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ARTICLES

The Inevitable Irrelevance of Affirmative Action Jurisprudence

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Fisher v. University of Texas presents an Equal Protection challenge to the University of Texas' race-preference admissions policy. Assuming that the Court will not abolish affirmative action programs wholesale, how will colleges and universities structure their admissions programs in light of the likely teachings of the *Fisher* case? Garfield argues that they are likely to ignore any broad message, instead treating Abigail Fisher's case as just another example of an impermissible program.

Misshaping the River: Proposition 209 and Lessons for the *Fisher* Case

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California's experiences with and responses to Proposition 209 bear on the *Fisher v. University of Texas* case with respect to both questions of "compelling interest" and "narrow tailoring." Two related developments led to the end of race-conscious admissions at the University of California. This article advances the five central findings and conclusions. First, it compares minority students' perceptions of campus racial climate at research universities with or without affirmative action and "critical mass." Second, it examines affirmative action bans and "chilling effects." Third, it examines two myths about credentials and performance upon which critics of affirmative action rely. Fourth, it claims that UC has a "natural experiment" verifying that class-based policies are not effective substitutes for race-conscious policies. Last, the article discusses UC business schools and UC Law schools as case studies demonstrating the need for race-conscious affirmative action.

Percent Plans: A “Workable, Race-Neutral Alternative” to Affirmative Action?

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This Article considers whether percent plans are a “workable, race-neutral alternative” to affirmative action in admissions. Connecting *Grutter* with doctrine on employment law, it clarifies that “critical mass” must be evaluated quantitatively, particularly in race-neutral regimes. It then finds that percent plan policies have not engendered critical mass because they rely on flawed assumptions about majority-minority schools. In contrast, individualized assessments can realize significant diversity gains in the same settings within the constitutional limits to college and universities’ latitude to weigh race. These findings support the notions that percent plans are not “workable” policies and that affirmative action should remain constitutionally permissible.

NOTE

Blue Field of Dreams: A BCS Antitrust Analysis

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This note examines antitrust issues with regard to the Bowl Championship Series [“BCS”]. Amateur sports have an enduring place within the hearts and minds of Americans. College football is considered a chief example of an amateur sport despite the fact that outside organizations and advertisers funnel millions of dollars into it each year. The persistent myth of amateurism in college football enabled it to run relatively unregulated and immune to antitrust scrutiny up until a few decades ago. The note begins by examining the current state of antitrust law. It then examines the origins of the National Collegiate Athletic Association [“NCAA”] and the BCS and discusses how antitrust law applies to these institutions. The article concludes with alternative remedies to the BCS system, with particular attention given to the recently adopted four-team playoff format. These alternatives are not intended to destroy the BCS, but to remove barriers to competition inherent in its current design.

BOOK REVIEWS

Textualism’s Last Stand: A Review of Scalia and Garner’s

In *Reading Law: The Interpretation of Legal Texts*, Supreme Court Justice Antonin Scalia, the architect of modern textualism, has teamed up with the distinguished lexicographer and usage expert, Bryan A. Garner, to write a thick, hard-punching, and highly readable book. It is an odd-couple partnership in some ways—Scalia, the witty, pugnacious, conservative icon; Garner, the tweedy, scholarly, pro-choice, pro-gay-marriage wordsmith. Yet the authors' strengths (and weaknesses) complement each other in a kind of literary and dialectical feng shui. While the book may not be the "great event in American legal culture" that Judge Frank Easterbrook touts it to be in his glowing Foreword, it is fair to say that it may become a minor classic. This review examines some of the strengths and weaknesses of the book.

Duke Lacrosse, Universities, the News Media, and the Legal System: A Review of Howard M. Wasserman's *Institutional Failures*

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This review examines a few passages and concepts from Howard M. Wasserman's *Institutional Failures: Duke Lacrosse, Universities, the News Media, and the Legal System*. This collection of essays is a must read for any college or university administrator who finds themselves embroiled in a high profile controversy. It allows the reader to consider the totality of the events that transpired at Duke with the benefit of hindsight and expert analysis. There are important lessons in this book not only for senior college and university administrators, but also for faculty members, college and university public relations/communications personnel, government prosecutors, the media, and perhaps most importantly, consumers of media. In total, this book is presented in a highly digestible way; its legal analysis is precise and thorough, but accessible to non-lawyers as well.

THE INEVITABLE IRRELEVANCE OF AFFIRMATIVE ACTION JURISPRUDENCE

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INTRODUCTION

*Fisher v. University of Texas*¹ presents an Equal Protection challenge to the University of Texas' race-preference admissions policy. In this article, I am proceeding on the assumption that, in its decision, the Court will not abolish affirmative action programs wholesale, if it addresses the merits of Abigail Fisher's challenge. Considering the present makeup of the Court following *Fisher*, colleges, universities, and graduate schools will remain free to pursue the Court's previously announced goal of admitting

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1. *Fisher v. Univ. of Tex.* at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

individual students who, as a group, present a critical mass of diverse viewpoints.² To meet this goal, those institutions that take race into account in the admissions process must create programs that are narrowly tailored to achieve the compelling governmental interest in what has come to be considered viewpoint diversity, an assurance of otherwise underrepresented voices in the classroom.³

In many instances, accepting students who will bring a differing viewpoint to the classroom is contrary to the current trend among colleges and universities to pursue favorable national recognition from various news outlets, most notably *U.S. News & World Report*.⁴ The problem lies with consideration of underrepresented students, who generally apply to colleges and universities with academic test scores that are not competitive with their majority peers.⁵ The disparity between minority and majority applicant test scores means that admitting a significant number of minority students would result in a potential decrease in a school's mean standardized test scores for entering students, numbers that factor significantly into a school's national rank. For the most part, institutions of higher education have become so consumed with the goal of achieving the highest possible ranking that they are uninterested in constructing constitutionally permissible race-preference admissions programs, even in light of the Court's continued guidance on the matter.

Although the Court has considered the constitutionality of race-preference admission policies on only two occasions,⁶ the law concerning the matter is fairly clear. Justice Powell, in the 1978 case of *University of California v. Bakke*,⁷ charted a new course for programs that were originally designed to remedy the present effects of past discrimination, presenting them instead as programs that benefit everyone in the classroom, by ensuring a diversity of viewpoints.⁸ And as recently as 2003, the Court reaffirmed its conclusion that there is a compelling governmental interest in ensuring viewpoint diversity in the classroom.⁹ Institutions, therefore, can construct policies that are narrowly tailored to meet that interest.

In the one instance in which the Court upheld race-preference programs, *Grutter v. Bollinger*,¹⁰ the Court held that a policy that provided for

2. See *Grutter v. Bollinger*, 539 U.S. 306, 315–17 (2003).

3. See *id.*

4. See *infra* notes 344–346 and accompanying text.

5. See *infra* notes 347–350 and accompanying text.

6. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter*, 539 U.S. 306, and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (decided the same day as *Grutter*).

7. *Bakke*, 438 U.S. 265.

8. *Id.* at 312–14 (citations omitted) (A college or university may consider race as one of a host of other factors in achieving a learning environment open to “speculation, experiment, and creation.”).

9. *Grutter*, 539 U.S. at 328 (2003) (“Today, we hold that the [University of Michigan] Law School has a compelling interest in attaining a diverse student body.”).

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

individual review of applicants' diverse qualities, including race, as a means to ensure diverse voices, was sufficiently flexible and narrow enough to withstand judicial scrutiny.¹¹

Following *Grutter*, the University of Texas (UT) adopted an admissions policy that considered a host of soft factors, including race, for those Texas residents who were not otherwise admitted by virtue of graduating in the top 10% of their Texas high school class.¹² Abigail Fisher, the plaintiff in the case, was rejected under both points and consequently sued the school.¹³ Her case has made its way to the Supreme Court for consideration.¹⁴

Based on the existing precedent, the Court can decide the *Fisher* case in any of three ways. First, the Court could avail itself of the opportunity presented by *Fisher* to expand the constitutional permissiveness of considering race as a factor in admissions decisions.¹⁵ Given that four of the eight justices deciding this case¹⁶ have made clear their strong opposition to the use of race in this context, this scenario is highly unlikely.¹⁷ At the other end of the spectrum, the Court could find that there is no longer a compelling governmental interest in the use of race in the admissions process, thereby causing the sun to set on affirmative action admissions policies much sooner than Justice O'Connor predicted in her majority opinion in *Grutter*.¹⁸ This is an equally unlikely scenario because four of the Justices have already confirmed their commitment to the compelling governmental interest in using race-preference policies to achieve viewpoint diversity.¹⁹ The most likely outcome is that the Court will rule very narrowly, striking down the UT program as not being narrowly tailored, while leaving intact the Court's previously articulated

11. *Id.* at 337–39 (citations omitted).

12. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 224, 227–28 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

13. *Id.* at 217.

14. *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (granting certiorari).

15. *See infra* Part III.B (discussing socioeconomic status as an alternative approach to traditional affirmative action admissions standards).

16. Justice Kagan has recused herself from the decision because she was Solicitor General when the Obama administration filed a brief with the lower courts siding with the University of Texas. Jess Bravin, *Justices to Revisit Race Issue*, WALL ST. J. (Feb. 22, 2012), <http://online.wsj.com/article/SB10001424052970203358704577237112218477648.html>.

17. *See infra* Part II.D (evaluating the probable outcome of *Fisher*, based on Supreme Court Justices' decisions in similar cases on race-preference admissions policies).

18. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in student body diversity] approved today.”).

19. *See infra* Part II.D (discussing why, in deciding *Fisher*, Justices Ginsburg, Breyer, Kennedy, and Sotomayor are likely to uphold the Court's compelling governmental interest in viewpoint diversity).

finding of a compelling governmental interest in diversity education.²⁰

Thus, colleges and universities will remain free to construct some type of race-preference admissions policy in an effort to ensure diversity among their classes. Despite the Court's commitment to upholding the narrow use of race in the admissions process, however, most institutions will be unable or, more likely, unwilling to construct constitutionally permissible race-preference admissions programs. The problem lies with the egos and the budgets of the administrators of today's colleges and universities. The current quest in academia to climb in the rankings promotes a meritocratic system in which many African-Americans and Hispanics, who, studies confirm, perform less well on standardized tests than whites or Asian-Americans, cannot compete.²¹ Colleges and universities concerned with reporting high academic test scores do not admit more than a small number of students who apply with weaker academic scores, despite their personal achievement or other indicia of academic success.²² Moreover, institutions faced with an unprecedented number of applicants cannot commit to a holistic individualized review because doing so would be extremely costly and time-consuming.²³

Sadly, the current trend in post-secondary education to race to the top of the rankings combined with the increase in applications at most academic institutions is diametrically opposed to constructing a flexible, individualized, and therefore, constitutionally permissible race-preference program. Ensuring elite status by admitting students with the highest standardized test scores yields a racially homogenous entering class.²⁴ The need for efficiency mandates that colleges and universities define a standardized test cutoff point for admission to their school, thereby decreasing the number of students whom the school must consider. Despite some reports to the contrary, school admissions boards remain unwilling or uninterested in removing themselves from the ratings game.²⁵ For this reason, regardless of how the Court decides, *Fisher* will ultimately be inconsequential to school admissions decision-making and, therefore, will do little more than highlight the growing irrelevance of affirmative action jurisprudence.

This article proceeds in three parts. In Part I of this article, I provide a

20. See *infra* notes 296–300 and accompanying text.

21. See THE COLLEGE BOARD, 2012 COLLEGE-BOUND SENIORS TOTAL GROUP PROFILE REPORT 4 (2012), available at <http://media.collegeboard.com/digitalServices/pdf/research/TotalGroup-2012.pdf> (reporting much lower mean Scholastic Aptitude Test (SAT) scores for African-American and Hispanic students than for white students, across critical reading, math, and writing components of the SAT).

22. See Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487, 489–91 (2007).

23. *Id.* at 503.

24. See *id.* at 508.

25. *Id.*

narrative of affirmative action jurisprudence in higher education, with a particular focus on the meaning of viewpoint diversity in higher education.²⁶ This section tracks the definitional shift in preference policies from their original design as remedial and compensatory programs for those suffering the effects of educational discrimination to interest convergence programs, which assure equal benefits irrespective of race. In Part II, I explore the circumstances giving rise to *Fisher*, including an overview of the lower court decisions. This section presents a discussion of the likely outcome of the *Fisher* case based on past rulings by members of the current Court and predicts that the Court will decide *Fisher* on very narrow grounds.²⁷ In Part III, I explore the underpinnings of the post-secondary education admissions process. This section explores the contemporary goals of most institutions' admissions, including their moral sense of providing a compensatory education to groups that previously experienced academic disadvantage, the nature of elitism in education fueled in large part by *U.S. News & World Report*,²⁸ and the goal of colleges and universities to admit the most qualified students in the wake of an ever growing volume of applicants. This section concludes that colleges and universities, for both financial and egotistical reasons, are more concerned with their academic reputation than with Constitutional limitations on their admissions policies, and as a result, for the most part, colleges and universities will continue to try to use race as a plus, regardless of any future Supreme Court edict.

I. AFFIRMATIVE ACTION ADMISSIONS POLICY JURISPRUDENCE

The Supreme Court has expressed little opinion on race-preference admissions policies in higher education. In fact, over the past forty years, the Court has taken up the matter only twice.²⁹ These cases, coupled with the executive mandate for affirmative action and cases outside the higher education context, set the precedential stage for the Court's decision in *Fisher*. In this section, I provide a historical overview of the executive and judicial decisions that will inform the Court's decision in *Fisher*.

A. The Civil Rights Movement

The term "affirmative action" first appeared in a 1961 executive order

26. See *infra* notes 69–70 and accompanying text (discussing viewpoint diversity).

27. See *infra* notes 246–286 and accompanying text (discussing indicia of each member of the Court's opinion on affirmative action and the likely outcome).

28. See *Rankings*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/rankings> (last visited Sept. 1, 2012) (Annually, *U.S. News & World Report* ranks undergraduate and graduate institutions in the country.).

29. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003). Note that *Grutter* and *Gratz v. Bollinger* were decided on the same day, making the tally really three cases, were decided on the same day, making the tally really three cases.

issued by President John F. Kennedy; it required government contractors to “take affirmative action to ensure” that individuals are employed and treated equally without regard to race, creed, color, or national origin.³⁰ Four years later, and one year after Congress adopted the Civil Rights Act of 1964,³¹ President Lyndon B. Johnson issued Executive Order 11,246, which required federal contractors to “take affirmative action” to hire without regard to race, religion, or national origin.³² Executive Order 11,246, when read with the Civil Rights Act, was meant to guarantee that companies doing business with the government took active steps toward recruiting, hiring, and retaining members of underrepresented minority classes, which had historically been denied access to jobs at a rate equal to their majority counterparts.

Under Executive Order 11,246, most entities doing business with the government, or receiving government funding, must develop a written affirmative action compliance program and must further demonstrate proof that they are complying with their programs.³³ Following the issuance of Executive Order 11,246 and the series of compliance rules that were enacted in response to its adoption, “affirmative action plans” became the loosely used terminology for any program or methodology designed to enhance racial, ethnic, and, eventually, female representation in business and government entities.³⁴

For the ten years following the moment when affirmative action came into being, affirmative action plans and programs primarily concerned themselves with commercial entities.³⁵ Executive Order 11,246 was equally applicable to colleges and universities receiving federal funding, yet little attention was paid to the educational sector, thereby directing attention primarily on affirmative action plans to improve diversity in hiring and employment.³⁶ Title VI of the Civil Rights Act of 1964, however, prohibited race or national origin discrimination by any program or activity receiving federal financial assistance, including colleges and universities, thereby setting the groundwork for affirmative action admissions plans.³⁷ In 1973, the Department of Health, Education, and Welfare, interpreting Title VI for the first time, used affirmative action

30. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

31. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

32. Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965) (amended to include gender in 1968).

33. See Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 613–14 (1998) (footnotes omitted) (historical analysis of affirmative action beginning in the 1700’s and continuing to the mixed success of modern affirmative action programs).

34. See *id.* (footnotes omitted).

35. *Id.* at 618 (footnote omitted).

36. *Id.* at 618–19 (footnotes omitted).

37. *Id.* at 619 (footnotes omitted).

language when it amended its regulations.³⁸ According to the regulation, educational institutions found to have had past discrimination were required to create an affirmative action plan.³⁹ Those educational institutions at which the government had not found instances of discrimination were encouraged to create affirmative action plans.⁴⁰ By the mid-1970s, institutions of higher education had embraced the notion of employing affirmative action admissions programs, which was the name given to aspects of admissions plans that considered race as a factor in the admissions process.⁴¹

Both educational and commercial affirmative action plans were met with significant opposition.⁴² Affirmative action was seen as a zero-sum game.⁴³ Ensuring the rights of one person meant necessarily disqualifying the rights of another for the same jobs or place in an entering class. Not surprisingly, governmental efforts to grant access to those to whom such access was previously denied based on the color of their skin quickly became an issue of constitutional scrutiny.

