World Report* published a complete listing of this measure); and second, the school's rank in median student LSAT, as measured by averaging the 25th percentile and 75th percentile LSAT figures reported by law schools for the entering class of 2002-03. 2004 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 34, *passim*; U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS: 1997 EDITION 38-40 (1997). There are many other ways to rank law schools, but the results of these various methods tend to be highly collinear. With this ranking, I assigned the top ten schools to Category I, ranks 11-20 to Category II, ranks 21-40 to Category III, ranks 41-70 to Category IV, ranks 71-100 to Category V, ranks 101-130 to Category VI, ranks 131-160 to Category VII, and the remaining schools to Category VIII, which is used as the “omitted” category in the analysis.

262. This is not a perfect measure of capturing the effect of prestige; I suspect that no single approach can do the job. I do find that a variety of approaches produce substantially the same results that I report here—the trade-off of eliteness for lower grades is a negative

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Finally, I added a number of other variables to try to capture other aspects of the job market: whether a lawyer worked full-time or part-time, whether she had an engineering or “hard science” background, whether she reported that “high earnings” were a very important factor in selecting a job, whether she had served as a federal judicial clerk, and so on. I added a “dummy” variable denoting public sector employment, so that the eighteen percent of new attorneys working at various levels of government would be included as well. Income is again logged in both of the regressions reported in Tables 7.3 and 7.4. The first regression (Table 7.3) uses raw GPA, and the second (Table 7.4) uses my “standardized” GPA.

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for blacks across much of the range of schools, but is probably a net positive at the very top schools.



TABLE 7.3: REGRESSION OF EARNINGS OF ATTORNEYS COMPLETING SECOND YEAR OF PRACTICE, USING RAW GPAS

Independent Variable	Standardized Coefficient	Parameter Estimate	t-statistic	p-value
Tier of Metro Market	0.340	0.115	21.1	< .0001
Private Sector	0.294	0.365	18.3	< .0001
Raw Law School GPA	0.261	0.361	16.6	< .0001
School Prestige—Tier 1	0.179	0.296	6.2	< .0001
School Prestige—Tier 2	0.113	0.161	3.5	.0004
School Prestige—Tier 3	0.082	0.108	2.4	.02
School Prestige—Tier 4	0.018	0.022	0.50	.61
School Prestige—Tier 5	-0.043	-0.054	-1.2	.21
School Prestige—Tier 6	-0.014	-0.023	-0.51	.61
School Prestige—Tier 7	-0.058	-0.080	-1.8	.07
Asian	0.020	0.034	1.3	.19
Black	0.039	0.070	2.6	.01
Hispanic	0.004	0.008	0.29	.77
Other	0.002	0.006	0.17	.87
Male	0.048	0.046	3.2	.001
Has Children	0.021	0.023	1.2	.23
Bar Year of Admission	0.005	0.007	0.32	.75
Moot Court Participation	-0.007	-0.005	-0.45	.65
School Govt. Participant/Leader	0.025	0.021	1.7	.08
Earnings Important as a Goal	0.084	0.051	5.7	< .0001
Working Full-Time	0.095	0.356	6.4	< .0001
Has Other Job	-0.007	-0.020	-0.49	.63
Associate or Staff Attorney	-0.170	-0.163	-7.8	< .0001
General Clerkship	-0.007	-0.032	-0.46	.64
Hours Billed	0.149	0.146	6.8	< .0001
Hours Worked	0.050	0.002	3.4	.0007
Engineering, Physical Science, or Math Undergraduate Major	0.108	0.197	7.4	< .0001
Has MBA	0.011	0.039	0.74	.46
Roman Catholic	0.009	0.011	0.56	.57
Jewish	0.025	0.061	1.6	.10
Married Currently	0.024	0.023	1.5	.15
Law in Family	0.025	0.017	1.7	.09
Age	-0.044	-0.028	-2.8	.006
N of Attorneys Completing Second Year of Practice: 2013				
Adjusted R <sup>2</sup> of Model: .595				

Source: AJD Data, *supra* note 249 (national sample and racial oversample, unweighted). For definitions of key variables, see text. The median annual income of the respondents is \$80,000.

TABLE 7.4: REGRESSION OF EARNINGS OF ATTORNEYS COMPLETING SECOND YEAR OF PRACTICE, USING STANDARDIZED GPAS

Independent Variable	Standardized Coefficient	Parameter Estimate	t-statistic	p-value
Tier of Metro Market	0.361	0.122	21.2	< .0001
Private Sector	0.306	0.382	18.2	< .0001
Standardized Law School GPA	0.252	0.123	15.9	< .0001
School Prestige—Tier 1	0.258	0.404	5.5	< .0001
School Prestige—Tier 2	0.198	0.266	3.7	.0002
School Prestige—Tier 3	0.148	0.194	2.7	.006
School Prestige—Tier 4	0.067	0.082	1.2	.24
School Prestige—Tier 5	0.008	0.009	0.14	.89
School Prestige—Tier 6	0.013	0.023	0.32	.75
School Prestige—Tier 7	-0.037	-0.053	-0.76	.45
Asian	0.023	0.041	1.5	.14
Black	0.053	0.094	3.3	.0011
Hispanic	0.004	0.008	0.29	.77
Other	0.016	0.040	1.1	.30
Male	0.038	0.037	2.4	.015
Has Children	0.020	0.022	1.1	.27
Bar Year of Admission	0.001	0.002	0.09	.93
Moot Court Participation	-0.006	-0.005	-0.40	.69
School Govt. Participant/Leader	0.032	0.028	2.1	.03
Earnings Important as a Goal	0.086	0.052	5.6	< .0001
Working Full-Time	0.108	0.397	7.0	< .0001
Has Other Job	-0.007	-0.021	-0.48	.63
Associate or Staff Attorney	-0.163	-0.157	-7.1	< .0001
General Clerkship	-0.004	-0.017	-0.2	.81
Hours Billed	0.147	0.144	6.4	< .0001
Hours Worked	0.046	0.002	3.0	.003
Engineering, Physical Science, or Math Undergraduate Major	0.108	0.198	7.1	< .0001
Has MBA	0.012	0.046	0.80	.42
Roman Catholic	0.017	0.021	1.0	.32
Jewish	0.026	0.063	1.7	.10
Married Currently	0.022	0.021	1.3	.20
Law in Family	0.008	0.006	0.54	.59
Age	-0.046	-0.030	-2.8	.005
n of Attorneys Completing Second Year of Practice: 1742				
Adjusted R <sup>2</sup> of Model: .616				

Source: AJD Data, *supra* note 249 (national sample and racial oversample, unweighted). For definitions of key variables, see text. The median annual income of the respondents is \$80,000.

Both of these regressions provide a remarkably powerful account of earnings variations among new lawyers. The R<sup>2</sup> values for the two models are

.595 (Table 7.3) and .616 (Table 7.4)—astonishingly high values for models of this kind. The effects of the various independent variables are fascinating and worth discussion in a separate paper.<sup>263</sup> The models are quite helpful in showing the effects of school prestige on market outcomes. Recall that the lowest-prestige schools (Tier 8) are the “omitted” variable; the parameters for prestige are all measured relative to this group. The parameter estimates in the two tables measure the earnings effect of each variable in percentage terms. Thus, alumni of Tier 1 schools, when one controls for the other factors in the table, have earnings that are 29.6% (Table 7.3) to 40.4% (Table 7.4) higher than alumni of the lowest-status schools. Alumni of Tier 2 schools have an earnings gain of 16.1% to 26.6% relative to the lowest-status schools, and so on. Strikingly, the prestige premium essentially disappears by the time one reaches Tier 4 (in Table 7.3) or Tier 5 (in Table 7.4). In other words, there is no measurable earnings dividend from attending a more prestigious school in the bottom half of the law school distribution.

The key question of interest is whether higher prestige offsets lower grades. It is obvious in both models that law school GPA retains great explanatory power—it has very high standardized coefficients and t-statistics in both models. But what we would like to measure is the actual grade-prestige trade-off. The parameter estimates in Table 7.4 provide a way of doing this. Standardized grades have a parameter value of 0.123; this means that a one-standard-deviation improvement in grades at a school produces, on average, a 12.3% rise in earnings. Currently, black students at a typical law school have a GPA that is about two standard deviations lower than that of their white peers (see Figure 5.2). If race-neutral admissions eliminated that gap, then typical black GPAs should rise two standard deviations, translating to an earnings increase of about 25%.

A black beneficiary of preferences at a Tier 1 school would be, at worst, in a Tier 3 school without preferences (the average difference in credentials between Tier 1 and Tier 3 schools is somewhat greater than the black-white credentials gap). The earnings premium for Tier 1 students compared with Tier 3 students is 21%.<sup>264</sup> This is not quite as large as the 25% earnings penalty for lower grades. A typical beneficiary of preferences at a Tier 2 school would probably attend a Tier 3 or 4 school without preferences; the difference in Tier 2 and 4 earnings is 18.4%—substantially less than the grade penalty. For the majority of black students who are attending schools, under the current regime, in Tiers 4 and below, the prestige benefit is dwarfed by the grade penalty.

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263. It is particularly relevant to note that, in these more complex regressions, the earnings premiums for blacks (7% to 9%) and men (3% to 5%) are still statistically significant; no premium or penalty is apparent for any of the other ethnic groups.

264. The parameter estimate for Tier 1 is 0.404 and for Tier 3 it is 0.194; the difference is 0.21, which corresponds to a 21% difference in earnings.

There are other ways to explore empirically the trade-off of grades and prestige, and I have experimented with a number of them. My consistent finding is that the effect of racial preferences in law school admissions for black students upon their job market outcomes is overwhelmingly negative for blacks in middle- and lower-ranked schools. It is a smaller penalty for students at schools near the top of the status hierarchy, and it is nearly a wash—perhaps even a small plus—for students at top-ten schools. But nowhere do I find that the prestige benefits of affirmative action dominate the costs stemming from lower GPA.

Moreover, the estimates reported here almost surely understate the importance of GPA. This is because my “standardized GPA” variable has three measurement weaknesses: it is based on self-reported data, the data is grouped into eight broad “grade categories,” and my efforts to standardize GPA by school are based on only partial samples—sometimes as few as ten students. Measurement error always has the effect of weakening the explanatory power of a variable, since there is more “noise” in the measure. Exact reports by schools of the final class rank of respondents would probably add substantially to GPA’s power in the regressions reported here.

The AJD sample includes nearly four hundred blacks, and about two hundred have sufficiently complete data to include in these analyses. The grade-prestige patterns we see in the overall sample hold for the black subsample as well. Indeed, we can see in particularly compelling form the effects of higher GPA on blacks by examining actual outcomes (see Table 7.5). In the AJD sample, twenty-four black respondents reported law school GPAs of 3.5 or higher. Of these, two worked in public interest law, three worked in government, and nineteen worked in private firms. Of those in private practice, most worked in large firms; the median salary of these nineteen was \$130,000. Among all twenty-four, there is no observable difference in outcomes based on whether the lawyer graduated from NYU or Northwestern, at the elite end, or such schools as Howard, Texas Southern, or Santa Clara University, on the low-prestige end.

Sixty-one black respondents reported law school GPAs of 2.75 or lower. Of these, seventeen worked in government, seven were in solo practice, four were unemployed. Of the twenty-two working in private firms, nearly all were in firms with under twenty lawyers; the median income of this group was \$55,000. There *is* an observable difference within this group based on school prestige: the three highest-paid attorneys in this group were all from top-twenty schools. However, the median for these elite graduates in this grade range, working at private firms, was only \$67,000.

TABLE 7.5: SUMMARY OF STATISTICS ON YOUNG BLACK ATTORNEYS,  
2002-2003

Issue	Low-GPA Students ( <b>&lt; 2.75</b> )	High-GPA Students ( <b>&gt; 3.5</b> )
% Total in Private Firm	39%	75%
% in Firm with < 20 Attorneys	79%	17%
% in Firm with > 100 Attorneys	4%	61%
% Total Earning > \$100,000	9%	67%
% Total Earning < \$60,000	66%	17%
% Graduated from Tier 1-3 School*	33% **	35% ***
Size of Group	61	24

Source: AJD Data, *supra* note 249 (national sample and racial oversample, unweighted).

\* Tiers 1-3 account for approximately the top fifty ABA-accredited law schools.

\*\* The n for low-GPA students on the tier question is forty-four, as those reporting employment information without law school information were excluded.

\*\*\* The n for high-GPA students on the tier question is twenty-three, for the same reason as above.

Of course, when we discuss actual cases, we toss aside the elaborate controls of the regressions. The comparisons are cruder. But they probably do make the general point more forcefully: for most students, GPA is more important than law school prestige. And affirmative action by law schools, as we have seen, tends to lower the GPAs of black students systematically and substantially.

\* \* \*

One of the basic premises of affirmative action in law schools is that for blacks to have reasonable prospects in the job market, they need the extra “prestige” boost that preferential admissions provide. The visibility of attending and graduating from a more upscale school, a better brand name, will help overcome the intrinsic reluctance of employers to give good jobs to black candidates.