B. University of California v. Bakke

*University of California v. Bakke*⁴⁴ was the first affirmative action challenge to a race-based admissions policy that the Supreme Court

38. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 400 n.12, 418 n.22 (1978); see also 45 C.F.R. § 80.3(b)(6)(ii) (2012) (“Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”).

39. 45 C.F.R. § 80.3(b)(6)(i) (“In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.”).

40. *Id.* § 80.3(b)(6)(ii). (“Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”).

41. *Challenging Race Sensitive Admission Policies: A Summary of Important Rulings*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/sats/race/summary.html> (last visited Sept. 1, 2012).

42. See *id.* (discussing several successful legal challenges to affirmative action admissions policies); Cedric Herring & Loren Henderson, *From Affirmative Action to Diversity: Toward a Critical Diversity Perspective*, 38 CRITICAL SOC. 629, 631 (2011).

43. See *Challenging Race Sensitive Admission Policies*, *supra* note 41 (noting that many opponents of affirmative action admissions policies thought of affirmative action as reverse discrimination).

44. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see generally Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 J.C. & U.L. 895 (1996) (discussing the *Bakke* decision within the article’s analysis of the legal limits on a law schools’ adoption of diversity admissions policies).

considered on the merits.⁴⁵ Allan Bakke, a white male, unsuccessfully applied for admission to the University of California at Davis (Davis) Medical School in 1973 and in 1974.⁴⁶ At the time when Bakke applied to the Medical School, Davis had employed an affirmative action admissions policy that divided applicants into two groups, minority and majority.⁴⁷ The school set aside a certain number of seats for minority members, who could be admitted even if their undergraduate grade point averages (GPAs) and Medical College Admission Tests (MCATs) were lower than those of the applicants rejected from the majority pool.⁴⁸ Davis rejected Bakke's application in both 1973 and 1974, even though the school accepted minority applicants with lower test scores.⁴⁹ Following the second rejection, Bakke sued Davis and the Regents of the University of California in state court,⁵⁰ arguing that the Davis admissions policy violated the Equal Protection Clause,⁵¹ the California Constitution,⁵² and Title VI of the Civil Rights Act of 1964 (Title VI).⁵³

The case made its way to the Supreme Court, which considered both the Equal Protection claim and the Title VI claim.⁵⁴ The Court first considered the proper level of scrutiny for reviewing the challenge.⁵⁵ A majority of the Court concluded that because the Davis program considered race, it was subject to the strictest of scrutiny and would only pass constitutional muster if it were "precisely tailored to serve a compelling governmental

45. See Bridgette Baldwin, *Colorblind Diversity: The Changing Significance of "Race" in the Post-Bakke Era*, 72 ALB. L. REV. 863, 866 (2009).

46. *Bakke*, 438 U.S. at 276.

47. *Id.* at 274–76. Under a special admissions program, applicants could indicate on their medical school applications whether they wished to be considered as "economically and/or educationally disadvantaged". *Id.* at 274. To fall into such a "minority group", applicants could select one of the following categories: "Blacks", "Chicanos", "Asians", or "American Indians"; "White" or "Caucasian" was not an option. *Id.* (citation omitted). From 1971–1974, only ethnic minority students obtained admission under the special program, even though disadvantaged white students also applied to the special program. *Id.* at 275–76.

48. *Id.* at 275, 277 n.7.

49. *Id.* at 276–77 (footnote omitted).

50. *Id.* at 277 (footnote omitted).

51. U.S. CONST. amend. XIV, § 1, reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

52. CAL. CONST. art. I, § 7(b), reads: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

53. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006), reads: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

54. *Bakke*, 438 U.S. at 281.

55. *Id.* at 287–91.

interest.”⁵⁶

The Court was sharply divided on the constitutionality of the Davis program.⁵⁷ Justice Powell announced the judgment of the Court in an opinion that no other Justice joined.⁵⁸ Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist concurred in finding that the program was unlawful, but based their conclusion that the program violated of Title VI.⁵⁹ These five Justices made up the majority necessary to invalidate the Davis program.

Justice Powell held invalidated the Davis Program invalid, because, in his opinion, the program violated the Equal Protection Clause.⁶⁰ He thought that the Davis policy of setting aside a certain number of seats was tantamount to a quota and therefore in violation of the Constitution.⁶¹ In his opinion, however, the Constitution does permit some permissible uses of race in admissions decisions to institutions of higher education.⁶² Specifically, Justice Powell found “a compelling interest in ameliorating or eliminating, where feasible, the disabling effects of identified discrimination.”⁶³

Justice Powell paid particular attention to the benefits that both minorities and the non-minority would experience from learning in a classroom filled with diverse voices.⁶⁴ According to Powell, encouraging diversity in the student population is a compelling interest that is sometimes permissible, even if such action results in unequal treatment.⁶⁵ The majority student would greatly benefit, and his or her educational training would be enhanced, by having the opportunity to learn, study, and discuss academic information with students from diverse backgrounds.⁶⁶ A

56. *Id.* at 291, 299. Justice Powell also wrote that in “order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is ‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest.” *Id.* at 305 (quoting *In re Griffiths*, 413 U.S. 717, 721–22 (1973) (footnotes omitted)). See also *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

57. *Bakke*, 438 U.S. at 266–67.

58. *Id.* at 267.

59. See *id.* at 408–22 (showing that Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist did not reach the constitutional question because they concluded that the program in *Bakke* violated Title VI).

60. *Id.* at 289.

61. *Id.* at 307; see also 311–14 (stating specific goals or quotas are always impermissible to achieve diversity or to dismantle past discrimination.).

62. *Id.* at 315 (“Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”).

63. *Id.* at 325.

64. *Id.* at 307.

65. *Id.* at 307.

66. *Id.*

diverse student body contributing to a “robust exchange of ideas” is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated.⁶⁷ The Constitution does not bar admission policies from introducing race as a factor in the selection process.

Justices Brennan, White, Blackmun, and Marshall dissented from the conclusion of the majority but agreed with Justice Powell that race-based programs are sometimes permissible.⁶⁸ The four Justices endorsed most of Justice Powell’s opinion.⁶⁹ Consequently, following *Bakke*, later Courts embraced two principles that stemmed from Justice Powell’s opinion. First, benefits of viewpoint diversity could be considered advantageously in the admissions process, and second, any affirmative action admissions policy would be upheld only if it were “precisely tailored to serve a compelling governmental interest.”⁷⁰ This language became the basis of the strict scrutiny test applied to affirmative action programs. A state or state agency meets the strict scrutiny test when it demonstrates a compelling governmental interest and shows that the program or policy developed by the agency was narrowly tailored to help meet that compelling governmental interest.⁷¹

Justice Powell’s opinion shifted the focus of affirmative action admissions policies from remedial and compensatory programs aimed at ameliorating present effects of past discrimination to a more neutrally principled concept. Powell re-envisioned the race-based admissions programs as offering enhanced learning experiences for all.⁷² The original intent of affirmative action admissions programs, to provide opportunities for those who suffered from educational discrimination in the past,⁷³ meant favoring one group over the other.⁷⁴ But defining the advantage of race-preference admissions in terms of a benefit to all, the programs became more palatable to the majority, who otherwise perceived themselves to be hurt by a program that benefited other groups at their expense.⁷⁵

Many viewed Justice Powell’s shift of affirmative action admissions policies from a concept designed to eradicate present effects of past discrimination to one that benefits both whites and blacks equally as the genesis of “interest convergence,” a theory proposed by Derrick Bell that

67. *Id.* at 311–13. Justice Powell noted that educational excellence is widely believed to be promoted by a diverse student body. *Id.* at 313.

68. *Id.* at 325 (Brennan, J., concurring).

69. *Id.* at 324 (Brennan, J., concurring).

70. *Id.* at 300.

71. *Id.* at 313.

72. *See generally, id.* at 300–25.

73. *See supra* Part I.A (outlining the development of affirmative action admissions programs).

74. *Bakke*, 438 U.S. at 297.

75. *Id.* at 300–25.

white people would support racial justice only to the extent that it benefits them.⁷⁶ Justice Powell's advocacy of viewpoint diversity reframed race-preference admissions policies in terms of the benefits that majority students would reap from a school's assurance that otherwise underrepresented minorities would be present in the classroom. His interest-convergence logic seemed to make the notion of race-preference admissions policies seemingly more palatable to majority applicants, many of whom could view race-preference admissions policies as being valuable to them.⁷⁷

Post-*Bakke*, the Court embraced Justice Powell's interest convergence theory of race-preference admissions policies. Consequently, the Court evaluated the race-preference challenges in terms of the policies' benefit to majority and minority applicants. This newfound track veered the Court from the original course set by President Johnson to use race-preference policies as a means of remedying the present effects of past discrimination.⁷⁸ Thus from *Bakke* forward, colleges and universities could consider race a "plus" if, in so doing, they created what Jeremiah Chin termed a moral "mix tape" for the classroom.⁷⁹ In other words, through careful selection of the voices that students heard in the classroom, an educational experience could be created that is greater than the sum of each of its individual parts.⁸⁰

The Court heard its next affirmative action admissions policy cases twenty-five years after deciding *Bakke*. In the interim, several circuit courts took up challenges to affirmative action admission policies,⁸¹ and the Court also defined the constitutional parameters of affirmative action cases in the workplace.⁸² But the lower court cases were not binding

76. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

77. See, e.g., *id.* at 532–33 ("Many white parents recognize a value in integrated schooling for their children [such as in magnet schools] but they quite properly view integration as merely one component of an effective education.").

78. See, e.g., Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965).

79. Jeremiah Chin, Comment, *What a Load of Hope: The Post-Racial Mixtape*, 48 CAL. W. L. REV. 369, 369–70 (2012) (discussing post-racial rhetoric—in other words, a "mixtape"—and the lack of discourse on the persistence of racism, even decades after the Civil Rights Movement).

80. *Id.* at 396.

81. *Smith v. Univ. of Wash. Law. Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (holding that Justice Powell's opinion in *Bakke* authorizes a "properly designed and operated race-conscious admission program"); *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (concluding that Justice Powell's opinion in *Bakke* was not binding on the Fifth Circuit); *Johnson v. Bd. of Regents of Univ. of Ga.*, 106 F. Supp. 2d 1362, 1368 (S.D. Ga. 2000) (holding that Justice Powell's opinion in *Bakke* regarding a compelling governmental interest in student diversity "is not binding..although ...it is persuasive).

82. See e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (reviewing

nationwide, and the affirmative action challenges in the commercial context, other than affirming the rational test, were distinguishable.⁸³ Consequently, the Court's opinion in the twin cases of *Grutter v. Bollinger* and *Gratz v. Bollinger*⁸⁴ were the first post-*Bakke* cases to further shape race-preference admissions policies.

C. Post-Bakke Decisions

In *Grutter* and *Gratz*, the Court considered the constitutionality of affirmative action admissions programs at the University of Michigan School of Law ("Law School")⁸⁵ and the University of Michigan College of Literature, Science, and Arts ("LSA"),⁸⁶ respectively. The Supreme Court heard the cases separately and issued opinions to the two cases on the same day.⁸⁷

LSA based its admissions policy on a 150-point scale.⁸⁸ The admissions office assigned points based on several factors including high school grade point average, standardized test scores, high school curriculum, and underrepresented racial or ethnic background.⁸⁹ Students from an underrepresented racial or ethnic background were automatically assigned twenty points,⁹⁰ a potentially significant advantage over students not from

federal agency contract clause providing financial incentive to hire certified disadvantaged businesses); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (reviewing city policy requiring that at least thirty percent of any city construction contract be subcontracted to "Minority Business Enterprises"); *United States v. Paradise*, 480 U.S. 149 (1987) (reviewing district court order requiring that fifty percent of promotions to certain ranks within the Alabama Department of Public Safety be given to qualified black candidates); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (reviewing provision in teacher contract which resulted in non-minority teachers with greater seniority being laid off before minority teachers with lesser seniority); *see generally*, Leslie Yalof Garfield, *Adding Colors to the Chameleon: Why the Supreme Court Should Adopt a Compelling Governmental Interest Test for Race-Preference Student Assignment Plans*, 56 U. Kan. L. Rev 277 (2008).

83. *See supra* note 81.

84. 539 U.S. 244 (2003).

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

86. *Gratz*, 539 U.S. 244.

87. *Grutter* and *Gratz* were both decided on June 23, 2003.

88. *Id.* at 255.

89. *Id.*

90. *Id.* LSA's admissions point system also assigned points based on additional factors, including alumni relationship, personal essay, and demonstrated leadership qualities. *Id.* The twenty points automatically assigned to students from an underrepresented racial or ethnic background could have given those applicants a significant advantage because applicants with a score of over 100 automatically received admission to LSA. *Id.* at 277 (O'Connor, J., concurring).

Plaintiffs in *Gratz* challenged LSA's admissions policy under Sections 1981, 1983, and 2000d of the Civil Rights Act, 42 U.S.C. §§ 1981, 1983, 2000d (2000), and the Equal Protection Clause of the Fourteenth Amendment, alleging that LSA improperly used race as a factor in determining admissions. *Gratz*, 539 U.S. at 252 (majority opinion) (citation omitted). Under one variation of the admissions policy, the school used a

an underrepresented racial or ethnic background.

The Law School admissions program called for the enrollment of a “critical mass of underrepresented minority students” as a means of creating a diverse student body.⁹¹ Under the written policy, those reviewing applications for admission were encouraged to consider factors including recommendations, quality of the undergraduate institution, essays, course selection, and whether the applicant had a perspective or experience that would contribute to a diverse student body.⁹²

As per *Bakke* and the ensuing affirmative action cases that the Court considered in the context of the workplace,⁹³ the Supreme Court reviewed the Law School and LSA policies, respectively, under the strict scrutiny test because the plaintiffs in each case challenged the affirmative action admissions policies as violating of the Equal Protection Clause.⁹⁴ In both *Grutter* and *Gratz*, the Court swiftly accepted as binding Justice Powell’s majority opinion in *Bakke*, finding a compelling governmental interest in achieving a diverse entering class.⁹⁵ The Court reached different conclusions as to whether the admissions policies were narrowly tailored, choosing to uphold the Law School admissions policy and to invalidate the LSA policy.⁹⁶ Read together, the cases suggest that institutions of higher education remain free to consider race as one factor among several factors in the admissions policy so long as the consideration is individualized.⁹⁷

A majority of the Court struck down the LSA program, finding that it was overly broad.⁹⁸ According to Chief Justice Rehnquist, who wrote the majority opinion in *Gratz*, the LSA point-allocation policy, which awarded twenty points to underrepresented minorities, “ensures that the diversity contributions of applicants cannot be individually assessed” and was therefore unconstitutional.⁹⁹

150-point scale to rate applicants. *Id.* at 294. Applicants were assigned points based on race. *Id.* at 294–95. The district court upheld the program, and plaintiffs appealed to the Supreme Court. *Id.* at 258–60. See also Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631, 655–56 (2005) (discussing the LSA policy).

91. *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003).

92. *Id.* at 315. The district court struck down the Law School policy finding that it did not survive the strict scrutiny test. The Sixth Circuit reversed. *Id.* at 321.

93. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995) (reviewing allegations of workplace discrimination allocating federal government contracts); *United States v. Paradise*, 480 U.S. 149, 163 (1987) (reviewing allegations of workplace discrimination of government workers).

94. *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 326.

95. *Gratz*, 539 U.S. at 270–71; *Grutter*, 539 U.S. at 325.

96. *Gratz*, 539 U.S. at 270–71; *Grutter*, 539 U.S. at 325.

97. *Gratz*, 539 U.S. at 269; *Grutter*, 539 U.S. at 309–10.

98. *Gratz*, 539 U.S. at 269.

99. *Id.* at 273 n.20 (citing *Id.* at 279 (O’Connor, J., concurring)).