Our analysis shows that the assumptions underlying this premise are fundamentally flawed.<sup>265</sup> Even “prestige” employers apparently scan a much

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265. Like a number of the ideas that I thought were original at the outset of this project, the effect I describe in this part—lower grade performance offsetting the labor market value of a more elite school—was anticipated and demonstrated by others. Linda Datcher Lory and David Garman, using the National Longitudinal Study, find a very similar pattern for college students benefiting from affirmative action. *See* Linda Datcher Lory & David

broader range of law schools for strong students than has commonly been thought. And the strong positive coefficient associated with black lawyers in our regression shows that the legal market as a whole is more willing, not less willing, to hire blacks into good jobs. Since employers are already looking closely at lower-tier schools to find and hire blacks with good grades, it seems obvious that they would do this even more without preferential law school admissions. And the absence of preferences would greatly increase the supply of blacks with high grades—the students both elite and ordinary employers are obviously seeking out most vigorously.

#### VIII. THE EFFECTS OF DROPPING OR MODIFYING RACIAL PREFERENCES

A reader persuaded by the evidence in prior Parts might concede that affirmative action hurts the intended beneficiaries more as a class than it helps them, but might insist that racial preferences are nonetheless vital. “Without some consideration of race in law school admissions,” the argument goes, “the number of minority lawyers would drop precipitously, and the number of black lawyers would fall back to levels unseen since the Civil Rights Act of 1964.” This is one of those arguments that is repeated so often that it is taken as an indisputable article of faith throughout most of legal academia.<sup>266</sup> In this Part, we will examine this claim, and attempt to answer a central question: what effect would the elimination or substantial modification of racial-preference policies have upon the number of practicing black lawyers? As we shall see, the paradoxical but straightforward answer is that *the annual production of new black lawyers would probably increase if racial preferences were abolished tomorrow*.

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Garman, *Affirmative Action in Higher Education*, 83 AM. ECON. REV. 99 (1993). Along similar lines, see Dale & Krueger, *supra* note 242.

266. The ABA, in its brief for the respondents in *Grutter*, argued that “the reduction in minority enrollment that would result from an abandonment of the policies embraced by *Bakke*, as evidenced by recent experience in Texas and California, would undo much of what has been accomplished in the last several decades.” Brief of Amicus Curiae American Bar Association at 20, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at [http://supreme.lp.findlaw.com/supreme\\_court/docket/2002/april.html](http://supreme.lp.findlaw.com/supreme_court/docket/2002/april.html) (last visited Nov. 22, 2004). Similar claims were made in the briefs submitted by the American Law Deans Association and the AALS. See Brief of Amicus Curiae American Law Deans Association at 5, *Grutter*, 539 U.S. 306 (No. 02-241), available at [http://supreme.lp.findlaw.com/supreme\\_court/docket/2002/april.html](http://supreme.lp.findlaw.com/supreme_court/docket/2002/april.html) (last visited Nov. 22, 2004); Brief of Amicus Curiae Association of American Law Schools at 3, *Grutter*, 539 U.S. 306 (No. 02-241), available at [http://supreme.lp.findlaw.com/supreme\\_court/docket/2002/april.html](http://supreme.lp.findlaw.com/supreme_court/docket/2002/april.html) (last visited Nov. 22, 2004).

In its 2002 Supreme Court brief for *Grutter*,<sup>267</sup> the LSAC laid out the familiar case for racial preferences:

For the 1990-91 applicant pool, as many as 90 percent of black applicants would not have been admitted to any nationally-accredited law school in the United States if grades and test scores were the sole admissions criteria . . . .

The real-world consequences of these statistics were illustrated by the experience of law schools in Texas and California in the years immediately after affirmative action was prohibited in those states. In 1997, the first year Boalt Hall was legally barred from considering race, it enrolled no African-Americans—not one—and only seven Latino applicants.<sup>268</sup>

Although arguments like this are often taken seriously, and probably influenced Justice O'Connor's opinion in *Grutter*, they lose almost all meaning when examined closely. The main difficulty is that these arguments ignore the cascade effect discussed in Part III. Current racial preferences in law school admissions essentially boost black applicants up one or two tiers of prestige. A black applicant who would be admitted to a fortieth-ranked school in a race-blind process is admitted to a fifteenth-ranked school when race is considered. Black applicants understand this and take it into account when they apply to schools—one might apply to a few schools in the tenth-to-twentieth range of schools, with perhaps a thirtieth-ranked school as a backup. If racial preferences suddenly disappeared and black applicants continued to apply to the same schools as they do now, then of course they would be rejected at a very high rate. But the idea that the applicant in our example could not get into any ABA-approved law school is, of course, ridiculous.

The case of Boalt's drop from twenty black matriculants in 1996 to essentially zero in 1997, after the passage of Proposition 209, also tells us very little about what would actually happen in the case of a national ban on the use of racial preferences. Proposition 209 only applied to public institutions in California. In observing the ban, Boalt's minimum index threshold for blacks (expressed in the terms used in Parts II-VI of this Article) would have risen from, say, 630 to 800, the level used for whites and Asians. Boalt did in fact admit a number of blacks with high index scores, but all of these candidates would have also had offers from any top-five law school to which they applied, since none of those schools was enjoined from considering race. Admitted blacks would have only attended Boalt if it held some special attraction that outweighed prestige. But in the first year of Proposition 209's implementation, that was not likely—on the contrary, many blacks avoided the UC law schools

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267. *Grutter*, 539 U.S. 306.

268. Brief of Amicus Curiae Law School Admission Council at 9-10, *Grutter*, 539 U.S. 306 (No. 02-241), available at [http://supreme.lp.findlaw.com/supreme\\_court/docket/2002/april.html](http://supreme.lp.findlaw.com/supreme_court/docket/2002/april.html) (last visited Nov. 22, 2004).

because of a perception that Proposition 209 would create an atmosphere isolating and hostile to blacks.<sup>269</sup>

To accurately assess the impact of eliminating racial preferences upon blacks, we must take into account that the cascade effect forces lower-tier schools to give racial preferences, not because there is any shortage of qualified blacks eligible under the schools' general standards, but because those blacks have been absorbed by higher-tier institutions. As before, we can only see system-wide effects by considering the system as a whole.

\* \* \*

A logical method of looking at the systemic effect on black applicants of eliminating racial preferences was outlined by Franklin Evans in a report to the LSAC in 1977.<sup>270</sup> Evans divided whites who applied for admission to at least one law school in 1976 into ninety-nine categories based on their LSAT score and undergraduate GPA. He then determined what proportion of the applicants in each category received at least one offer of admission. The resulting grid of admission probabilities is, in effect, rather similar to the admissions curve I used in Part II (Table 2.1) to illustrate the relation between applicants' academic credentials and their probability of admission—except that the Evans analysis created a “grand curve” for all law schools in the aggregate. For example, his grid showed that 98.5% of white applicants with an LSAT score between 700 and 749 and an undergraduate GPA of 3.75 or higher received at least one offer of admission, as did 89% of applicants with an LSAT score between 600 and 649 and an undergraduate GPA of 3.25 to 3.49, and 31.2% of those with an LSAT score between 500 and 549 and an undergraduate GPA of 2.5 to 2.74.<sup>271</sup> Blacks with the same credentials had higher chances of admission in nearly every cell of Evans's grid—but the point was that by applying the white percentages to the black applicant pool, one could come up with an estimate of how many blacks would be admitted to at least one law school if blacks applied to schools in the same manner as whites and if law schools evaluated them in the same way they evaluated whites.<sup>272</sup>

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269. Black applications to Boalt fell by 36% from 1996 to 1997, the year Proposition 209 took effect. Black applications to all UC law schools fell by 31% over the same period, while total white applications declined by only 3%. Data Mgmt. & Analysis Unit, Univ. of Cal. Office of the President, University of California Law and Medical Schools Enrollments, <http://www.ucop.edu/acadadv/datamgmt/lawmed/> (last visited Dec. 2, 2004).

270. Evans, *supra* note 46.

271. *Id.* at 602 tbl.15.

272. This method could underestimate actual black admissions. It might well be that blacks with, say, an index of 650 have more impressive records of leadership, community service, or other qualities than do whites with an index of 650, because the black applicants with those indices stand much higher academically relative to other blacks than is the case with whites. Since schools take such matters into account at the margin, we would expect



Evans's results were sobering. In his simulation, the number of admitted blacks fell 58%, from 1697 to 710, nearly as low as the levels that prevailed in the mid-1960s.<sup>273</sup> This finding, and similar analyses conducted in other fields, was prominently cited in the *Bakke* briefs.

The Evans method was replicated, using applicants to the class entering law school in 1991, by Linda Wightman in her well-known 1997 article, *The Threat to Diversity in Legal Education*.<sup>274</sup> In her grid simulation,<sup>275</sup> she found that race-blind admissions would produce a 52.5% drop in black admissions—a result that seemed only slightly less dramatic than that found by Evans.<sup>276</sup> However, the full picture had improved substantially in some important ways. Between the 1976 and 1991 classes, the number of blacks as a proportion of the total applicant pool had increased substantially, from one black per fifteen white applicants in 1976 to one black per ten white applicants in 1991.<sup>277</sup> The black-white credentials gap had also narrowed somewhat, and the proportion of blacks admitted (in the real world, not the simulation) had increased from 39% to 48% of all applicants. Together, these changes meant that in Wightman's race-blind simulation, the number of blacks receiving at least one offer of admission in 1991 was 1631—nearly the same number as actually received offers of admission in 1976.

In an article published in September 2003, a few months after the Supreme Court's decision in *Grutter*, Wightman repeated the grid simulation once more, this time studying applicants to the class entering law school in 2001.<sup>278</sup> The new grid analysis showed a remarkably improved result: under a race-blind regime, as Table 8.1 shows, the number of blacks receiving at least one offer of admission declined by only 14%.

What had produced such a dramatic change? It was due in part to a further increase in the ratio of black applicants to white applicants: by 2001, there was

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blacks to have slightly higher admissions rates, within any box of the grid, under a race-blind system.

273. See Evans, *supra* note 46, at 609 tbl.17, 612. Note that this figure, unlike some cited in Part II, includes the historically black law schools.

274. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 2 (1997) [hereinafter Wightman, *Threat to Diversity*].

275. Wightman's article contained a parallel analysis calculating the proportion of blacks who would be admitted to the schools they applied to in 1991 if no racial preferences had been in effect. See *id.* at 6. This second approach produces more catastrophic results (which have received far more attention), see *id.* at 14-18, but these results are nonsensical for the reasons discussed at the beginning of this Part.

276. See *id.* at 22 tbl.5.

277. This claim is based on a comparison of Evans, *supra* note 46, at 582 tbl.3, 599 tbl.12 and Wightman, *Threat to Diversity*, *supra* note 274, at 22 tbl.5.

278. Linda Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data*, 53 J. LEGAL EDUC. 229, 229 (2003) [hereinafter Wightman, *Race-Blindness*].

1 black applicant for every 6.5 white applicants.<sup>279</sup> The credentials of blacks continued to improve slightly relative to those of whites. Together, these effects meant that the number of blacks with good credentials had increased sharply as a proportion of the pool. From 1976 to 2001, the number of blacks in the applicant pool with better-than-average LSAT scores and undergraduate GPAs greater than 3.0 increased from 317 to 1019.<sup>280</sup>

TABLE 8.1: CHANGES IN THE BLACK APPLICANT POOL  
FOR LAW SCHOOL ADMISSIONS, 1966-2001  
(ABA-ACCREDITED SCHOOLS ONLY)

Year	Total Black Applicants	Blacks Actually Admitted	Blacks Admitted Under Race-Blind Simulations	Blacks Admitted Under Race-Blind Simulations, as Percent of White Admissions*	Black-White Gap in Mean LSAT**
1966	N/A	400 (est.)	400 (est.)	1.2%	N/A
1976	4299	1697	710	1.8%	1.61
1991	7083	3435	1631	3.9%	1.34
2001	7404	3706	3182	8.5%	1.18

Sources: Evans, *supra* note 46, at 599 tbl.12, 602 tbl.15 (1976 data); Wightman, *Threat to Diversity*, *supra* note 274, at 22 tbl.5 (1991 data); Wightman, *Race-Blindness*, *supra* note 278, at 234 tbl.1, 240 tbl.5 (2001 data); LINDA F. WIGHTMAN, ANALYSIS OF LSAT PERFORMANCE AND PATTERNS OF APPLICATION (LSAC Research Report 94-02, 1994) (1991 LSAT data); author's own calculations from LAW SCH. ADMISSION COUNCIL, LSAC NATIONAL STATISTICAL REPORT, 1997-98 THROUGH 2001-2002, at E13, F13. (2003) (presenting 2001 mean LSAT data).

\* The small improvement between 1966 and 1976 in the column concerning black admissions, under race-blind simulations, as a percentage of white admissions is due to the dramatic increase in white applicants (and the quality of applicants) during that decade.

\*\* Black-white gap is the number of standard deviations separating black and white median LSAT scores.