The Court upheld the law school program challenged in *Grutter*.¹⁰⁰ According to Justice O'Connor, who wrote the majority opinion, when viewed in the context of education,¹⁰¹ the use of race-preference policies is not objectionable so long as these policies are flexible in a non-mechanical way.¹⁰² Unlike LSA's policy, which assigned points to an applicant based on membership in a minority class, the Law School's policy required admissions officials to evaluate each applicant based on all of the information available in the file, including a personal statement, letters of recommendation, . . . an essay describing [how] the applicant will contribute to the life and diversity of the Law School. . . ., and the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score¹⁰³

The policy was constitutionally permissible because it did not "define diversity 'solely in terms of racial and ethnic status'" and did not "restrict the types of diversity contributions eligible for 'substantial weight' in the admissions process."¹⁰⁴ The Law School's policy did, however, "reaffirm the Law School's . . . commitment" to diversity, with "'special reference to the inclusion'" of African-American, Hispanic, and Native-American students, who otherwise "'might not be represented in [the] student body in meaningful numbers.'" By enrolling a 'critical mass' of [underrepresented] minority students, the [policy sought] to 'ensur[e] [the students'] ability to . . . contribut[e]" to the Law School's character and to the legal profession.¹⁰⁵

Justice O'Connor ended her opinion with an expressed hope of eventual termination of this and all other race-based admissions policies.¹⁰⁶

Grutter remains the most recent case to consider race-based admissions plans at the post-secondary school level. Following *Grutter* and *Gratz*, institutions like the University of Texas devised programs that were holistic in scope and that considered race as a factor among many when assembling an entering class.¹⁰⁷ *Grutter* seemed to grant the status of race a kind of

100. *Grutter*, 539 U.S. at 310.

101. *Id.* at 327 (holding that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause" because "[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context.").

102. *Id.*, at 333–34.

103. *Id.* at 315.

104. *Id.* at 316.

105. *Id.* (citations omitted).

106. *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.").

107. See *infra* notes 133–48 and accompanying text. The University of Texas adopted its plan before *Grutter*, but expanded its program to include a holistic review for those denied admission under the Top Ten Percent plan. See *infra* notes 119–20.

benefit status, similar to that announced by Justice Powell in the *Bakke* decision, at least to the extent that race was relevant to a particular institution's goal of accepting a critical mass of diverse voices. *Grutter* left in its wake a clear signal to colleges and universities that Justice Powell's understanding of the permissibility of race-sensitive admissions policies as part of an effort to obtain a diverse student body was still the law.

Following *Grutter*, the Court took up one other education-rooted affirmative action case. *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁰⁸ concerned two cases from different K-12 school districts that challenged school districting plans. In one case, parents from Jefferson County, Kentucky, challenged a school assignment plan that the School Board adopted as a means to maintain racial equality in the school in response to a previously issued desegregation order.¹⁰⁹ In Seattle, Washington, parents challenged a plan that used race as one of four tiebreakers to decide who can attend an oversubscribed district school.¹¹⁰ In both instances, the school plans were designed to ensure racial diversity and equal access to the county's best colleges and universities. The Court heard these cases together.

A narrow majority of the Court voted to invalidate each plan.¹¹¹ Chief Justice Roberts delivered the majority opinion with respect to several of the issues presented by the case and a plurality opinion with respect to others of those issues.¹¹² Justice Kennedy was the swing vote, concurring with the judgment but agreeing with only part of the plurality's reasoning.¹¹³ Justices Breyer, Ginsburg, Stevens, and Souter dissented.¹¹⁴ The entire Court was in agreement that any educational-assignment program that uses race must be narrowly tailored to meet a compelling governmental interest.¹¹⁵ The majority view distinguished *Bakke*, *Grutter*, and *Gratz*.¹¹⁶ Justice Roberts acknowledged that what "was upheld in *Grutter* was consideration of 'a far broader array of qualifications and characteristics of

108. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

109. *Id.* at 716–18 (summarizing the facts of the Kentucky case) (citations omitted).

110. *Id.* at 711–15 (summarizing the facts of the Seattle case) (citations omitted).

111. *Id.* at 707 (5–4 decision) (Justices Scalia, Kennedy, Thomas, and Alito joined Chief Justice Roberts in Parts I, II, III–A, and III–C of the Court's opinion. Justices Scalia, Thomas, and Alito also joined the Chief Justice in Parts III–B and IV.).

112. *Id.*

113. *See id.* at 782–98 (Kennedy, J. concurring in part and concurring in the judgment).

114. *See id.* at 798–803 (Stevens, J., dissenting); *Id.* at 803–76 (Breyer, J., dissenting) (joined by Justices Ginsberg, Stevens, and Souter).

115. *Id.* at 720 (citation omitted) (plurality opinion); *Id.* at 783 (citation omitted) (Kennedy, J., concurring in part and concurring in the judgment); *Id.* at 803 (Breyer, J., dissenting).

116. *Id.* at 722–25 (plurality opinion).

which racial or ethnic origin is but a single, though important, element.”¹¹⁷ Justices Alito, Scalia, and Thomas all agreed with Justice Robert’s conclusion that the only time it would find the use of race justified would be when the governmental entities defending the policy could establish proof of *de jure* segregation.¹¹⁸ Given the lack of any such proof, five Justices concluded that the use of the racial classifications was not justified.¹¹⁹

Justice Kennedy joined the plurality’s judgment but sharply disagreed with its conclusion that such policies could never pass muster or could do so under only very limited circumstances.¹²⁰ His concurrence, therefore, was the fifth vote, the other four being Justices Breyer, Ginsberg, Stevens, and Souter, for holding that instances in which race-preference school-assignment plans were constitutionally permissible absent *de jure* segregation.¹²¹ Justice Kennedy argued that viewpoint diversity and greater assurance that institutions not revert to educational segregation are compelling governmental interest.¹²²

The *Parents Involved* majority agreed with Justice O’Connor that context matters when considering equal protection challenges.¹²³ Within the context of race-preference admissions policies, the Court will demand strict scrutiny review.¹²⁴ Thus an admissions policy will be upheld if it is narrowly tailored to meet the compelling governmental interest in assuring viewpoint diversity.¹²⁵ It is this standard against which the Supreme Court will evaluate *Fisher v. Texas*.¹²⁶

II. FISHER V. TEXAS

On April 7, 2008, attorneys filed suit on behalf of Abigail Fisher and Rachel Michalewicz against the University of Texas for violation of the Equal Protection Clause of the Fourteenth Amendment.¹²⁷ Edward Blum, the sole proprietor of the Washington, D.C., legal defense fund Project for

117. *Id.* at 722 (quoting *Grutter*, 539 U.S. at 325).

118. *Id.* at 749 (Roberts, C.J., plurality opinion).

119. *Id.* at 750 (finding no danger of re-segregation in either the Louisville or Seattle case).

120. *Id.* at 783, 787–88.

121. *Id.* at 820–21 (Breyer, J., dissenting) (“A court finding of *de jure* segregation cannot be the crucial variable.”).

122. *Id.* at 783, 787–88.

123. *Id.* at 725 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003)).

124. *Id.* at 720 (citation omitted).

125. *Id.* at 705.

126. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

127. Second Amended Complaint for Declaratory, Injunctive, and Other Relief at 1–2, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS).

Fair Representation, motivated the case.¹²⁸ Blum put lawyers in touch with Fisher as a means to challenge, and hopefully end, what he calls reverse discrimination.¹²⁹ His actions were somewhat successful in that he initiated a Supreme Court challenge to race-preference admissions policies.¹³⁰

Given the narrow ruling of *Grutter*, there seemed little reason for the Supreme Court to grant certiorari on *Fisher*, except for purposes of prohibiting any consideration of race in admissions decisions.¹³¹ However, an evaluation of decisions rendered by Justices currently sitting on the bench suggests that an insufficient number will vote to abolish race-preference admissions policies wholesale.¹³² In this section, I consider the legal landscape of the *Fisher* case and provide reasoned support for why the Court is unlikely to end affirmative action in higher education. Specifically, I first provide a narrative of the *Fisher* case to date, including a description of the UT policy and a brief discussion of both the district and the circuit court decisions. I then discuss arguments advanced in briefs submitted by opponents of affirmative action admission programs. Next, I consider opinions of various judges as they relate to the use of race in the admissions policy. Finally, I conclude with a prediction that the Court will uphold the compelling governmental interest in viewpoint diversity but will invalidate the UT policy on the grounds that it is not narrowly tailored to meet that need.

A. The University of Texas Race-Preference Admissions Policy

Following *Grutter* and *Gratz*, admissions officials at the University of Texas carefully constructed a race-based admissions plan that they believed was in compliance with Supreme Court precedent.¹³³ The UT application process is comprehensive and complicated. Applicants are initially divided into three pools: (1) Texas residents, (2) domestic non-Texas residents, and (3) international students.¹³⁴ Students compete for admission against others

128. Morgan Smith, *One Man Standing Against Race-Based Laws*, N.Y. TIMES, (Feb. 23, 2012), available at <http://www.nytimes.com/2012/02/24/us/edward-blum-and-the-project-on-fair-representation-head-to-the-supreme-court-to-fight-race-based-laws.html?pagewanted=all>.

129. *Id.* (With respect to Blum's involvement in the case, the *New York Times* noted that it "crown[ed] a two-decade-long devotion to disputing race-based laws.").

130. *Id.*

131. Robert Barnes, *Supreme Court Agrees to Reconsider Use of Race in College Admission Decisions*, WASH. POST (Feb. 21, 2012), available at http://www.washingtonpost.com/supreme-court-agrees-to-reconsider-use-of-race-in-college-admission-decisions/2010/07/28/gIQA2viJRR_story.html.

132. See *infra* Part II.D (evaluating the probable outcome of *Fisher*, based on Supreme Court Justices' decisions in similar cases on race-preference admissions policies).

133. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 218 (5th Cir. 2011), cert. granted, 132 U.S. 1536 (2012).

134. *Id.*

in their respective pool.¹³⁵ Admission for students in the second and third groups is based solely on academic and personal achievement.¹³⁶ The UT Office of Admissions devised a more comprehensive and complicated admissions process for in-state residents.¹³⁷ The first prong of the admissions process is known as the Top Ten Percent Law, which the Texas legislature adopted in 1997.¹³⁸ According to the Top Ten Percent Law, Texas resident-applicants who are in the top ten percent of their high school class are guaranteed admission to UT.¹³⁹ The Top Ten Percent prong of the two-tiered program yields the “vast majority” of admitted students.¹⁴⁰ This prong of the admissions program gives no consideration to race, ethnicity, income level, or life experience.¹⁴¹

Because the Top Ten Percent Law does not yield an entire class, the admissions committee considers the remaining Texas-resident pool based on academic and personal achievement indices.¹⁴² The Academic Index is a “mechanical formula that predicts freshman GPA using standardized test scores and high school grade point rank.”¹⁴³ If students are further considered, the admissions officer looks at the applicant’s Personal Achievement index, which is a number based on a student’s personal achievement score and an evaluation of each of a student’s two personal essays.¹⁴⁴ The personal achievement score, which is given slightly greater weight than the student essays, “is designed to recognize qualified students whose merit as applicants was not adequately reflected by their Academic Index.”¹⁴⁵ The admissions staff assigns the score by considering a host of factors, including demonstrated leadership, awards and honors, work experience, a “special circumstances” element that may reflect an applicant’s socioeconomic status or his or her high school, and the applicant’s race.¹⁴⁶ None of the personal achievement criteria, including race, are considered in a vacuum or are given extra attention; rather, they are part of the review that admissions readers conduct for each

135. *Id.* at 227.

136. *Id.* (footnote omitted).

137. *See id.* (describing admissions process for Texas applicants).

138. *Id.* at 224.

139. Tamar Lewin, *At the University of Texas, Admissions as a Mystery*, N.Y. TIMES (Apr. 1, 2012), available at <http://www.nytimes.com/2012/04/02/education/university-of-texas-mysterious-admissions-process.html>.

140. *Fisher*, 631 F.3d at 227 (eighty-one percent of UT’s 2008 entering class was admitted under the Top Ten Percent Law).

141. *Id.* at 224 (a Texas applicant’s ranking in high school is the sole determinative factor for admission to any Texas state university, under the Top Ten Percent Law).

142. *Id.* at 227.

143. *Id.* (footnote omitted).

144. *Id.* at 227–28 (footnote omitted).

145. *Id.* at 228.

146. *Id.* (footnote omitted).

application.¹⁴⁷ Students are admitted or further considered based on their academic index.¹⁴⁸

B. The Lower Court Decisions

Abigail Fisher and Rachel Michalewicz applied to UT and in the winter of 2008 were denied admission to its fall entering class.¹⁴⁹ In April of that same year, Fisher and Michalewicz brought suit, requesting a preliminary injunction that would require UT to reevaluate their applications without considering race as a factor.¹⁵⁰ The plaintiffs alleged that the UT admissions policies violated their right to Equal Protection under the Fourteenth Amendment and 42 U.S.C. Sections 1981, 1983, and 2000(d).¹⁵¹

The Fifth Circuit considered the case against the backdrop of not only *Grutter* and *Gratz* but also *Hopwood v. Texas*,¹⁵² a 1996 federal challenge to the University of Texas Law School's race-preference program.¹⁵³ In 1993, Cheryl Hopwood, a white single mother with a handicapped child applied to the University of Texas School of Law.¹⁵⁴ Hopwood was denied admission while the school admitted several black and Hispanic students with lower Law School Admissions Test (LSAT) scores and GPAs than Hopwood presented.¹⁵⁵ Hopwood brought an action in district court challenging the Texas plan under the Equal Protection Clause.¹⁵⁶ Judge Sam Sparks heard the case at the district level.¹⁵⁷ He concluded that based on the *Bakke* precedent, the UT law school could continue to consider race a "plus" in the admissions process.¹⁵⁸ Hopwood appealed.¹⁵⁹ Judge Smith writing for the Fifth Circuit reversed this decision.¹⁶⁰ The court concluded that Justice Powell's opinion in *Bakke* spoke for himself alone on the

147. *Id.* (footnote omitted).

148. *Id.* at 229 (footnote omitted) ("Without a sufficiently high [Academic Index] and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.").

149. *Id.* at 217.

150. Complaint for Declaratory, Injunctive, and Other Relief at 112, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS).

151. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 591 (W.D. Tex. 2009) [hereinafter *Fisher I*], *aff'd* 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

152. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) [hereinafter *Hopwood II*].

153. *Hopwood v. Texas*, 861 F. Supp. 551, 569 (W.D. Tex. 1994) [hereinafter *Hopwood I*], *rev'd*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

154. *Id.* at 564.

155. *Id.* at 580.

156. *Id.* at 553.

157. *Id.*

158. *Id.* at 577.

159. *Hopwood II*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

160. *Id.* at 935.

diversity issue and, as a result, was not binding on the court.¹⁶¹ Following the decision, UT could no longer consider race in the admissions process, and the Texas legislature adopted the Top Ten Percent Law.¹⁶² UT appealed to the Supreme Court, which denied certiorari.¹⁶³ Thus, the somewhat controversial *Hopwood* decision informed race-preference admissions policies in the Fifth Circuit until the Court ruled in *Grutter* that race could be a factor in the admissions process.¹⁶⁴ It was *Grutter*, therefore, and not *Hopwood*, that served as precedent for the district and circuit courts.

In *Fisher*, Judge Sparks once again was charged with hearing and ultimately passing judgment on the constitutionality of the UT race-preference program.¹⁶⁵ As in *Hopwood*, Judge Sparks favored the university's policy.¹⁶⁶ He denied the plaintiffs' motion for a preliminary injunction and concluded that given the quality of their applications, they could not demonstrate a likelihood of success on the merits.¹⁶⁷ Furthermore, the court found that the plaintiffs failed to establish a substantial likelihood that UT's use of race in undergraduate admissions unlawfully discriminated in violation of the Fourteenth Amendment of the U.S. Constitution.¹⁶⁸

Following the court's denial of the motion for preliminary injunction, the parties agreed to a bifurcated trial, allowing the court to separately consider the issues of liability and remedy.¹⁶⁹ As to liability, Judge Sparks measured the UT program against the Supreme Court's strict scrutiny standard.¹⁷⁰ Judge Sparks found that the UT decision to consider race as just one factor in the admissions process was supported by the compelling governmental interest in the *Grutter* Court's sanctioned goal of achieving a critical mass of minority students.¹⁷¹ In addition, the manner in which UT considered race was narrowly tailored to meet that compelling

161. *Id.* at 944.

162. *Tribpedia: Top Ten Percent Rule*, TEX. TRIB., available at <http://www.texastribune.org/texas-education/top-ten-percent-rule/about/> (last visited Nov. 26, 2012).

163. *Hopwood v. Texas*, 518 U.S. 1033 (1996) [hereinafter *Hopwood III*] (denying certiorari).

164. *Grutter v. Bollinger*, 539 U.S. 306, 315–17 (2003) (citing *Bakke*, 438 U.S. at 317 (1978) (Powell, J., concurring)).

165. *Fisher I*, 645 F. Supp. 2d 587, 589 (W.D. Tex. 2009), *aff'd* 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

166. *Fisher I*, 645 F. Supp. 2d 587.

167. *Id.*

168. *Id.* at 613.

169. *Id.* at 590.

170. *Id.* at 599–600.