Because of the cascade effect and improvements in both the relative size and relative strength of the black applicant pool, the consequences of race blindness on black admissions to law school have changed dramatically over the past generation. But it is just as important to consider how race blindness would shape the fortunes of blacks once they enter law school. If it is true, as I have argued in Parts V and VI, that large racial preferences place blacks in

279. Note that the black proportion of total applicants did not improve as dramatically, since the numbers for other nonwhite groups were rising too, but the white number is important because it shapes the size of the preference.

280. The 2001 data is from the LSAC's National Statistical Report, which has slightly higher total numbers than Wightman—Wightman does not present enough data in her article to make direct comparisons possible.

schools where they will generally perform badly, and that this leads to both lower graduation rates and lower bar passage rates for blacks than for academically similar whites, then race-blind policies will moderately increase black graduation rates and will dramatically improve their performance on the bar.

How can we actually estimate these effects? First, we estimate the academic index distribution of blacks who would have been qualified for law school under race-blind policies. Second, we use the analyses summarized in Parts V and VI to measure the difference between white and black rates in attrition and bar passage at each academic index level (recall that differences in school placement appeared to be the only factor that could explain the differences in black and white performance, graduation, and bar passage rates for applicants with otherwise identical academic credentials). Combining these two sets of data, we can estimate a weighted aggregate effect on black matriculants of race-blind policies. The results are summarized in Table 8.2.

TABLE 8.2: ESTIMATING THE EFFECTS OF ELIMINATING RACIAL PREFERENCES ON BLACK ADMISSIONS TO LAW SCHOOL—2001 MATRICULANTS

Stage of the System	Number of Blacks in the System Under Current Policies	Number of Blacks in the System with No Racial Preferences	% Change Caused by Moving to No Preferences
Applicants	7404	7404	—
Admittees	3706	3182	-14.1%
Matriculants	3474	2983	-14.1%
Graduates (2004 or Later)	2802	2580	-8.1%
Graduates Taking the Bar	2552	2384	-6.8%
Passing the Bar, First Time	1567	1896	+20.1%
Passing the Bar, Eventual	1981	2150	+7.9%

Sources: Wightman, *Race-Blindness*, *supra* note 278, at 243 tbl.7 (first two rows in above table); statistics compiled by the author from the LSAC-BPS data (last four rows in above table).<sup>281</sup>

281. See WIGHTMAN, LSAC-BPS, *supra* note 133.

The analysis produces a result that will strike many people as intuitively implausible: the number of black lawyers produced by American law schools each year and subsequently passing the bar would probably increase if those schools collectively stopped using racial preferences. Indeed, the absolute number of black law graduates passing the bar on their first attempt—an achievement important both for a lawyer's self-esteem and for success in the legal market—would be much larger under a race-blind regime than under the current system of preferences. There are two simple reasons for this surprising result. First, the main effect of contemporary racial preferences by law schools is to reshuffle blacks along the distribution of schools; six out of every seven blacks currently in law school would have qualified for admission at an ABA-accredited school under a race-blind system. Second, the elimination of racial preferences would put blacks into schools where they were perfectly competitive with all other students—and that would lead to dramatically higher performance in law school and on the bar. Black students' grades, graduation rates, and bar passage rates would all converge toward white students' rates. The overall rate of blacks graduating from law school and passing the bar on their first attempt would rise from the 45% measured by the LSAC-BPS to somewhere between 64% and 70%.<sup>282</sup>

Conversely, the black students excluded by a switch to a race-blind system have such weak academic credentials that they add only a comparative handful of attorneys to total national production. Blacks with academic indices of 480 or lower would make up the bulk of those excluded under a race-blind system. In the LSAC-BPS study, only 65% of black students with these scores graduated from law school, and only 19% passed the bar on their first attempt.<sup>283</sup> For the same reasons, this group is, on the whole, most injured by the system of racial preferences. Admitted to the lowest-ranking law schools as part of law schools' effort to compensate for the cascade effect, these students invest years of their lives in an enterprise that usually does not allow them to enter the legal profession—or, if it does, only with the weakest possible qualifications.

The real world is a very different and more promising place than the world most legal educators have created in their minds to justify affirmative action. It is true, as defenders of preferences have long maintained, that a large majority of the black students at any given law school today depend on racial preferences to be there. But this has led to the unjustified delusion that blacks, system-wide, are equally dependent on racial preferences. In the law school system as a whole, racial preferences no longer operate as a lifeline vital to

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282. Black graduation rates and bar passage rates would still be somewhat lower than white rates in a race-blind system, simply because the average credentials of blacks (in the system as a whole, not at individual schools) would still be lower than those of whites. But something like three-quarters of existing disparities would disappear.

283. Twenty-nine percent of this group passed *supra* the bar within five attempts. Calculations by author from LSAC-BPS Data, discussed *supra* note 133.

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preserve the tenuous foothold of blacks in the legal profession. Quite the contrary: racial preferences have the systematic effect of corroding black achievement and reducing the number of black lawyers.

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Still, if the reader suspects that the story I just told sounds too good to be true, she is at least partly right. There are a few assumptions in my argument that should be considered more closely.

Most seriously, my simulation uses two different sources of data. The top two lines of Table 8.2 come from Wightman's analysis of law students matriculating in the fall of 2001. But the other analyses in that table are based on the LSAC-BPS data, which studied and followed the cohort beginning law school in 1991. This is not ideal, and could lead to an overstatement of black-white differences. After all, as Table 8.1 suggests, one of the reasons more blacks would be admitted under Wightman's 2001 simulation was some narrowing of the black-white gap. If this gap is narrowing, one would expect the much higher attrition rates of blacks in law school and on the bar should moderate as well.

One could only fully answer this question by replicating the LSAC-BPS study with current students—something that is not likely to happen soon. Instead, I can think of a few types of indirect evidence that bear on this question. First, the 2002 and 2003 admissions data that I have secured from seven public law schools<sup>284</sup> suggests that the black-white credentials gap has indeed narrowed, from about 170 points in the early 1990s to perhaps 130 or 140 points now. This is consistent with the narrowing of the black-white LSAT gap and should have a moderating effect on black attrition. And, indeed, ABA data on minority attrition rates shows a slight decrease in black attrition between the first and third years of law school, from 18.9% in 1991-1993 to 18.4% in 1999-2001.<sup>285</sup> This is a small change, but in the right direction. However, during the same period, average bar passage rates across American jurisdictions dropped as many states raised the passing threshold; nationally, the proportion of first-time takers who passed the bar fell from 82.3% in 1994-1995 to 74.7% in 2002-2003.<sup>286</sup> Increases in bar difficulty disparately affect blacks, because the high black failure rate on the bar implies that there are a disproportionately large number of blacks who barely pass. It is hard to document how seriously this change has affected blacks because very few

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284. See *supra* Part II.