171. *Id.* at 604.

governmental interest because race was only one of seven “special circumstances” that, together with the personal essays, made up an applicant’s personal index.¹⁷² The Court denied the plaintiffs’ motion for summary judgment.¹⁷³ The plaintiffs appealed to the Fifth Circuit.¹⁷⁴ Judge Higginbotham delivered the opinion of the Court.¹⁷⁵

Judge Higginbotham set out the precedent on which the Court would rely.¹⁷⁶ Citing *Bakke*, *Grutter*, and *Gratz* as controlling, he wrote that the Fifth Circuit would apply the Supreme Court’s mandate of strict scrutiny.¹⁷⁷ Thus, it would only uphold the UT policy if it found that it supported a compelling governmental interest and that the program was narrowly tailored to meet that interest.¹⁷⁸ Reiterating the lessons learned from *Grutter* and *Gratz*, Judge Higginbotham wrote: “A race-conscious admissions program is constitutional only if it holistic, flexible and individualized.”¹⁷⁹

The opinion overturned *Hopwood* to the extent that it considered Justice Powell’s separate opinion in *Bakke* binding.¹⁸⁰ Citing *Bakke*, Judge Higginbotham held that diversity in education is a compelling interest because it is essential to the quality of higher education that a university be able to pursue the atmosphere of speculation, excitement, and creation that is promoted by a diverse student body, he said.¹⁸¹ Student body diversity better prepares students as professionals.¹⁸² The opinion, however, seemed to go beyond adopting Justice Powell’s holding that there is a compelling governmental interest in viewpoint diversity; the court held that “a university’s educational judgment in developing diversity policies is due deference.”¹⁸³ The court seemed to reduce the burden of showing a compelling governmental interest with this deference to institutional judgment.

On the second prong of the compelling governmental interest test, the court held that narrow tailoring requires that the use of any racial classifications fit a compelling goal so closely as to remove the possibility

172. *Id.* at 608.

173. *Id.* at 614. Note that by this point the second plaintiff dropped from the suit.

174. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011) [hereinafter *Fisher II*], *cert. granted*, 132 S.Ct. 1536 (2012).

175. *Id.*

176. *Id.*

177. *Id.* at 231.

178. *Id.* at 220.

179. *Id.* at 221.

180. *Id.*

181. *Id.* at 230–31.

182. *See generally id.* at 232–35.

183. *Id.* at 231 (citing *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)) (“The Law School’s educational judgment ... is one to which we defer Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”).

that the motive for classification was illegitimate racial stereotype.¹⁸⁴ A university admissions program is narrowly tailored only if it allows for individualized consideration of applicants of all races and does not define an applicant by race; there can be no quota system or fixed number of bonus points allotted for race.¹⁸⁵

The court found that the UT program was narrowly tailored because race was only one of the elements combined in its Personal Achievement Index score.¹⁸⁶ Moreover, the committee never considered race, or any other personal variable, individually.¹⁸⁷ The court also weighed the program against the twenty-five-year sunset hope that Justice O'Connor expressed in *Grutter* and found that, although it does not have an end point, the UT practice of revisiting the need for its policy annually satisfied the court.¹⁸⁸

The real issue for the appellants, Fisher and Michalewicz, however, was not whether the UT race-conscious program was constitutionally acceptable, but rather, whether UT the second tier of its admissions program at all.¹⁸⁹ The appellants maintained that the UT Top Ten Percent Law was sufficient to achieve a critical mass of diverse students on UT's campus.¹⁹⁰ The thrust of their argument was that given the UT application of the Top Ten Percent Law, the school was overextending its right to use racial preference by double-dipping into a second tier of applicants, whose race or ethnicity could be a considered during UT's admissions process.¹⁹¹

The Court rejected the appellants' argument. Citing a 2002 UT study that found that 79% of the University's 5631 classes had zero or one African-American students, and 30% had zero or one Hispanic students, the Fifth Circuit concluded that "the Top Ten Percent Law is plainly not the sort of workable race-neutral alternative that would be a constitutionally mandated substitute for race-conscious university admissions policies."¹⁹² The court acknowledged that the Top Ten Percent Law contributed to an increase in overall minority enrollment; however, the court found that "those minority students remain[ed] clustered in certain programs, severely limiting the beneficial effects of educational diversity."¹⁹³ The court

184. *Id.*

185. *Id.* at 221.

186. *Id.* at 223–24.

187. *Id.* at 224.

188. *Id.* at 222.

189. *Fisher II*, 645 F. Supp. 2d 587, 607. (W.D.Tex. 2009).

190. *Id.* at 259.

191. *See*, Defendants' Reply Memorandum in Support of Cross-Motion for Summary Judgment at 4-5, *Fisher v. Univ. of Tex. at Austin* (W.D. Tex. 2009) (No. 1:08-CV-00263-SS), 2009 WL 5055457. "The core dispute ... is Plaintiff's claim that UT Austin does not need [the second tier of its admissions] policy to achieve diversity [because] the Top 10% law already achieves a critical mass of underrepresented minorities." *Id.* at 5.

192. *Fisher II*, 631 F.3d at 2.42.

193. *Id.* at 253–254.

concluded that with the Top Ten Percent Law and the *Grutter*-like plan, UT effectively ensured the type of educational diversity that was constitutionally permissible and compelling.¹⁹⁴ For this reason, the court upheld the UT policy and affirmed the lower court's decision.¹⁹⁵

In a special concurrence, Judge Garza called the decision “a faithful, if unfortunate, application” of *Grutter*, which he opined was a “digression in the course of constitutional law.”¹⁹⁶ Judge Garza took issue with what he described as the *Grutter* Court's abandonment of strict scrutiny.¹⁹⁷ Consequently, he wrote that he “await[s] the Court's return to constitutional . . . principles.”¹⁹⁸

The decision was contentious in the Fifth Circuit, in part because of Judge Higginbotham's conclusion that *Bakke* was binding on it.¹⁹⁹ Following the decision, one member of the court requested that the court poll a majority of the bench.²⁰⁰ “[A] majority of the judges who [were] in regular active service and not disqualified [from the case] [for] having voted in favor” of the decision denied the petition for a rehearing *en banc*.²⁰¹ In February 2012, the Supreme Court granted certiorari.²⁰²

C. Briefs in Support of Fisher

When the Supreme Court granted certiorari on *Fisher*, did it do so for the purpose of banning the future use of race in any post-secondary educational admissions process? A review of Fisher's own brief and those of supporting *amici* indicates more concern with the consideration of race generally than with the UT program. Those briefs seem to focus more on policy reasons as support for ending affirmative action in higher education.²⁰³

Three themes emerge in the briefs supporting Fisher. First, *Grutter* was a very narrow exception to an otherwise comprehensive ban on race

194. *Id.* at 254.

195. *Id.* at 247–254.

196. *Id.* at 247 (Garza, J., concurring).

197. *Id.* at 247–264 (Garza, J., concurring).

198. *Id.* at 266–67.

199. *Id.* at 238.

200. *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 303 (5th Cir. 2011) [hereinafter *Fisher III*] (denying rehearing *en banc*).

201. *Id.*

202. *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (granting certiorari).

203. *See, e.g.*, Brief for Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759; Brief of Amici Curiae Members of the United States Commission on Civil Rights in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1950270; Brief of Amici Curiae of Pacific Legal Foundation, Center for Equal Opportunity, American Civil Rights Institute, National Association of Scholars and Project 21 in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1961249.

discriminations and that the UT policy goes beyond the limits articulated in *Grutter*.²⁰⁴ Second, race-preference programs yield an “academic mismatch” that actually harms the intended beneficiaries more than they help them.²⁰⁵ Finally, institutions, in part guided by the courts, have lost sight of the initial intent of affirmative action policies—to provide remedial benefits to those who felt the effects of educational discrimination—and by basing their programs on race and ethnicity, colleges and universities now provide programs that often benefit individuals who no longer suffer any educational harm.²⁰⁶

Lawyers representing Fisher and Michalewicz, petitioners to the Supreme Court, and those who favor their position posit two alternative legal theories that support their cause. The narrow argument is that the Fifth Circuit misread *Grutter* and substituted due deference for compelling governmental interest. The broader argument is that the Court should, through *Fisher*, avail itself of the opportunity to reverse *Grutter* to the extent that it contravenes equal protection laws.²⁰⁷

The lower court ruled incorrectly, the argument goes, because it unconstitutionally expanded the school’s role in determining when the use of race is permissible in admitting students to a public university. The law is well settled that race-preference programs must be subject to the most exacting scrutiny.²⁰⁸ Relying heavily on challenges to affirmative action programs in the workplace, the petitioners cited the Court’s commitment to ensuring that the use of race is for a legitimate purpose.²⁰⁹ Thus, “more

204. See, e.g., Brief for Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759; Brief of Amici Curiae Members of the United States Commission on Civil Rights in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1950270; Brief of Amici Curiae of Pacific Legal Foundation, Center for Equal Opportunity, American Civil Rights Institute, National Association of Scholars and Project 21 in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1961249.

205. See, e.g., Brief of Amici Curiae for the Asian American Legal Foundation and the Judicial Education Project as Amici Curiae in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1961250; Brief of Amici Curiae for Richard Sender and Stuart Taylor in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2011 WL 5015112.

206. See, e.g., Brief for Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S.Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759; Brief of Amici Curiae California Association of Scholars, Connecticut Association of Scholars, Center for Constitutional Jurisprudence, Reason Foundation, Individual Rights Foundation, and American Civil Rights Foundation in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S.Ct. 1536 (2012) (No. 11-345), 2012 WL 1950267; Brief of Amici Curiae of Mountain States Legal Foundation in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1950269.

207. See, e.g., Brief for Petitioner at 53, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759.

208. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290–91 (1978).

209. See, e.g., Brief for Petitioner at 33, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759.

than good motives should be required when the government seeks to allocate its resources by way of an explicit racial classification.”²¹⁰ The *Fisher* court’s finding that deference is due to the “educational judgment [of the university] in developing diversity policies” abrogates the strict scrutiny that an equal protection challenge demands.²¹¹ Extending this argument further, the petitioners and others argue that, at best, *Grutter* is the limit of permissible race preference and *Fisher* pushed the limit beyond *Grutter*, which was intended as a narrow exception to the ban on race discrimination.²¹²

The broader argument for abolishing affirmative action favors the Court using *Fisher* as a means to reconsider *Grutter*. The petitioner’s brief fails to put forth a separate argument to support its assertion, writing only that “*Grutter* should be clarified or reconsidered to restore the integrity of the Fourteenth Amendment’s guarantee of equal protection.”²¹³

On the policy side, several amicus briefs argue that race-preference affirmative action programs are detrimental to the population that the programs seek to benefit. The most dominant theme in this argument is the idea of academic mismatch, highlighted most clearly in the brief submitted by Stuart Taylor and Richard Sander, in support of the petitioners’ argument.²¹⁴ According to the academic mismatch theory, granting some students an advantage over others in the admission process because of their race results in admitting them to colleges and universities for which they are not academically prepared.²¹⁵ Consequently, those students do not perform as well in class as regularly admitted students do, resulting in a less rigorous course load and ultimately to an inferior quality of work as compared to those admitted with higher test scores.²¹⁶ In its brief, the

210. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (quoting *Drew S. Days, III, Fullilove*, 96 YALE L.J. 453, 485 (1987)).

211. *Fisher II*, 631 F.3d at 231.

212. See e.g., Brief for Petitioner at 52, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11–345), 2012 WL 1882759.

213. Petition for a Writ of Certiorari at 35, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345) 2011 WL 4352286 (citation omitted).

214. See generally Brief of Amici Curiae for Richard Sander and Stuart Taylor in Support of Petitioner, *supra* note 133, at 21. The report was based in large part on Sander’s work on academic mismatch in the law school settings. In elite law schools, 51.6% of African-American law students had first year GPAs in the bottom 10% of their class as opposed to 5.6% of white students. Sander found that these results were almost entirely because of affirmative action. If African-American students with the same credentials were attending the mid-tier institutions, instead of the elite ones with affirmative action policies, they would be doing well. Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 427 (2004).

215. See generally Brief of Amici Curiae for Richard Sander and Stuart Taylor in Support of Petitioner, *supra* note 214 at 6. See also Sander, *supra* note 214 (analyzing affirmative action in law school context).

216. See generally Brief of Amici Curiae for Richard Sander and Stuart Taylor in Support of Petitioner, *supra* note 214, at 6.

United States Commission on Civil Rights, an independent commission of the federal government that is said by some to have a conservative bias, argued that the lower grades resulting from academic mismatch leads to lower self-confidence and is therefore contrary to the best interests of minority students.²¹⁷

Almost every brief submitted in support of the academic mismatch theory cited statistics to support their argument. Most common among the briefs were the findings of a University of California study completed after implementation of Proposition 209, in 1996, the state initiative that prohibited state government institutions from considering, race, sex, or ethnicity in public education (also in employment and contracting).²¹⁸ The 2011 study considered African-American and Hispanic students enrolled in California state colleges and universities.²¹⁹ At that time, admissions offers made by the University of California at Berkeley (Berkeley) to African-Americans, Hispanics, and Native Americans went from 23.1% to 10.4%.²²⁰ Instead, less highly ranked institutions, such as the University of California at San Diego (UCSD) and the University of California Los Angeles (UCLA) accepted the students who did not receive acceptance offers from Berkeley.²²¹ The study suggested that the academic performance of African-American students enrolled in these less elite institutions improved dramatically.²²² According to the study, which looked closely at graduation rates among the UC campuses, minority students were more likely to graduate from academic institutions that matched students based on their pre-college academic preparedness.²²³ These findings supported the authors' conclusion that, "Proposition 209 led to a more efficient [academic] sorting of minority students."²²⁴

The final argument in favor of abolishing affirmative action comes not

217. Brief of Amici Curiae of Gail Herot, Peter Kirsanow & Todd Gaziano, Members of the United States Commission on Civil Rights in Support of Petitioner, *supra* note 214, at 18-19.

218. *Cal Freshman Admissions for Fall 2008*, UNIV. OF CAL., <http://www.ucop.edu/news/factsheets/fall2008adm.html>; *see also* Peter Arcidiacono, Esteban Aucejo, Patrick Coate & V. Joseph Hotz, *The Effects of Proposition 209 on College Enrollment and Graduation Rates in California*, (March 2012) (unpublished article) (https://www.princeton.edu/economics/seminar-schedule-by-prog/applied_micros-s12/Prop_209_Paper_03-31-12.pdf). "With regard to the first one—did better student-campus matching on academic preparation account for the net effect Prop 209 had on minority graduation rates—the answer is: "yes somewhat." *Id.* at 31.

219. Arcidiacono, *supra* note 218 at 1.

220. *Final Summary of Freshman Applications, Admissions and Enrollment, Fall 1989-2011*, Univ. of Cal., 2, 5 (2012), http://www.ucop.edu/news/factsheets/2011/Flow_FROSH_CA_11.pdf

221. Arcidiacono, *supra* note 218.

222. *Id.* at 3.

²²³ *Id.* at 2, 33.

²²⁴ *Id.* at 3.

from the amicus brief but from Chief Justice Rehnquist's opinion in *Gratz*.²²⁵ Citing Justice Powell's *Bakke* opinion, Chief Justice Rehnquist explained the concern in focusing purely on race in the admissions process:

The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black child who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. . . . If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.²²⁶

Chief Justice Rehnquist used this hypothetical to illustrate the potential for race-preference policies to grant benefits to those who might not have suffered the ills of a poor education.²²⁷ Many anti-affirmative actionists subscribe to this theory and claim that in today's post-racist world, many black students can compete with their white counterparts, and consequently, they should not be at an advantage.²²⁸ Conversely, many white students suffer from poverty and poor access to education, yet under race-preference policies, they are not entitled to admissions preference.²²⁹ Indeed, Cheryl Hopwood was an out-of-work, single mother of three children, one of whom was severely handicapped at the time that Hopwood applied to UT's law school.²³⁰ Her status, opponents of race-preference admissions policies are quick to point out, did not qualify her for special consideration or any type of "plus."²³¹

Some argue that the past half-century of societal changes should also give pause to those who favor the original intent of race-preference policies.²³² The increase in biracial marriage had diluted the need to grant preferential treatment based on race.²³³ Interracial marriage, and consequently the number of interracial children, has risen dramatically over

225. *Gratz v. Bollinger*, 539 U.S. 244, 272–73 (2003) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978)).

226. *Id.* (citing *Bakke* 438 U.S. at 324).

227. *Id.* (citing *Bakke* 438 U.S. at 324).

228. *Gratz*, 539 U.S. at 273.

229. *Id.*

230. Leslie Y. Garfield, *Hopwood v. Texas: Strict in Theory or Fatal in Fact*, 34 SAN DIEGO L. REV. 497, 499 n.11 (1997).

231. *Id.* at 499, 505.

232. See, e.g., Kevin Brown, *Should Black Immigrants be Favored over Hispanics and Black Multiracials in the Admissions Process of Selective Higher Education Programs?*, 54 HOW. L. J. 255 (2011) (arguing that black immigrants should not be favored).