285. For data on enrollment by race at ABA law schools, see Am. Bar Ass'n, *Minority Enrollment 1971-2002*, *supra* note 10. My attrition statistics compare black first-year enrollment in 1991 and 1999 with third-year enrollment two years later.

286. This data is compiled from the *Bar Examiner*, which publishes bar passage statistics for the past year in each May's issue. The data is for all first-time bar-takers in the summer and winter administrations for 1994-1995 and 2002-2003.

states publish racial statistics on bar passage rates, but we can get some idea from a couple of sources. In California (one of the few states that provides bar exam results by race), the first-time bar passage rate for whites fell from 79.3% on the July 1997 bar exam to 70.0% on the July 2003 exam. The first-time pass rate for blacks fell from 47.5% to 32.8% over the same two exams—a much larger absolute and proportionate decline.<sup>287</sup> A corroborating piece of evidence comes from the AJD study, which asked its sample of certified lawyers whether they had failed the bar at least once before passing in the year 2000. Twenty-two percent of the blacks in this national sample said they had failed the bar at least once.<sup>288</sup> In the LSAC-BPS study, only 20% of those blacks who ultimately became lawyers had an experience of failing the bar.<sup>289</sup> This suggests that the bar posed a slightly higher hurdle for a national sample of black law graduates in 2000 than it did in 1994.

In short, the data suggests that over the past decade blacks have gained on whites in law school credentials; probably the gap in law school performance and law school attrition has narrowed. But the growing difficulty of the bar in many states has probably more than wiped out those gains, so that the overall penalties of affirmative action are still as great for blacks, and quite possibly greater, than they were at the time of the LSAC-BPS study. Considering all of this (admittedly imperfect) data in light of Table 8.2, I can see no reason for revising downward the table's estimate that the production of black lawyers would rise significantly in a world without racial preferences.

Table 8.2 is premised on two other significant assumptions. First, I assume that blacks will apply to law school in the same numbers without the benefit of affirmative action, and that they will accept admission to lower-ranked law schools than they currently enter instead of simply switching to other fields. This is, of course, debatable. A college graduate attracted to the law but not desperate to have a legal career might have second thoughts if she faced the prospect of attending a fortieth-ranked school instead of one ranked fourteenth. Other careers and other types of graduate study might loom more attractively, particularly if affirmative action still operated in some of those competing spheres.

On the other hand, there are reasons to think the number of blacks applying to law school in a race-blind regime would increase rather than decline. Surely there is some awareness among prospective black students of the daunting challenge bar exams pose for blacks; surely this discourages some people from applying. In a world where 74%—rather than 45%—of black law students

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287. See State Bar of Cal., Examination Results/Statistics at [http://calbar.ca.gov/state/calbar/calbar\\_generic.jsp?sImagePath=Examination\\_Results\\_Statistics.gif&sCategoryPath=/Home/About%20the%20Bar/Bar%20Exam&sHeading=Examination%20Results/Statistics&sFileType=HTML&sCatHtmlPath=html/Admissions\\_Old-Statistics.html](http://calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=Examination_Results_Statistics.gif&sCategoryPath=/Home/About%20the%20Bar/Bar%20Exam&sHeading=Examination%20Results/Statistics&sFileType=HTML&sCatHtmlPath=html/Admissions_Old-Statistics.html) (last visited Nov. 3, 2004).

288. Calculation by the author from AJD Data, *supra* note 249.

289. Calculation by the author from LSAC-BPS Data, *supra* note 133.

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graduate and pass the bar on their first attempt, law school might be a far more appealing prospect. Moreover, the findings of this Article and a growing body of other research are chipping away at the conventional wisdom that elite schools are the only path to coveted jobs. As those prejudices weaken, blacks may be less perturbed by the prospect of attending a less elite school. Blacks might also be highly attracted to a university environment in which they are not individually or collectively assumed to have weak credentials.

A second unknown in a race-blind system is the operation and effect of financial aid awards. Anecdotal evidence suggests that many law schools try to minimize the size of their internal black-white gap by competing vigorously for black candidates, both by “winning and dining” strong prospects and by offering those prospects generous financial aid. More systematic data from the AJD study shows that blacks in the 2000 cohort of graduates received about three times as much in grants and aid from their law schools as did students of other races.<sup>290</sup> It is reasonable to suppose that in a race-blind system, race-based financial aid would decline (though I would argue that recruiting more blacks into the system as a whole remains a valid and important goal). It is certainly possible that a decline in aid for blacks, if it occurs, could discourage some black applicants. On the other hand, Hispanic law students currently receive far less scholarship aid than blacks (even though Hispanic law students tend to come from less affluent backgrounds) but apply to law school in very similar proportions to their numbers among college graduates.<sup>291</sup>

There are, in short, many uncertainties built into any prediction about how a change to race-blind admissions would change the production of black lawyers. There are a couple of conclusions that do seem to me very defensible (and which are the real point of my simulations and attendant discussion). First, the oft-repeated claim that the number of black lawyers would be decimated by the elimination of racial preferences is simply untrue. One can make an argument that the number might decline, but the balance of evidence suggests an increase is more likely. Second, what *will* change dramatically is the academic preparation of those blacks who become attorneys. Under current conditions, over a fifth of practicing black lawyers have failed the bar at least once, and, given the high failure rate generally, it is a statistical certainty that many blacks who pass the bar pass by very small margins. Sharply raising the first-time pass rate for blacks would be accompanied by a similar rise in the

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290. Dinovitzer et al., *supra* note 249, at 73 tbl.10.1.

291. According to AJD data, aid from law schools covered only 5% of the law school expenses of Hispanics in the Class of 2000, but 14% of the law school expenses of blacks. *Id.* The size of the Hispanic cohort matriculating in law school in the fall of 2001 was equal to 3.4% of the number of Hispanics graduating from college that year; the comparable figure for blacks was 3.1%. See U.S. CENSUS BUREAU, *supra* note 11, at 191; Am. Bar Ass’n, *Minority Enrollment 1971-2002*, *supra* note 10. And, in one of the few available studies on this point, the median parental income for Hispanic applicants to one major law school in 1997 was \$31,000, compared to \$38,000 for black applicants. Sander, *supra* note 5, at 494.

scores of those who do pass. If we believe that bar exams measure anything relevant to good lawyering, this change would be a very good thing.

#### CONCLUSION

I began this Article with a simple question: does affirmative action, as practiced by American law schools, clearly help blacks more than it hurts them? Although I started this project with serious doubts about some things law schools were doing, the answer to the big question turned out to be far less ambiguous than I would have imagined possible. Law school admissions preferences impose enormous costs on blacks and create relatively minor benefits. By looking at law schools systemically, we can see patterns and larger consequences that would be invisible or speculative if we looked at any one school or group of schools in isolation. As it is, the key features of the current system seem very clear.

For blacks, there are two primary benefits of affirmative action. First, black students widely have the opportunity to attend significantly more elite schools than do white peers with similar credentials. Preferences boost students up the hierarchy of 184 schools by 20 to 50 steps, sometimes more; a very large majority of black students accept these opportunities and attend schools that used preferences to admit them. Second, the system as a whole leads to the admission of an additional five or six hundred black students—about one-seventh of the annual total—who would not otherwise be admitted to any accredited school. Cutting against these benefits are six major costs of the current system of racial preferences.

*1. Black students as a whole are at a substantial academic disadvantage when they attend schools that used preferences to admit them.*<sup>292</sup> As a consequence, they perform poorly as a group throughout law school. The median GPA of all black students at the end of the first year of law school lies roughly at the sixth percentile of the white grade distribution. Put differently, close to half of black students end up in the bottom tenth of their classes. This performance gap is entirely attributable to preferences; none of it seems to be attributable to race per se.

*2. The clustering of black students near the bottom of the grade distribution produces substantially higher attrition rates.* Entering black law students are 135% more likely than white students to not get a law degree. Part of this is the effect of low grades on academically strong black students who

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292. The “as a whole” qualifier is important. None of the empirical claims applies to every black individually—indeed, we can empirically demonstrate that there are exceptions. Some blacks are not direct beneficiaries of preferences; some buck the odds and excel academically. But since affirmative action policies treat blacks as a single group, we can only sensibly analyze the aggregate effects of those policies by examining consequences on blacks as a whole.



would have easily graduated from less competitive schools; part of this is the effect of high attrition among the five or six hundred academically weak black students admitted to the low-prestige law schools. But again, virtually all of the black-white gap seems attributable to preferences; virtually none of it seems attributable to race or to any correlate of race (such as income).

3. *Generally low grades among blacks have even larger effects on bar performance.* Blacks are nearly six times as likely as whites to not pass state bar exams after multiple attempts. The difference, again, is mostly attributable to preferences. Half of the black-white bar passage gap is traceable to the effects of blacks with good credentials getting low grades at higher-prestige schools; nearly a quarter is due to low-prestige schools admitting blacks with lower credentials than almost any of the other students in the system.

4. *When blacks pass the bar and enter the job market, they encounter a generally positive climate.* Blacks earn 6% to 9% more early in their careers than do whites seeking similar jobs with similar credentials, presumably because many employers (including government employers) pursue moderate racial preferences in hiring. Nonetheless, affirmative action by schools hurts blacks in the job market more than it helps. The data in Part VII suggests that employers weigh law school grades far more heavily in evaluating job candidates than most legal academics have assumed. Law school racial preferences give blacks fancier degrees, but also systematically lower their GPAs. For at least two-thirds of black law graduates, the harm preferences do to a student's grades greatly outweighs the benefit derived from the more prestigious degree. Only black students graduating from the top ten law schools even arguably derive net benefits from this trade-off. Racial preferences therefore have not been an indispensable part of credentialing blacks for the job market; overall, they clearly end up shutting more doors than they open.

5. *In 2001, about 86% of all black students who attended accredited American law schools would have been eligible for admission at one or more law schools in the total absence of racial preferences.* System-wide, racial preferences expand the pool of blacks in law school by only 14%. These 14%—about five to six hundred students admitted to low-prestige schools—have very low academic credentials and face long odds against becoming lawyers. Only a fifth of this group finishes law school and passes the bar on their first attempt; fewer than a third become lawyers after multiple attempts at taking the bar.

6. *When one takes into account the corrosive effects of racial preferences on the chances of all black law students to graduate and pass the bar, these preferences probably tend, system-wide, to shrink rather than expand the total number of new black lawyers each year.* If all preferences were abolished, the data in Part VIII suggests that the number of black attorneys emerging from the class of 2004 would be 7% larger than it is. The number of black attorneys passing the bar on their first attempt would be 20% larger. These numbers are simply estimates, resting on the assumptions I have detailed; but even if the

attrition effects of the current system were much smaller than I have estimated, we would still be producing approximately the same number—and much better trained—black attorneys under a race-blind system.

These are simply the direct, easily quantifiable effects of law school racial preferences. I have said nothing about the stigma of preferences, about the effect of low grades on student esteem, about the life consequences for hundreds of young blacks each year who invest years of effort and thousands in expense but never become lawyers, or about the loss to communities that could be served by black lawyers but are not because racial preferences have had the effect in recent years of reducing our annual output of qualified black attorneys.

There are many ironies in this state of affairs, but perhaps the central irony is this: Law schools adopted racial preferences because, soon after they began to seek actively in the 1960s to increase black enrollment, they confronted the black-white credentials gap. The schools conceived of preferential policies to overcome the gap, hoping that by ignoring the differences in credentials they could perhaps make the gap go away. But these very policies have the effect of widening the credentials disadvantage facing individual black students rather than narrowing it. The effect of preferences on black graduation rates is similar to the effect of subtracting 60-odd points from the academic index of every black matriculant. The effect of preferences on black bar passage rates is similar to the effect of subtracting 120 points. Large-scale preferences exacerbate the problems they try, cosmetically, to cover up.

What can be said about the conduct of law schools in this system? Looking back over the years of the rise and development of the modern system of racial preferences, I think it is fair to say that there was a good deal of honor in what law schools did during the first ten years of this era. From the late 1960s through the time of *Bakke*, law schools shook off their complacency as overwhelmingly white bastions of prestige. They critically examined old procedures, experimented with new admissions methods, and sponsored summer programs like CLEO that worked hard to broaden and deepen the field of potential minority students. Reports from that period are infused with a degree of honesty and openness. And these policies did transform the image of law school and increased the interest of young minority college students in making law school a goal.

The era since *Bakke* has been quite different. Schools have felt hemmed in. The cascade effect of preferences exercised by law schools as a whole meant that any individual school had to choose between either having only a handful of black students or preserving racially segregated admissions procedures. Pressures from students and faculty, and fears of appearing racist, made this seem to be no choice at all. *Bakke* provided a convenient veil of diversity that could be draped over policies that were substantively hard to distinguish from those the Supreme Court had struck down. Viewing Powell's holding as hypocritical, law school deans joined in the hypocrisy. For most, this probably seemed a small price to pay in the cause of an apparently greater good.