233. *Id.* at 272, n.79.

the past fifty years.²³⁴ The Court's decision striking down miscegenation statutes and a general increase in tolerance toward diversity have yielded a population that is quite different from the polarizing racial divide of the pre-Civil Rights Era.²³⁵

Much has been made of the interracial issue, most notably by Kevin Brown, who argues that a problem with race-based affirmative action comes with the way in which applicants self-identify.²³⁶ According to Brown, the policies help all people who identify themselves as black, while some of those people may be biracial, such as President Obama, and brought up by a white family.²³⁷ These students, therefore, have not faced the stereotypical discrimination of blacks in America.²³⁸ Others could be recent immigrants from areas of the Caribbean and have not come from families who experienced racial discrimination in that country.²³⁹ Biracial children and children of immigrants, it is argued, do not experience the disadvantages of poor black children who are the product of generations of poverty and discrimination stemming from slavery.²⁴⁰ Because of this difference, Brown maintains that race-based affirmative action does not focus on helping the most deserving.²⁴¹

Opponents of race-preference admissions policies have provided the Court with several arguments upon which the Court can rely. First, they urge the Court to adopt Petitioners' brief and to find that Judge Higginbotham improperly granted deference to UT.²⁴² Alternatively, they argue that the Court can adopt the argument of some amicus briefs that, based on statistical findings that race-preference admissions policies are detrimental to those whom they intend to benefit, there is no longer a compelling governmental interest in using race as one way to achieve viewpoint diversity.²⁴³ Finally, the Court can adopt the argument

234. *Id.* at 289.

235. Wendy Wang, *The Rise of Intermarriage*, PEW RESEARCH CENTER (Feb. 16, 2012), <http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/5/#chapter-4-public-attitudes-on-intermarriage>; Jeffrey Passel, Gretchen Livingston & D'Vera Cohn, *Explaining Why Minority Births Now Outnumber White Births*, PEW RESEARCH CENTER (May 17, 2012), <http://www.pewsocialtrends.org/2012/05/17/explaining-why-minority-births-now-outnumber-white-births/>.

236. *See* Brown, *supra* note 232, at 267.

237. *Id.* at 263, 267, n.412.

238. *Id.* at 267.

239. *Id.*

240. *Id.*

241. *Id.*

242. *See, e.g.*, Brief for Petitioner at 47, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1882759.242.

243. *See, e.g.*, Brief of Amici Curiae of Pacific Legal Foundation, Center for Equal Opportunity, American Civil Rights Institute, National Association of Scholars and Project 21 in Support of Petitioner at 7, *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (No. 11-345), 2012 WL 1961249.

advocated by other amicus briefs that race-preference policies are irrelevant because a population of today's post-Civil Rights Era blacks does not necessarily reflect the type of student contemplated when these policies were first put in place.²⁴⁴

D. Probable Outcome of Supreme Court Review

The lower court decisions in the *Fisher* case present the Court with several options: the Court can uphold UT's policy and reaffirm *Grutter*; alternatively, the Court can uphold the use of race-preference policies based on a reaffirmation of a compelling governmental interest in viewpoint diversity but strike down the UT policy for its failure to be narrowly tailored; the Court can dismiss the petition for certiorari in *Fisher* as improvidently granted; the Court can strike down Judge Higginbotham's findings and limit its decision to reversing and remanding the Fifth Circuit decision; the Court can use *Fisher* as an opportunity to reverse *Grutter* and rule that the use of race is prohibited in admissions considerations.

Given the Supreme Court's current composition, it is unlikely that the Court will uphold the lower court decision in *Fisher* and find the UT admissions policy constitutional. The bigger question is, in striking down *Fisher*, how far the Justices will go to dismantle the use of race-preference policies. Eight justices will hear the case because Justice Kagan has recused herself from the case.²⁴⁵ In light of these Justices' opinions and writings, the most likely scenario is that while the Court will strike down the UT policy, it will probably retain the idea that there is a compelling governmental interest in viewpoint diversity, thereby leaving colleges and universities free to enact future programs.

Justice Ginsburg will most certainly vote in favor of the UT policy. Ginsburg is the only member of the current Court who voted to uphold both LSA and the Law School's admissions policy when they were before the Court in 2003.²⁴⁶ In *Grutter*, Justice Ginsburg wrote that "some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated."²⁴⁷ Until then, according to Justice Ginsburg, the compelling governmental interest in ensuring access to education to all remains in full stead.²⁴⁸ The state of education has not changed significantly enough to encourage Justice

244. *Id.* at 24.

245. *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (*granting cert.*).

246. *See Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J. concurring), and *Gratz v. Bollinger*, 539 U.S. 244, 291 (2003) (Ginsburg, J. dissenting).

247. *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring).

248. *Id.* at 345.

Ginsburg to retreat from her stance,²⁴⁹ and for this reason, she is likely to approve the UT policy.

Justices Breyer and Kennedy have expressed a commitment to viewpoint diversity as a compelling governmental interest.²⁵⁰ Justice Breyer's separate opinion in *Gratz* makes clear that he, like Justice O'Connor, might have upheld the LSA policy if it had considered various diverse qualifications of each applicant, including race, on a case-by-case basis.²⁵¹ He held that there is a compelling governmental interest in an effort to help create citizens better prepared to know, understand, and work with people of all races and backgrounds, thereby furthering the kind of democratic government that our Constitution foresees.²⁵²

Justice Kennedy has repeatedly endorsed the compelling governmental interest in viewpoint diversity.²⁵³ Justice Rehnquist's majority opinion in *Gratz*, while striking down the LSA policy, conceded that there is a compelling governmental interest in viewpoint diversity.²⁵⁴ Justice Kennedy reaffirmed his commitment to viewpoint diversity in *Parents Involved* when he wrote that the "highest aspirations [for an integrated educational system] are yet unfulfilled."²⁵⁵ His dissent in *Grutter* makes it clear that he would uphold race-conscious admissions as part of a strategy for achieving viewpoint-diversity as a compelling governmental interest: "Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task"²⁵⁶

But Justice Kennedy stated that the use of race to ensure diversity can

249. *Id.* at 348 (Ginsburg J., concurring); see also Gary Orfield and Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, THE CIVIL RIGHTS PROJECT (Aug. 2007), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf>; see also Emily Richmond, *Schools Are More Segregated Today than During the Late 1960s*, THE ATLANTIC (June 11, 2012), <http://www.theatlantic.com/national/archive/2012/06/schools-are-more-segregated-today-than-during-the-late-1960s/258348/>.

250. *Gratz*, 539 U.S. at 270; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007).

251. *Gratz*, 539 U.S. at 278 (2003) (O'Connor, J., concurring).

252. *Id.* at 270.

253. Justice Kennedy joined the majority in *Gratz* and filed a dissenting opinion in *Grutter*.

254. Compare *Grutter*, 539 U.S. at 378–84, with *Gratz*, 539 U.S. at 245. "Petitioners further argue that 'diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means.' But for the reasons set forth today in *Grutter v. Bollinger*, ante, the Court has rejected these arguments of petitioners." *Gratz*, 539 U.S. at 268 (internal citations omitted).

255. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring).

256. *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

be sustained only if a school has empirical evidence to support its need.²⁵⁷ In Justice Kennedy's opinion, the *Grutter* majority confused deference to a university's definition of its educational objective with deference to the implementation of this goal.²⁵⁸ In the context of university admissions, he said, the objective of racial diversity can be accepted based on empirical data.²⁵⁹ In *Grutter*, however, the law school did not demonstrate that it lacked the diversity to justify its plan and, thus, its race-conscious policy was not narrowly tailored.²⁶⁰ In his dissent, Justice Kennedy also voiced concerns that the majority abandoned the strict scrutiny and granted too much deference to the University of Michigan.²⁶¹ In his view, the majority in *Grutter* was flawed because it did not properly apply the strict scrutiny test.²⁶²

The opinions of Justices Roberts, Scalia, and Thomas seem more antithetical to the constitutional use of race as one consideration in the admissions process. Public perception of Justice Scalia is that he would be constitutionally critical of anything short of a pure meritocratic admissions policy.²⁶³ Justice Scalia's position must be evaluated based on his dissent in *Grutter* because he did not offer independent opinions in either *Gratz* or *Parents Involved*. In *Grutter*, Justice Scalia agreed with the majority, who acknowledged the compelling governmental interest in viewpoint diversity.²⁶⁴ His issue was with how the Court went about finding what type of program would support that compelling governmental interest.²⁶⁵ According to Justice Scalia, the concern was more with setting a high academic bar so as to meet a particular level of educational elitism, which, due to the disproportionate performance of minorities on admissions-related exams, necessitated giving minorities some kind of admissions boost to guarantee their representation on the campus.²⁶⁶ In his writings as a professor at the University of Chicago, Justice Scalia wrote that he strongly favored what might be termed "affirmative action programs" to help the poor or disadvantaged.²⁶⁷

Justice Thomas also seems more concerned with the way in which colleges and universities go about trying to admit a diverse student body.

257. *Id.* at 388.

258. *Id.* at 387.

259. *Id.* at 388.

260. *Id.* at 391.

261. *Id.* at 394.

262. *Id.* at 389.

263. See Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L. Q. 147, 156 (1979) ("I am, in short, opposed to racial affirmative action for reasons of both principle and practicality").

264. See *Grutter*, 539 U.S. at 343.

265. *Id.* at 347–48. (Scalia, J. concurring).

266. *Id.* at 350 (Thomas, J., dissenting).

267. See, e.g., Scalia, *supra* note 263, at 156.

In *Grutter*, he agreed with the majority opinion so far as it prohibits the use of race as a blanket criterion for admissions, signaling that he would not uphold a race-preference policy that gave blanket consideration to candidates based on membership in a particular racial or ethnic group.²⁶⁸ Justice Thomas went beyond his colleagues in *Gratz*, in which he did find a compelling governmental interest in diversity, but added that “a State’s use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause.”²⁶⁹

Chief Justice Roberts was not on the Court when *Grutter* or *Gratz* were decided but wrote the opinion in *Parents Involved*, an opinion which signaled an acceptance, if not an endorsement, of viewpoint diversity.²⁷⁰ Despite the Court’s finding that the school assignment plans violated the Equal Protection clause, Chief Justice Roberts, joined by Justices Alito, Scalia, Thomas, and Kennedy reaffirmed the Court’s recognition of a compelling governmental interest in diversity in the context of higher education.²⁷¹ In Roberts’ model, viewpoint diversity arguably expanded beyond race and “encompass[es] ‘all factors that may contribute to student body diversity.’”²⁷²

There is little that can be gleaned from Justice Alito on the bench because he did not participate in either *Grutter* or *Gratz*. Justice Alito joined Chief Justice Roberts in the *Parents Involved* decision but did not offer a concurrence.²⁷³ Alito has, however, weighed in on the matter in other contexts. As Solicitor General during the Reagan administration, for example, Justice Alito submitted a brief in *Wygant v. Jackson Board of Education*,²⁷⁴ arguing that affirmative action was not justified by the lone fact that minorities were underrepresented.²⁷⁵

268. *Grutter*, 539 U.S. at 350 (Thomas, J., dissenting).

269. *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J., concurring).

270. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 707 (2007).

271. *Id.* at 708, 722.

272. *Id.* at 722 (citing *Grutter*, 539 U.S. at 337). The diversity interest was not focused on race alone but encompassed “all factors that may contribute to student body diversity.” We described the various types of diversity that the law school sought:

“[The law school’s] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. . . . To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.”

Id. at 733.

273. *See id.* at 707.

274. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

275. *See* Brief for the United States Amicus Curiae Supporting Petitioners at 5, *Wygant v. Jackson Board of Ed.*, 476 U.S. 267 (1986) (No. 84-1340), 1985 WL

Justice Sotomayor has not yet voted on any race-preference admissions cases. She has, however, provided insight into her opinions through comments and speeches that she has made regarding the issue of affirmative action.²⁷⁶ According to Sotomayor, the use of race in university admissions is constitutional as set forth in the Court's opinion in *Grutter*.²⁷⁷ Proudly referring to herself as an "affirmative action baby," Justice Sotomayor has said that we cannot achieve quality without providing some advantage to those not properly schooled in gaming the college admissions system.²⁷⁸ Sotomayor's comments before the Senate Judiciary Committee, who approved her nomination to the Supreme Court, also shed some light on her pro-affirmative action stance.²⁷⁹ The Committee questioned Sotomayor on her position²⁸⁰ concerning *Ricci v. DeStefano*,²⁸¹ a case brought by a white firefighter who, despite his dyslexia, received a higher score than a minority peer on a promotion exam but was passed over for promotion.²⁸² Sotomayor expressed support for New Haven's desire to prevent disparate impact of the New Haven Firefighters' entrance exam by adopting race-conscious measures designed to benefit racial minorities.²⁸³

In rendering its decision in *Fisher*, the Court is likely to pass on the issue of strict scrutiny first. Based on their writings, Justices Ginsburg, Breyer, Kennedy, and Sotomayor are all likely to uphold the Court's compelling governmental interest in viewpoint diversity. Although Chief Justice Roberts has shown no inclination to rule with these four Justices, his recent opinion in *National Federation of Independent Businesses v. Sebelius*²⁸⁴ indicates that he may become more liberal in his constitutional interpretation.²⁸⁵ Regardless of whether Roberts agrees, when a Court

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276. See, e.g., Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 478–79 (2012).

277. *Id.* at 478–79.

[I]n a speech at Kansas State University, Justice Sotomayor stated, in connection with affirmative action, that the United States still has 'structural problems in the society that have to be addressed before we reach full equality We can't live in a society where the poorest children are the poorest educated.'

Id. at 479.

278. See *id.*

279. See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing on S. 503 Before the S. Comm. on the Judiciary*, 111th Cong. (2009).

280. See, e.g., *id.* at 64–65 (questioning Justice Sotomayor on *Ricci v. DeStefano*).

281. 557 U.S. 557 (2009).

282. *Id.* at 562–63, 567–68.

283. See Leyland Ware, *Ricci v. DeStefano: Smoke, Fire and Racial Resentment*, 8 RUTGERS J.L. & PUB. POL'Y 1 (2011) (a group of white and Hispanic firefighters received the highest scores on two civil service examinations and claimed that the City of New Haven, Connecticut, discriminated against them because of race.).

284. 132 S. Ct. 2566 (2012).

285. See *id.* at 2608 (upholding the individual mandate of the Affordable Care Act

splits 4–4 on an issue, the previous precedent remains the law. Thus, the result following *Fisher* will be that there remains, under the law, a compelling governmental interest in viewpoint diversity.²⁸⁶

If a majority of the Court concludes that there is a compelling governmental interest, it will turn its attention to whether UT demonstrated that its plan was narrowly tailored to meet that interest. Judge Higginbotham suggested that the University was in the best position to decide whether its policy was the most narrowly tailored, thereby granting it “due deference” with respect to the issue.²⁸⁷ Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Scalia may well take issue with Judge Higginbotham, thereby agreeing with *Fisher* that the circuit court decision abandons strict scrutiny in favor of due deference. Justice Breyer may agree. In so doing, the Court can reverse the Fifth Circuit’s *Fisher* decision while leaving the compelling governmental interest in diversity education intact.

In addition to finding that Judge Higginbotham did not provide the appropriate level of scrutiny, the Court may conclude that UT’s program is not narrowly tailored. *Fisher* argues that it was unconstitutional to “overlay” race preference policies on top of the Texas Top Ten Percent program.²⁸⁸ According to her, the Texas Top Ten Percent Law is a race-neutral way to ensure that there is diversity in its classroom.²⁸⁹ Given the use of the Texas Top Ten Percent Law, UT cannot also use the race-preference policy that it put in place for those who were not admitted under the Top Ten Percent Law. The issue for the Court is less about whether UT can layer its program and more about the way in which UT conducted its layering.

To meet the criteria set forth in *Grutter* and *Gratz*, UT must first demonstrate that its use of race preferences is flexible and non-mechanical.²⁹⁰ Those in favor of upholding the UT policy will find comfort in the fact that the policy is non-mechanical.²⁹¹ Justice Breyer, in joining Justice O’Connor’s concurrence in *Gratz*, rejected the LSA policy because it automatically assigned points and, therefore, “unlike the law school . . . , [did] not provide for a meaningful individualized review of applicants.”²⁹² UT’s Personal Achievement Index is similarly non-

of 2010 as a valid exercise of Congress’s taxing power).

286. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (holding that the Second Amendment right to keep and bear arms is fully applicable to the states by virtue of the Fourteenth Amendment)).

287. *Fisher II*, 631 F.3d at 231.

288. *Id.* at 243.

289. *Id.* at 242 n.156.

290. *Id.* at 221; *Grutter*, 539 U.S. at 334.