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Unfortunately, once law schools had adopted the pretense that students of all races at any institution had essentially the same qualifications, it was difficult for anyone to pursue serious research into the effects of affirmative action, or even for faculties to engage in honest discussion. The entire topic has been largely given over to myth-making and anecdote for an entire generation. It should perhaps not be so surprising, then, that a close look at the emperor today shows such an unflattering nakedness.

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What are the implications of this analysis for the law of affirmative action? There are three. First, the distinction drawn by Justice O'Connor between the admissions systems of the University of Michigan's law school and its undergraduate college is a false one. It is impossible to explain the admissions outcomes at the law school, or at any other law school we have examined, unless the schools are either adding points to the academic indices of blacks or separating admissions decisions into racially segregated pools.

Second, Justice O'Connor's decision in *Grutter* is wrong in a broader sense. Her opinion draws heavily on amicus briefs that paint a glowing picture of the benefits of affirmative action and its indispensability as a vehicle of mobility by blacks into the legal profession. The premise accepted by O'Connor is that racial preferences are indispensable to keep a reasonable number of blacks entering the law and reaching its highest ranks—a goal which is in turn indispensable to a legitimate and moral social system. The analysis in this Article demonstrates that this premise is wrong. Racial preferences in law schools, at least as applied to blacks, work against all of the goals that O'Connor held to be important. The conventional wisdom about these preferences is invalid.

But a third legal implication of this work is the most important of all. All of the Supreme Court's decisions about affirmative action in higher education presume that the discrimination involved is fundamentally benign. It is tolerable only because it operates on behalf of a politically vulnerable minority—that is, blacks. A preferences program that operated on behalf of whites would be unconstitutional beyond question.

Yet if the findings in this Article are correct, blacks are the victims of law school programs of affirmative action, not the beneficiaries. The programs set blacks up for failure in school, aggravate attrition rates, turn the bar exam into a major hurdle, disadvantage most blacks in the job market, and depress the overall production of black lawyers. Whites, in contrast, arguably benefit from preferences in a number of ways. Whites have higher grades because blacks and other affirmative action beneficiaries fill most of the lower ranks; whites are the most obvious beneficiaries of the diversity produced by affirmative action programs; it is even plausible to argue that bar passage rates are kept high to avoid embarrassingly high failure rates by minority exam-takers. The

next legal challenge to affirmative action practices by law schools could very plausibly be led by black plaintiffs who were admitted, spent years and thousands of dollars on their educations, and then never passed the bar and never became lawyers—all because of the misleading double standards used by law schools to admit them, and the schools' failure to disclose to them the uniquely long odds against their becoming lawyers. And these plaintiffs, unlike the plaintiffs in *Hopwood* and *Gratz*, could be entitled to more than nominal damages.

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What can law schools do to escape this imbroglio? It might seem that there is very little that individual law professors or even law school deans can do, by themselves. As I have suggested, the cascade effect seems to give individual schools little control over their own destinies. This is true so far as it goes, but I believe there are important steps that individual professors and individual schools can take.

First and foremost, we should begin to be honest about what we are doing. We can disclose how admissions works at our individual schools. We can admit that our schools rely heavily on numerical indices of student credentials, that most of the white matriculants are chosen from a fairly narrow band of credentials, and that there is a big gap between white and black index scores. We can admit that black applicants are treated differently as a group, and that our schools' practices look more like the system described by Justice O'Connor in *Gratz* than the "individualized assessment" of *Grutter*. We can disclose to black admittees that, while our schools value them enormously and will work to make them succeed, there is some reason to believe that attending a school where a student's credentials are weaker than those of most classmates puts the student at greater risk of academic failure.

More specifically, each law school that takes race into account in its admissions should provide to all applicants a document that lists: (1) the median academic index (or test scores and undergraduate grades, if no index is used) of admitted and enrolled applicants, by race; (2) the median class rank of each racial or ethnic group whose identity is a factor in admissions; and (3) the pass rate of recent graduates from each group on the bar of the school's home state. This information would of course greatly aid applicants (particularly those who receive preferences) in evaluating the potential costs of attending a given school.

Once some honest conversation about affirmative action practices is underway, it will be much easier to talk about constructive solutions. The most obvious solution is for schools to simply stop using racial preferences. As we have seen, this is not an unthinkable armageddon; by every means I have been able to quantify, blacks as a whole would be unambiguously better off in a system without any racial preferences at all than they are under the current

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regime. The most obvious disadvantage of such a solution is that the most elite law schools would have very few black students—probably in the range of 1% to 2% of overall student bodies. Many observers would view this as an enormous cost, for at least two reasons: the diversity at elite schools is thought to be critical in shaping the attitudes of future national leaders, and the sheer numbers of blacks at top schools are thought to be a vital source for future black judges, public intellectuals, and political leaders. I have not explored these specific issues here, and I agree that they merit serious consideration.

There is an intermediate step that is at least worth considering as a thought experiment. Consider the workings of a system in which law schools only use admissions preferences for blacks to the extent necessary to prevent black enrollments from falling below 4% of total enrollment.<sup>293</sup> Obviously, the preference given to each enrolled student would be smaller. Academic gaps between whites and blacks would thus be narrower at the top. But the real benefit of this approach would be a dampening of the cascade effect. If the top ten schools enroll 150 blacks instead of 300, then the next tier of schools (say, those ranked eleven through twenty) would need to exercise even smaller preferences to reach the 4% target. At some point fairly high in the law school spectrum, no preference at all would be needed to achieve a 4% goal, and from that point on the proportion of blacks (all admitted on essentially race-blind systems) would be greater than 4%.

This approach would have three significant advantages. First, it would maintain a significant black presence at all schools. Second, it would dramatically narrow the average black-white gap across all schools. And third, the most significant remaining black-white gaps (still much smaller than present-day gaps) would be at the most elite schools, where the data suggest the harmful side effects of a gap are minimized and the positive effects of prestige for blacks are maximized. There are obvious practical problems—the patent illegality of avowed racial targets, the problem of coordination among competing schools—but this proposed solution does illustrate the possibility of “middle ways” that can capture some putative benefits of the current system while greatly mitigating its harms.

If candid dialogue can begin within the law school world on the subject of affirmative action, it will have positive effects throughout society. We could explore more honestly and systematically the meaning of diversity, the current extraordinary socioeconomic eliteness of law students of all races, the real potential to identify other indicators of academic promise, and the extent to which one can target for admission students who will establish public-service practices in low- and moderate-income communities. The battle for racial inclusion has been fought and largely won. Let us come out of the trenches, look around, take stock, and move forward to challenge injustice anew.

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293. Such goals, of course, would be floors, not ceilings; schools should not limit their admission of black candidates who satisfy the standards applied to other students.