291. See *Fisher II*, 631 F.3d. at 227.

292. *Gratz v. Bollinger*, 539 U.S. 244, 276–277 (2003) (O’Connor, J., concurring).

mechanical in that it also provides for individual review.²⁹³ Admissions officers review a host of what it terms special circumstance sub-factors, including race,²⁹⁴ holistically to “develop an applicant’s Personal Achievement Index.”²⁹⁵ The school’s policy of applicant by applicant consideration of any special sub-factors with which the applicant presents closely reflects the individual, non-mechanical review of *Grutter*, and for that reason, Justices Breyer, Ginsburg, and Sotomayor may well find that UT meets these criteria.

A positive vote from three Justices on the issue of whether the UT policy is narrowly tailored will still result in the invalidation of the UT policy. Even if one or more Justices are likely to find that the program is non-mechanical, most will find that it suffers from inflexibility. According to the *Grutter* majority, a flexible program is one that is not fixed on admitting a certain number of minority students.²⁹⁶ What made the *Grutter* program attractive to the Court was that the school was willing to review the program often, through the admissions season.²⁹⁷ But to Justice Kennedy, even the continual review of the number of students admitted to UT to contribute to a diverse voice was inadequate.²⁹⁸ In his mind, obtaining a critical mass is tantamount to setting a goal, and therefore, regardless of individual review, race has to become an impermissibly important factor to achieve the “critical mass” that the University may deem necessary.²⁹⁹ In *Grutter*, Justice Kennedy also demanded empirical proof from the law school that it needed the program before he would pass the narrowly tailored prong.³⁰⁰

A majority of the Court hearing this case is unlikely to retreat from its previously articulated finding that there is a compelling governmental interest in viewpoint diversity.³⁰¹ The majority is, however, likely to strike down the decision of the lower court for deferring to the UT policy under the narrowly tailored prong of the strict scrutiny test. The Court may

293. *Fisher II*, 631 F.3d at 228.

294. Defendant’s Brief in Opposition, *Fisher v. Univ. of Tex. at Austin* (U.S. 2011) 2011 WL 6146835 at 5. UT added to UT, race was added to the list of the schools “special circumstance” sub factors, following *Grutter*. *Id.* at 6.

295. Following *Grutter*, UT launched an extensive review to determine whether its admissions policies adequately served its broad interest in diversity. UT commissioned a thorough study to evaluate diversity throughout the University, in various departments and colleges and within individual classrooms. The university consulted with legal scholars to interpret *Gutter* and with students, faculty members and a leading expert on holistic review to evaluate whether UT was attaining the educational benefits on diversity. *Id.*

296. *Grutter*, 539 U.S. at 335.

297. *Id.* at 342–43.

298. *Id.* at 394 (Kennedy, J., dissenting).

299. *Id.* at 389, 392.

300. *Id.* at 388.

301. *Id.* at 315–17.

further rule that the UT policy was not narrowly tailored, thereby prohibiting the school's use of the challenged program. For this reason, following *Fisher*, institutions may remain free to consider race in the admissions process, if only in a limited way.

III. THE INEVITABLE IRRELEVANCE OF AFFIRMATIVE ACTION JURISPRUDENCE

To some of those following affirmative action disputes, the Court's decision to grant certiorari in *Fisher*³⁰² signaled the end of affirmative action. With Chief Justice Roberts at the helm, they thought that the Court would eliminate an institution's ability to use race as a variable in admissions decisions. Closer scrutiny of past decisions, however, reveals that although the UT policy is unlikely to survive the present challenge, the Court will not slam the door on the consideration of race in admissions decisions.³⁰³

Following *Fisher*, colleges and universities may be likely to remain free to consider race in the admissions process, if only in a limited way. Thus, the issue becomes how the *Fisher* decision, by upholding the compelling governmental interest in viewpoint diversity, might inform colleges and universities as they proceed to develop new race-preference admissions policies. The likely answer to this question is: not very much.

In theory, *Fisher*, particularly as it will be read with *Grutter* and *Gratz*, could provide a workable framework for institutions that want to ensure a diverse entering class. This framework would require individual review of every applicant and a decreased reliance on a purely meritocratic admissions process. But today's academic climate holds little value for colleges and universities, particularly elite academic institutions that choose to structure their respective admissions processes in a constitutionally workable manner.

One reading of affirmative action jurisprudence is that institutions interested in adopting constitutionally permissible admissions programs can shift the focus from race-based admissions policies to socioeconomic-based admissions plans.³⁰⁴ Alternatively, colleges and universities can abandon their meritocratic admissions plans in favor of individual review that values all factors equally, rendering unnecessary the "plus" factor of meritocratic admissions policies.³⁰⁵

Colleges and universities, however, are unlikely to adopt either of these solutions. Some scholars argue that adopting a socioeconomic admissions program may not yield the critical-mass-type of racial diversity that is

302. *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (granting certiorari).

303. *See, e.g., Grutter*, 539 U.S. at 306; *Gratz v. Bollinger*, 539 U.S. 244 (2003) (laying out the standard for constitutional use of race in admissions).

304. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978).

305. *See id.* at 317.

arguably essential to viewpoint diversity.³⁰⁶ Abandoning meritocratic admissions policies is antithetical to the modern institutional goal of retaining, or obtaining, nationally recognized “elite” status.

Indeed, over the past few decades, both applicants and post-secondary institutions have placed an unhealthy emphasis on national rankings.³⁰⁷ Media outlets, such as *U.S. News & World Report*, have taken to ranking institutions on a host of factors, placing heavy reliance on the mean grade

306. See Deborah Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DENV. U. L. REV. 729 (2011). See Tung Yin, *A Carboic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213 (observing that in any particular socioeconomic strata of law school applicants, “whites swamp [[minority applicants]] in numbers, so their greater diversity gets lost in the broader pool”); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 494–98, 492–94 (1997) (providing statistical support for the conclusion that a socioeconomic based affirmative action admissions policy would yield a less diverse class than a race-based affirmative action admissions policy); Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 645 (2011) (providing statistical support for his conclusion that institutions favor admitting law students based on race rather than socioeconomic status, despite presenting with similar LSAT scores); and Yin, *supra*, at 235 (noting that the beneficiaries of class-based affirmative action “are likely to be overwhelmingly white”); see also Malamud, *supra*, at 731 (arguing that elite law schools would be unlikely to alter their middling socioeconomic status enrollments). Given the heavy reliance that *U.S. News & World Report* places on an applicant’s Scholastic Aptitude Test (SAT) score, colleges and universities will look to admit those students who perform best on the SAT. See Richard Perez-Peña & Daniel E. Slotnick, *Gaming the College Rankings*, N.Y. TIMES, Feb. 1, 2012, at A14, available at <http://www.nytimes.com/2012/02/01/education/gaming-the-college-rankingscollegerankings.html>. Among those test takers who had a reported family income of \$0–\$20,000 per year, the mean test score for white test takers was significantly higher than that of minority test takers:

	Critical Reading	Mathematics	Writing
White	433	461	428
African-American	399	402	391
Hispanic	416	411	411

THE COLLEGE BOARD, 2012 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2012), available at <http://media.collegeboard.com/digitalServices/pdf/research/TotalGroup-2012.pdf> (identifying SAT test takers by ethnicity and income level). While the number of test takers at or below poverty level was comparable for those identifying themselves as African-American or Caucasian, the number of students from families reporting higher incomes was not.

307. Richard Perez-Peña & Daniel E. Slotnick, *Gaming the College Rankings*, N.Y. Times, Feb. 1, 2012, at A14, available at <http://www.nytimes.com/2012/02/01/education/gaming-the-college-rankingscollegerankings.html> (citing numerous examples of college misconduct directed at advancing in college rankings, including 1) Iona College, admitting that employees had lied for years about, among other things, test scores, graduation rates, and freshman retention rates, as well as 2) Claremont McKenna College, whose Vice President & Dean of Admissions inflated average SAT scores provided to *U.S. News & World Report* for years); See also *infra* note 344 and accompanying text (discussing the focus of admissions offices on climbing the *U.S. News & World Report* rankings).

point average and standardized test scores of the entering class.³⁰⁸ Unfortunately, the wide-spread goal among a majority of colleges, universities, and graduate schools to “rise in the rankings” is antithetical to admitting students with noncompetitive Scholastic Aptitude Test (SAT) scores; due to the racial gap between mean test scores on the SAT, many of the students denied admission in this way will be minority students.³⁰⁹

The academic admissions process, when measured against the current trend to seek national recognition for academic elite status, reveals the inconsequential nature of race-preference affirmative action admission policies. In this section, I demonstrate why institutions will continue to adopt race-preference admissions policies as a complement to their meritocratic process. I first highlight the nature of the academic admissions process. I then consider a constitutional alternative that will likely be available to colleges and universities following the *Fisher* decision. Finally, I conclude by explaining why, given the rise in the importance of reputational surveys, any decision by the Court regarding race-preference admissions policies will not have much impact on how colleges and universities choose which students to admit.

A. The Nature of the Admissions Process

The need for preference admissions policies stems from the meritocratic nature of post-secondary institutions’ admission programs. Colleges and universities place the greater weight of their admissions policies on objective factors, such as standardized test scores and GPAs.³¹⁰ The reason

308. Robert Morse, Methodology: Undergraduate Criteria and Weights, U.S. News & World Report, Sept. 11, 2012, available at <http://www.usnews.com/education/best-colleges/articles/2011/09/12/methodology-undergraduate-ranking-criteria-and-weights-2012.308>.

309. See Daniel Koretz, The Impact of Score Differences on the Admissions of Minority Students: An Illustration, 1 Nat’l Bd. on Educ. Testing & Pub. Pol’y 5 (2002) (discussing the difference found on tests of academic achievement between non-Asian minority and majority students); *The Widening Racial Scoring Gap on the SAT College Admissions Test*, J. BLACKS HIGHER EDUC., http://www.jbhe.com/features/49_college_admissions-test.html (last visited Oct. 31, 2012) (providing statistical support for the conclusion that African-American and Hispanic students lag in SAT scores behind majority students).

310. GEORGE H. HANFORD, LIFE WITH SAT: ASSESSING OUR YOUNG PEOPLE AND OUR TIMES 90 (1991) (According to former College Board President George Hanford, “the SAT served as the most widely used and possibly the most important single talent search device the country had.”); William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 135 (2002) (calling the SAT the “gatekeeper of higher education”) (citation omitted); Rachel Moran, *Sorting and Reforming: High Stakes Testing in Public Schools*, 34 AKRON L. REV. 107, 110 (2000) (observing that SATs have become “a fixture of the college application process”); see Theodore M. Shaw, *Comments of Theodore M. Shaw*, 30 COLUM. HUM. RTS. L. REV. 489, 492 (SUMMER 1999) (“[W]e have increasingly become a society run as a testocracy where . . . opportunit[y] . . . depends, in large part, on . .

for placing such emphasis on these objective scores is twofold. First, given the sheer number of applicants, threshold GPAs and SATs gave an arbitrary cutoff point below which colleges and universities did not have to consider students, thereby shrinking the reviewable applicant pool.³¹¹ Second, the use of standardized and objective factors supports the meritorious nature of admissions.³¹² Those who worked hard received the right to study in a school with the most academically achieving students.

Unfortunately, this system gave rise to two negative phenomena. First, and the reason for affirmative action programs in the first place, is that meritocratic programs favor those from elite secondary schools and those who had access extra tutoring and coaching.³¹³ This phenomenon created a schism between those who had better access and those who did not.³¹⁴ Most often those with the least access to advantageous training were minorities.³¹⁵ African-American students who grew up in a world shaped more by *Plessey v. Ferguson*³¹⁶ than by *Brown v. Board of Education*³¹⁷ could not present the objective achievement-based measures necessary to compete with their “majority” peers.³¹⁸ The problem had its roots in pre-Civil Rights Era racism at the K-12 grade level.³¹⁹ Colleges, universities, and graduate schools, however, quickly assumed the moral and ethical need to provide equal access at the post-secondary school level.³²⁰

Unfortunately, educational improvements toward more equal education at the K-12 level and the post-secondary level have not achieved the goals set by Civil Rights Era educational reformers. Justice Ginsburg observed in *Grutter* that, as of the beginning of this century, “many minority students [continue to] encounter markedly inadequate and unequal education opportunities.”³²¹ In 2006, the average African-American score on the combined math and verbal portions of the SAT test was 863.³²² The mean

. how [well] one performs on standardized tests.”).

311. See, e.g., Kidder & Rosner at 205 (citing Florida’s use of a 1270 SAT cutoff score for a scholarship program).

312. *Id.* at 142.

313. See THE COLLEGE BOARD, 2012 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2012), available at <http://media.collegeboard.com/digitalServices/pdf/research/TotalGroup-2012.pdf>.

314. See *id.*

315. See Walter R. Allen, *Black Students in U.S. Higher Education: Toward Improved Access, Adjustment, and Achievement*, 20 URB. REV. 165, 184–85 (1988).

316. 163 U.S. 537 (1896).

317. 347 U.S. 483 (1954).

318. See Allen, *supra* note 315.

319. *Id.* at 185.

320. *Id.* at 165.

321. *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring).

322. *A Large Black-White Scoring Gap Persists on the SATs*, J. BLACKS IN HIGHER EDUC., <http://www.jbhe.com/features/53SAT.html> (last visited Oct. 31, 2012).

score for whites on the combined math and verbal SAT was 1063, approximately 17% higher.³²³ Hispanics similarly lagged behind.³²⁴ Today, Wayne Camara, the College Board's vice president for research and development, attributed the gaps between black and Hispanic students and whites and Asians to access to education.³²⁵ A study in the *Journal of Blacks in Higher Education* attributed sharp differences in family income as a major factor for these results.³²⁶ Consequently, African-Americans and other minority groups are unable to compete when applying to colleges and universities whose admissions processes are largely based on a meritocratic system.

B. A Constitutional Manner of Achieving Diversity

With regard to race-preference admissions policies, the Court has laid out, with sufficient clarity, what is and is not acceptable for purposes of complying with the U.S. Constitution. The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."³²⁷ Individuals and groups bring challenges under the Equal Protection Clause, claiming that members of a class, of which they are a part, are receiving unequal treatment from a federal or state law. In evaluating these laws, the Court will subject them to a level of scrutiny depending on the type of group at which the laws take aim.

Laws differentiating individuals based on immutable traits such as race

323. *Id.* The article also states:

Not only are African-American scores on the SAT far below the scores of whites and Asian Americans, but they also trail the scores of every other major ethnic group in the United States including students of Puerto-Rican and Mexican backgrounds. In fact, few people realize that Native American and Alaska Native students on average score 118 points higher than the average score of black students. On average, Asian American students score 225 points, or 19%, higher than African-Americans.

Id. at 1.

324. Victor Manuel Ramos, *SATs: Hispanics Scoring Better, but Lag in College Admissions Tests*, ORLANDO SENTINEL (Aug. 26, 2009, 5:55 AM), http://blogs.orlandosentinel.com/news_hispanicaffairs/2009/08/sat-scores-hispanics-doing-better-but-still-behind-in-college-admission-tests.html.

325. Tamar Lewin, *Average Scores Slip on SAT*, N.Y. TIMES, Sept. 15, 2011, at A20, available at <http://www.nytimes.com/2011/09/15/education/15sat.html>.

326. *Scoring Gap*, *supra* note 323:

In 2006, 24 percent of all black SAT test takers were from families with annual incomes below \$20,000. Only 4 percent of white test takers were from families with incomes below \$20,000. At the other extreme, 8 percent of all black test takers were from families with incomes of more than \$100,000. The comparable figure for white test takers was 31 percent.

Id. at 1.

327. U.S. CONST. amend. XIV, § 1.

or national origin are subject to elevated judicial scrutiny.³²⁸ Laws that do not implicate a suspect or quasi-suspect class, are subject to the rational basis test, the most deferential form of judicial scrutiny.³²⁹ Under rational basis review, the burden is on the challenger to show that the policy is not rationally related to a legitimate state interest.³³⁰ The rational basis standard of review does not require a court to take into account the actual purposes behind the legislation.³³¹ Any conceivable purpose would suffice. Under-inclusiveness or over-inclusiveness are not fatal under rational basis review.³³²

A regulation based on race triggers strict scrutiny.³³³ Programs that differentiate based on socioeconomic status, however, may only trigger the rational basis test.³³⁴ Thus, defining a socioeconomic class-based admissions program is significantly more likely to pass constitutional muster than is a race-based admissions policy. Studies support the need for students from low income or poverty level homes to receive a “plus” in the admissions decision because these students are less likely to achieve the same academic success as their more financially fit counterparts.³³⁵ Thus, a

328. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229–30 (1995) (“[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of *equal protection*.”) (emphasis added).

329. *See Romer v. Evans*, 517 U.S. 620, 640 n.1 (stating that that rational basis test—the “normal test for compliance with the Equal Protection Clause—is the governing standard.”).

330. *See, e.g., New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979). A group of former and current employees of the New York City Transit Authority filed a suit challenging the Transit Authority’s rule disallowing any employees from partaking in methadone treatment. The regulation did not fail equal protection merely because it is over-inclusive. The fact that the reach of the rule includes persons who did not exhibit the trait the Authority was seeking to exclude—unemployability due to narcotic use—did not make the regulation unconstitutional.

331. *See, e.g., U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980). A retired railroad worker filed suit challenging the Railroad Retirement Act of 1974, legislation that made the plaintiffs ineligible for certain retirement benefits granted to other workers, on the ground that the statute made a distinction disallowed by equal protection. The Court found that once there is any plausible reason, that explanation is enough to withstand rational basis review. Any conceivable legislative purpose is sufficient under rational basis.

332. *See, e.g., Ry. Express Agency v. People of State of N.Y.*, 336 U.S. 106 (1949). A national delivery company sought to challenge a New York City traffic regulation which prohibited advertisements on the side of vehicles, claiming that the regulation was in violation of equal protection because it did not apply to delivery vehicles that advertised the delivery service itself. The Court held under-inclusiveness is not fatal under rational basis.

333. *See supra* notes 70–71.

334. *See supra* notes 328–332.

335. *See* THE COLLEGE BOARD, 2012 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2012), available at <http://media.collegeboard.com/digitalServices/pdf/research/TotalGroup-2012.pdf>.

school employing a socioeconomic plan could successfully argue that its use of socioeconomic classifications is rationally related to a legitimate state interest.

Class-based admissions policies would yield diverse classes.³³⁶ Admitting students whose family income falls at or below the poverty level would assure a viewpoint that is not otherwise heard in many elite classrooms.³³⁷ There is a legitimate, even compelling, interest in achieving diversity in education.³³⁸ Class-based admissions policies are race-neutral alternatives to diversifying student bodies.³³⁹ Socioeconomic-based policies, rather than race-based policies, would therefore achieve the goal of diversity in education without necessarily having to pass the strict scrutiny review.

Despite the seeming logic in switching from race-based admissions policies to class-based policies, institutions have been reluctant to embrace the concept.³⁴⁰ Both the UT and Michigan plans provided admissions officials with the opportunity to consider socioeconomic status as well as race in their admissions decisions.³⁴¹ Yet, despite a clear directive from a majority of the bench to only consider race in the narrowest of circumstances, colleges and universities continue to include it as a factor in their decision-making process.³⁴² Retooling admissions decisions to a class-based policy would provide a different type of diversity, one that institutions are not yet prepared to embrace. Despite decades of precedent,

336. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978).

337. *Id.*

338. *Id.* at 314.

339. *Fisher II*, 631 F.3d 213, 242 n.156, 243 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

340. The notion of shifting from race-based admissions policies to socioeconomic-based admissions policies has been advocated for decades. See, e.g., Richard Fallon, *Affirmative Action Based on Economic Disadvantage*, 43 *UCLA L. REV.* 1913 (1996) (advocating a shift from race-based preferences to socioeconomic preferences); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 *CALIF. L. REV.* 1037 (1996); see also Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 *IOWA L. REV.* 1549 (2011) (acknowledging efforts to ensure socioeconomic diversity). One reason for schools' reluctance is historical in nature. During the neophyte post-Civil Rights Era in which *Bakke* was decided, underrepresentation in colleges and universities was equated with race. Furthermore, at that time, individuals applying to graduate schools, like the medical school at the center of the *Bakke* controversy, had spent their primary and secondary education in racially segregated schools, which, after the mid-1960s, were universally recognized as sub-par. See Allen, *supra* note 318, at 185.

341. See *Fisher II*, 631 F.3d at 228; *Gratz v. Bollinger*, 539 U.S. 244, 256–57 (2003).

342. Richard H. Sander, *Class in American Legal Education*, 88 *DENV. U. L. REV.* 631, 645 (2011) (providing statistical support for his conclusion that schools favor admitting law students based on race rather than socioeconomic status, despite presenting with similar LSAT scores).

colleges, universities, and graduate schools are unwilling to shift from a race-based policy to a class-based policy.³⁴³ Consequently, race-based admissions policies following *Fisher* will continue to meet with equal protection challenges.

C. Why *Fisher* is Irrelevant

It is a poorly kept secret that admissions offices in today's post-secondary institutions tailor their decisions to climbing the rankings of *U.S. News & World Report*.³⁴⁴ Because *U.S. News* places heavy emphasis on objective scores such as GPAs and standardized tests, institutions work hard to admit those with the most competitive objective admissions criteria.³⁴⁵ African-American and Hispanic students perform less well on standardized tests such as the SAT.³⁴⁶ Consequently, opportunity costs of

343. *Id.*

344. See Elise Amendola, *Editorial: Colleges Fail Students When They Game Rankings*, USA TODAY (Sept. 7, 2012, 12:09 AM), <http://www.usatoday.com/news/opinion/story/2012-09-05/college-rankings-US-news/57614840/1> ("Emory [University] officials misrepresented enrollees' SAT and ACT scores, and in some years their high school standing, in reports to the U.S. Education Department and to publications that rank colleges, including *U.S. News & World Report*."); Kenneth Anderson, *LSAC Study on Law Schools Gaming Resources for US News Rankings*, THE VOLOKH CONSPIRACY (Dec. 3, 2009, 11:31 AM), <http://www.volokh.com/2009/12/03/lvac-study-on-law-school-gaming-resources-for-us-news-rankings> (summarizing an LSAC study regarding law schools redistributing resources to increase their respective rankings in *U.S. News & World Report* and noting the increase in merit scholarships intended to improve the statistical profile of incoming classes); Elie Mystal, *Another Law School Caught in a Lie*, ABOVE THE LAW (Sept. 12, 2011, 1:40 PM), <http://abovethelaw.com/2011/09/another-law-school-caught-in-a-lie> (citing an example in which a University of Illinois College of Law administrator reported inflated grade point averages and LSAT scores); Justin Pope, *Colleges May Obsess Over Rankings, But Students Don't Care*, HUFFINGTON POST (Feb. 5, 2012, 12:50 PM), http://www.huffingtonpost.com/2012/02/05/colleges-may-obsess-over-n_1256365.html (explaining the significant role of rankings, such as *U.S. News & World Report*, on college administrators, with one college, Baylor University, offering financial rewards to already admitted students to retake the SAT exam as a ploy to boost the average score it could report.); Elie Mystal, *Villanova Law 'Knowingly Reported' Inaccurate Information to the ABA*, ABOVE THE LAW (Feb. 4, 2011, 3:34 PM), <http://abovethelaw.com/2011/02/villanova-law-school-knowingly-reported-inaccurate-information-to-the-aba>; see also Perez-Pena & Slotnick, *supra* note 307.

345. See, e.g., Lani Gunieier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 144–45 (2003) (discussing the emphasis that colleges and universities place on *U.S. News & World Report*); Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1080 (2009) (citation omitted) ("[C]olleges and universities need high average SAT scores to place well in the college-rankings systems like *U.S. News & World Report*'s 'America's Best Colleges.'").

346. 2012 COLLEGE-BOUND SENIORS 2012, *supra* note 21 (reporting the mean SAT for African-Americans as 428, 428, 417).

rejecting a meritocratic admissions in policies of colleges and universities in favor of a more viewpoint diverse class-based system are very large.³⁴⁷

Indeed, standardized tests figure largely into the problem. Introduced in 1926, the SAT³⁴⁸ was designed to assess a student's preparedness for college.³⁴⁹ Institutions combined the SAT score³⁵⁰ with a student's GPA to establish an easy base line for admissions.³⁵¹ Many admissions offices settle on a score, below which they are unwilling to consider applicants.³⁵² Institutions, particularly elite institutions, strive for a high mean score for entering students because it will reflect favorably on their academic reputation.³⁵³

The problem is that the SAT presents a bias against students who come from poor educational backgrounds.³⁵⁴ One study revealed close to a 400-

	Critical Reading	Mathematics	Writing
African American	428	428	417
Hispanic	448	462	442
White	527	536	515

Id.

347. Thomas J. Epenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. 293, 303 (2005).

348. IDA LAWRENCE, GRETCHEN W. RIGOL, THOMAS VAN ESSEN & CAROL A. JACKSON, THE COLLEGE BOARD, RESEARCH REPORT NO. 2002-7: A HISTORICAL PERSPECTIVE ON THE SAT: 1926-2001, 1 (2002).

349. *A Brief History of the SAT*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/sats/where/history.html> (last visited Nov. 1, 2012).

350. Note: Many colleges and universities settle on the ACT too. *Test Prep: Choosing the ACT or SAT*, PETERSON'S, <http://www.petersons.com/college-search/test-prep-act-sat.aspx> (last visited Nov. 1, 2012).

351. William C. Kidder & Jay Rosner, *How the SAT Creates "Built in Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 13, 207-08 (2002).

352. *Id.* at 135, 170.

353. See, e.g., Perez-Pena & Slotnick, *supra* note 308 (reporting instances of manipulation at institutions including Iona College, Baylor University, and Claremont McKenna).

354. See Derrick Bell, *Diversity's Distraction*, 103 COLUM L. REV. 1622, 1630-31 (2003) (citing studies that demonstrate admissions tests "measure quite accurately the incomes of the applicants' parents"); William C. Kidder & Jay Rosner, *How the SAT Creates "Built in Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 13, 156 n.73 (2002) (observing the SAT demands knowledge of "white upper-middle class social norms") (citation omitted). An example of bias on the exam includes the following question:

RUNNER:MARATHON

(A) envoy:embassy

(B) martyr:massacre

(C) oarsman:regatta *the correct answer*

(D) referee:tournament

(E) horse:stable

point disparity between students from homes with incomes less than \$20,000 per year and students from homes with incomes of over \$200,000 per year.³⁵⁵ The reason for this disparity is that like other vestiges of racism, economic disparity generally falls across racial lines.³⁵⁶

During the early days of affirmative action admission policies, the notion of race as a consideration in the admissions process mattered because students with low test scores could not compete for seats in an otherwise meritocratic admissions process.³⁵⁷ The problem was exacerbated with the introduction of *U.S. News & World Report* rankings for colleges, universities, and graduate schools.

U.S. News & World Report rankings first appeared in the early 1980s and have since become extremely influential.³⁵⁸ The rankings are based on the average standardized test score of entering students, the mean GPA of entering students, and five other factors.³⁵⁹ All data are submitted to *U.S. News & World Report* by institutions interested in participating in the rankings.³⁶⁰ And while many colleges and universities abhor the *U.S. News & World Report* rankings,³⁶¹ they all participate.³⁶² Institutions see the

Only 22% of those from low income families chose the proper answer (c) as opposed to 53% of those from more affluent homes. Critics cite an unfamiliarity among low income households with words like regatta as the reason for a disparate result of the answer. See generally SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS (Joseph Soares ed., Teachers College Press 2012) (highlighting the class bias of the SAT); Leslie Yalof Garfield, *The Cost of Good Intentions: Why the Supreme Court's Decision Upholding Affirmative Action Admissions Programs is Detrimental to the Cause*, 27 PACE L. REV. 15, 23 (2006) (discussing the above as an example of a culturally biased SAT question).

355. See THE COLLEGE BOARD, 2011 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2011), available at http://professionals.collegeboard.com/profdownload/cbs2011_total_group_report.pdf (showing a 398 point differential between students from homes with incomes less than \$20,000 per year and students from homes with incomes of over \$200,000 per year). See also THE COLLEGE BOARD, 2010 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2010), available at <http://professionals.collegeboard.com/profdownload/2010-total-group-profile-report-cbs.pdf> (showing a 392-point differential).

356. Bell, *supra* note 355, at 1631.

357. Allen, *supra* note 318.

358. *U.S. News History*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/usnews/usinfo/history.htm> (last visited Nov. 28, 2012).

359. Robert Morse, *Methodology: Undergraduate Criteria and Weights*, U.S. NEWS & WORLD REPORT, Sept. 11, 2012, available at <http://www.usnews.com/education/best-colleges/articles/2011/09/12/methodology-undergraduate-ranking-criteria-and-weights-2012>.

360. *Id.*

361. Margot E. Young, *Making and Breaking Rank: Some Thoughts on Recent Canadian Law School Surveys*, 20 WINDSOR Y.B. ACCESS JUST. 311, 327 (2001) (reporting that “a letter signed by 150 [U.S.] law deans was sent to *U.S. News* protesting the survey”).

362. Johnson, *infra* note 366, at 311–12.

rankings as a way to maintain or enhance their academic reputation.

Admitting students with lower SAT scores undermined the ranking system.³⁶³ Despite a general desire to admit a diverse class, the concern over falling in the rankings due to a lower mean SAT score for its entering class arguably fuels continued emphasis on the SAT.³⁶⁴ Institutions have raised concern over the dilemma of rankings and their effect on admissions decisions.³⁶⁵

Over the past few decades, law schools seem to have been most vocal about problem of rankings as they are associated with the LSAT. Dean Alex Johnson wrote, “*U.S. News* ranking[s] use[] [the] median score in evaluating law schools in a way that exacerbates the very small differences between the median scores of schools, . . . [t]hus . . . forc[ing] law schools to increase their median LSAT score[s] in order to raise [the] rank[ings], disproportionately affecting those who score lower on the test.”³⁶⁶

School officials do not want to acknowledge the quagmire in which the admissions process is stuck. Justice Scalia, in his *Grutter* dissent, however, was willing to so do.³⁶⁷ Scalia supported Justice Thomas’ “central point” that the Michigan need for race-preference programs was based on “Michigan’s interest in maintaining a prestigious law school whose normal admissions standards disproportionately exclude blacks and other

363. Robert Morse, *Methodology: Undergraduate Criteria and Weights*, U.S. NEWS & WORLD REPORT, Sept. 11, 2012, available at <http://www.usnews.com/education/best-colleges/articles/2011/09/12/methodology-undergraduate-ranking-criteria-and-weights-2012>.

364. Many institutions have been accused of pandering to *U.S. News* or, worse, “fudging numbers” to game the system. See Perez-Pena & Slotnick, *supra* note 308 (reporting instances of manipulation at institutions including Iona College, Baylor University, and Claremont McKenna); Brian Z. Tamanaha, *Law Schools Fudge Numbers, Disregard Ethics to Increase Their Rankings*, THE DAILY BEAST (June 7, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/06/17/law-schools-fudge-numbers-disregard-ethics-to-increase-their-ranking.html> (describing the perspective of the former interim Dean of St. John’s Law School); Debra Cassens Weiss, *US News to Law Deans: Please Don’t Fudge Your Numbers*, ABA J, (Mar. 11, 2011, 11:40 AM), http://www.abajournal.com/news/article/us_news_to_law_deans_please_dont_fudge_your_numbers (reporting on *U.S. News & World Report’s* acknowledgement that schools manipulate statistics).

365. Alex M. Johnson, *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309 (2006). Note: 150 schools signed a petition to abolish rankings.

366. *Id.* at 313–14. Law schools’, and indeed all schools’, reliance on the median number has significant impact on admissions decisions, particularly at less elite academic institutions. The median number is that number above which and below which half the class is ranked. For those competing in the *U.S. News & World Report* process, the number of accepted students with standardized test scores above their desired median dictates the number of students that the school is willing to admit with standardized test scores below the desired median. See *id.* at 353.

367. *Grutter v. Bolinger*, 539 U.S. 306, 347 (2003) (Scalia, J., concurring in part and dissenting in part).

minorities.”³⁶⁸ This observation was that schools make a choice to be elite, and demonstrates that the problem of pandering to the rankings had made its way to the highest court.

Large elite academic institutions cannot have it both ways.³⁶⁹ These colleges and universities seek to report a high academic average for those entering its gates.³⁷⁰ The disproportionate performance between minority students and non-minority students³⁷¹ yields a student body that is more homogenous than institutions desire. Thus, to assure viewpoint diversity, institutions create race-preference policies that allow them to give a “plus” to those who have not performed in a way that would keep the colleges and universities’ standardized test scores or GPAs at an ideal level for purposes of reporting to those who rank the school.³⁷²

368. *Id.* at 347 (Scalia, J., concurring in part and dissenting in part. (“The Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status”); *Id.* at 355–56 (Thomas, J., concurring in part and dissenting in part).

369. Claims challenging policies on Equal Protection grounds have brought against schools ranked in the upper tiers of *U.S. News & World Report*. See *Best Law Schools*, U.S. NEWS & WORLD REPORT (2012), available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Nov. 1, 2012); *National University Rankings*, U.S. NEWS & WORLD REPORT (2012), available at <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities> (last visited Nov. 1, 2012) (for example, the University of Michigan at Ann Arbor ranked twenty-ninth nationally, University of Michigan School of Law School ranked tenth among U.S. law schools, University of Texas at Austin ranked forty-sixth among national universities).

370. Perez-Pena & Slotnick, *supra* note 308.

371. See COLLEGE-BOUND SENIORS 2012, *supra* note 347.

372. See *Plessey v. Ferguson* through U.S. CONST. Amend. XIV, *supra* notes 316–327. Justice Scalia, during oral arguments for *Fisher v. Texas*, alluded to this practice questioning African-American and Hispanic applicants from privileged backgrounds might deserve a preference. Transcript of Oral Argument at 58–62, *Fisher v. Texas*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012) (No. 11-345), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf.

A 2010 Pew Research Center study entitled, *Minorities and the Recession-Era College Enrollment Boom*, found that “Minority college students are concentrated at two-year colleges and less-than-two-year institutions in comparison with their white peers (National Center for Education Statistics, 2010b) [and that] among undergraduates at four-year colleges and universities, minority undergraduates on average enroll at the less academically selective institutions compared with white undergraduates. The concentration of minority students at the less elite institutions provides further support for the proposition that elite intuitions are not accepting minority students with the same frequency as those schools with less impressive rankings. See, MINORITY AND THE RECESSION-ERA COLLEGE ENROLLMENT BOOM 6 (June 2010) available at <http://www.pewsocialtrends.org/files/2010/11/757-college-enrollment.pdf> (citing Sigal, Alon and Marta Tienda, “Assessing the “Mismatch” Hypothesis: Differentials in College Graduation Rates by Institutional Selectivity,” *SOCIOLOGY OF EDUCATION*, Vol. 78, No. 4 (October 2005).

Institutions interested in the twin goals of assuring a diverse classroom and achieving a high rank in the *U.S. News & World Report* rankings are incentivized to select minority students with the highest SATs and undergraduate GPAs (UGPAs).³⁷³ This practice of “gaming the rankings”³⁷⁴ tends to yield selection of, say, an African-American student from an elite private high school, who has shared all of the benefits and experiences of her non-minority peers, over a student from a low-income family presenting with a less stellar SAT score and UGPA.³⁷⁵ Consequently, the voice that the former applicant contributes to the classroom may not be of a view that is much different than that of a majority of her new classmates.³⁷⁶

Ideally, colleges and universities would disregard *U.S. News & World Report* and select students whose attributes, which combine objective test scores and demonstrated uniqueness, best reflect the institutions’ academic missions. A normative shift away from *U.S. News & World Report*, however, would not relieve colleges and universities of constitutional restraint. State funded post-secondary school admissions programs remain limited to the doctrinal confines of *Bakke*, *Gratz*, and *Grutter* and what is likely to follow with *Fisher*.³⁷⁷ A school interested in considering race in the admissions decision would still be charged with making individualized decisions about each applicant.³⁷⁸ The current trend of commoditizing SATs and UGPAs, however, might fall by the wayside in favor of colleges and universities assuring a real sense that the diverse voices they choose to admit are ones that might not otherwise make it to the classroom.

To the extent that viewpoint diversity means assembling a critical mass representing a variety of viewpoints,³⁷⁹ race and socioeconomic status should remain relevant in the admissions process. A post-secondary school

373. See *supra* notes 307–309.

374. Perez-Pena & Slotnick, *supra* note 308.

375. See NAT’L ASS’N NATIONAL ASSOCIATION FOR COLL. ADMISSION COUNSELING, 2010 STATE OF COLL. ADMISSIONS 18 (2010), available at <http://www.nacacnet.org/research/PublicationsResources/Marketplace/Documents/SoCA2010.pdf>. The 2010 report for the National Association for College Admissions Counseling reports that for 2009, 86.5% of colleges attribute grades in college-preparation courses as the most important factor in admissions decisions. 57.8% report the SAT or ACT as the most important factor in admissions decisions.

376. See Transcript of Oral Argument, *supra* note 372 at 58–60. Justice Alito raised this very concern during the *Fisher* oral arguments when he asked whether African-American and Hispanic Applicants from privileged backgrounds deserve a preference. *Id.*

377. See generally *supra* Parts I.B, I.C, II.B, and II.C (discussing affirmative action policy jurisprudence in *Regents of the Univ. of Cal. v. Bakke* and later decisions, and the treatment of *Fisher v. Univ. of Tex. at Austin* in the lower courts and in briefs to the Supreme Court).

378. See *Grutter v. Bollinger*, 539 U.S. 306, 336 (2003).

379. See *id.* at 315–16.

may consider race as one of several factors in its admissions process so long as it makes individualized holistic decisions about applicants.³⁸⁰ Unfortunately, it is quite costly for colleges and universities to consider applicants individually; they must assemble a cadre of admissions officials available to annually review thousands of applications.³⁸¹

To paraphrase Justice Scalia in the *Fisher* oral arguments, it takes a lot of people to assure racial diversity.³⁸² But it is the Constitution, and not the cost, that should limit a school's ability to create viewpoint diversity in its classrooms. Colleges and universities ideally should undertake the expensive review necessary to ensure that students with the kind of diverse voices that a classroom might otherwise lack are offered admission to their institutions.

The best constitutional route to assure meaningful viewpoint diversity would be for academic institutions to abolish their meritocratic admissions policies in favor of a holistic review of each applicant. Doing so, however, is likely to yield decreased mean GPAs or standardized test scores. Sadly, it seems that today's post-secondary institutions are not willing to compromise their academic elite status. For this reason, *Fisher* is likely to provide little contribution to affirmative action jurisprudence other than yet another example of what colleges and universities cannot do when creating race-preference admissions policies.

CONCLUSION

In the coming months the Supreme Court is likely to issue an opinion of little consequence. In *Fisher v. Texas*, the Court will most probably strike down the UT race-preference admissions plan but will not prohibit the consideration of race in any admissions process. The *Fisher* decision, therefore, will do little more than provide colleges, universities, and graduate schools with another example of an impermissible admissions program.

Colleges and universities are likely to ignore any broad message that *Fisher* may send to them. The decision to strike down the UT plan, like the decisions in *Grutter* and *Gratz* before it, will not encourage schools to rethink the meritocratic admissions plans that themselves create the kind of racial imbalances that lead to race-based admissions policies. The

380. *Id.* at 337.

381. For example, the University of Michigan received 29,965 applications for admission for the 2009–2010 academic year. See Joseph Lichterman, 'U' Officials: This Year's Application Numbers Up, MICH. DAILY, Apr. 11, 2010, available at <http://www.michigandaily.com/content/u-officials-say-number-applicants-has-increased>. In 2010, the University of Texas received 31,000 applications. Bill Powers, *Message by President Bill Powers: The Challenge of Admission to UT*, UNIV. OF TEX. AT AUSTIN (Feb. 26, 2010), available at <http://blogs.utexas.edu/towertalk/2010/02/26/the-challenge-of-admission-to-ut>.

382. See Transcript of Oral Argument, *supra* note 372, at 58.

paramount desire among a significant number of colleges, universities, and graduate schools today to rise in the rankings will continue to trump judicial decisions that encourage schools to retool their admissions policies in a more holistic way. That desire is the primary reason for the growing irrelevance of affirmative action jurisprudence.

MISSHAPING THE RIVER: PROPOSITION 209 AND LESSONS FOR THE *FISHER* CASE

WILLIAM C. KIDDER*

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* Assistant Executive Vice Chancellor, UC Riverside; B.A. and J.D., UC Berkeley (william.kidder@ucr.edu). This article expresses my personal views as a researcher; it does not represent the views of the administration at UCR or of the UC system. The title refers to Bowen & Bok’s *The Shape of the River*, discussed infra. Errors and omissions are my responsibility. In the interest of full disclosure, I have been affiliated with many higher education and civil rights groups over the years that have been supportive of affirmative action, including the amicus brief signed by 444 American social science researchers in the *Fisher v. University of Texas* case (Liliana M. Garces, counsel of record). I wish to thank the following professors for their reviews of this article: Emily Houh, Richard Lempert, Angela Onwuachi-Willig, Gary Orfield and David Benjamin Oppenheimer. My related social science paper “The Salience of Racial Isolation” (October 2012) is available through the Civil Rights Project at UCLA (<http://civilrightsproject.ucla.edu/research/college-access>). At the *Journal of College & University Law* I wish to thank Jonathan Gaynor and the other editors as well as the Journal’s anonymous faculty peer reviewers.

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INTRODUCTION

California's experiences with and responses to Proposition 209 bear on the *Fisher v. University of Texas at Austin*¹ case with respect to both questions of compelling interest and narrow tailoring.² Two related developments led to the end of race-conscious admissions at the University of California. In July 1995 the UC Regents adopted a resolution (SP-1) prohibiting affirmative action that took effect with the entering 1997 class at the graduate/professional school level and the 1998 class at the undergraduate level. In November 1996 California voters passed Proposition 209, a constitutional amendment³ that likewise prohibited affirmative action in state education, employment and contracting.⁴ An opening proviso about this paper is that several details about University of California (UC) admissions that have high relevance and importance within the UC community and for policy stakeholders in California—such as “Eligibility in Local Context” and “Entitled to Review” admission

1. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

2. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court declared, “Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative . . . [it] does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” *Grutter v. Bollinger*, 536 U.S. 306, 339 (2003). For a jurist imposing a “last resort” test in connection with narrow tailoring, see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007); *id.* at 789–90 (Kennedy, J., concurring); *Grutter*, 539 U.S. at 387–95 (Kennedy, J., dissenting). The post-209 data at the University of California helps inform “last resort” queries when evaluating the broader range of race-neutral outcomes and efforts outside Texas.

3. CAL. CONST. art. I §31.

4. 1995 is for some purposes a preferred “pre-Prop 209” baseline for undergraduate changes because to some extent pre-209 chilling effects were manifest by 1996 and 1997, but this is complicated and 1997 data should not be ignored, as noted in the review of graduation rates in Part III of this paper. *Cf.* Eric Grodsky & Michal Kurlaender, *The Demography of Higher Education in the Wake of Affirmative Action*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION – THE PAST AND FUTURE OF CALIFORNIA’S PROPOSITION 209 33, 41 (Eric Grodsky & Michal Kurlaender eds., 2010); University of California Office of the President, *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies*, 15 (March 2003), http://www.ucop.edu/sas/publish/aa_final2.pdf. Also note that the UC Regents rescinded SP-1 in 2001, though more importantly, Proposition 209 remains in effect. By contrast, at the UC Law Schools there was more of a “bright line” boundary between 1996 and 1997 for purposes of assessing UC pre/post affirmative action patterns. See William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino and American Indian Law School Admissions 1950–2000*, 19 HARV. BLACKLETTER L.J. 1, 31–32 (2003).

programs—are not addressed in this paper because of the lesser degree of nexus to the applied context of the Fisher case and because of significant distinctions as compared to the Texas Ten Percent Plan.⁵

This article advances the following findings and conclusions:

Lesson #1 – At the University of California, which is subject to an affirmative action ban, recent survey data from eight campuses confirms that the campus racial climate is significantly more inhospitable for African Americans and Latinos than at UT Austin and two other peer universities. In particular, these survey data from 9,750 African American and Latino students confirm that having an affirmative action ban and low diversity is associated with African Americans and Latinos perceiving that students of their race or ethnicity are less respected on campus compared to those on campuses with affirmative action and/or higher levels of diversity. Although establishing a correlation is not the same as proving causation, these data are consistent with the conclusion that affirmative action bans and lower diversity (at least in combination) lead African American and Latino students to feel that they are less respected by their peers. More importantly, the data are the opposite of what one would expect if Petitioner’s amici were correct in claiming abolishing affirmative action lessens any stigmatization that minority students might feel or otherwise creates a racial “warming effect” (themes discussed more in the next section). Relatedly, on the question of “critical mass” versus racial isolation that was discussed at length during the U.S. Supreme Court’s oral argument in the Fisher case – and that was one key consideration taken into account by UT Austin in devising its admissions program – the comparative data in this article suggest that the threat of educational harm associated with racial isolation is very real (particularly for African Americans) and should not be minimized or overlooked.

Lesson #2 – Contrary to recent claims by groups opposing affirmative action, Proposition 209 (“Prop 209”) triggered a series of educationally

5. In particular, a detailed analysis of UC’s Eligibility in Local Context and other post-209 undergraduate admission efforts are beyond the scope of this *Fisher*-related article for the following reasons: (1) the traditional concept of “UC eligibility,” which conditions both the applicant pool and admission decisions, is complicated and somewhat counter-intuitive relative to the national scene; (2) UC’s Eligibility in Local Context program (i.e., four percent plan) guarantees admission to the UC system rather than to an applicant’s campus of choice, which is fundamentally different than the Texas Ten Percent Plan; (3) Eligibility in Local Context will change from 4% to 9% beginning with the 2012 class, though this has already been part of the policy conversation for several years—increasing chances of confusion—and it is accompanied by another significant change with a new “Entitled to Review” category; and (4) the aggregate impact of various race-neutral efforts to improve diversity at UC post-209 (some more successful than others) is of greater practical relevance than the component parts. For background, see, e.g., Michael T. Brown et al., *The Quest for Excellence and Diversity in UC Freshmen Admissions*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION—THE PAST AND FUTURE OF CALIFORNIA’S PROPOSITION 209, at 129, 132–38 (Eric Grodsky & Michal Kurlaender eds., 2010).

harmful “chilling effects.” Data on UC’s freshman admit pools spanning a dozen years show that underrepresented minorities (more so for those with the strongest credentials, and especially for African Americans) are more likely to spurn an offer from UC than they were before Prop 209, and the difference compared to whites/Asian Americans has gradually widened under Prop 209. In combination with the survey data above, these findings about students’ enrollment choices again cast doubt on claims by affirmative action critics that Prop 209 benefited underrepresented minorities by lessening racial stigma. Declines in law school applications and undergraduate enrollments are also reviewed and contextualized.

Lesson #3 – Affirmative action critics supporting Petitioner are propagating two related myths about credentials and performance. First, they scapegoat affirmative action as the overwhelming cause of racial/ethnic differences in SAT scores at UT Austin and elsewhere, when this relationship is quite modest for reasons stemming from the mathematics of admissions. Secondly, the critics stubbornly insist that affirmative action causes substantial “mismatch” effects on underrepresented minority student performance when in fact there is a voluminous social science literature indicating that affirmative action at highly selective institutions has a net positive effect on graduation rates and other important outcomes. Law school mismatch claims are also reviewed.

Lesson #4 – While some argue in favor of class-based affirmative action in lieu of race-conscious programs, UC’s atypically large enrollment of low-income undergraduates is strong “natural experiment” evidence verifying that class-based policies are not effective substitutes for race-conscious policies

Lesson # 5 – The experience of: UC Business Schools and UC Law Schools after Proposition 209 provide compelling case studies regarding the need for race-conscious affirmative action

LESSON #1: COMPARING MINORITY STUDENTS’ PERCEPTIONS OF CAMPUS RACIAL CLIMATE AT RESEARCH UNIVERSITIES WITH OR WITHOUT AFFIRMATIVE ACTION AND “CRITICAL MASS”

At the University of California, which is subject to an affirmative action ban, recent survey data from eight campuses confirm that the campus racial climate is significantly more inhospitable for African Americans and Latinos than at UT Austin and two other peer universities.

In particular, these survey data from 9,750 African American and Latino students confirm that having an affirmative action ban and low diversity is associated with African Americans and Latinos perceiving that students of their race/ethnicity are less respected on campus compared to those on campuses with affirmative action and/or higher levels of diversity. The data call into question both Petitioner and her amici’s minimization of the harms of racial isolation and their claims that affirmative action is the cause of stigmatic harm (discussed in the next section).

At the Supreme Court oral argument in the Fisher case, the Justices and lawyers devoted considerable attention to the concept of “critical mass” (mentioning the term approximately fifty times).⁶ Relatedly, there was significant debate about the import of students from certain racial groups potentially feeling isolated on campus, as in this exchange between the University’s counsel and Chief Justice Roberts:

CHIEF JUSTICE ROBERTS: So, what, you conduct a survey and ask students if they feel racially isolated? UNIVERSITY COUNSEL, MR. GARRE: That’s one of the things we looked at.

CHIEF JUSTICE ROBERTS: And that the basis for our Constitutional determination?

MR. GARRE: Your Honor, that’s one of the things that we looked at.

CHIEF JUSTICE ROBERTS: Okay. What are the others?

MR. GARRE: Another is that we did look at enrollment data, which showed, for example, among African Americans, that African American enrollment at the University of Texas dropped to 3 percent in 2002 under the percentage plan.

CHIEF JUSTICE ROBERTS: At what level will it satisfy the critical mass?

MR. GARRE: Well, I think we all agree that 3 percent is not a critical mass. It’s well beyond that.

CHIEF JUSTICE ROBERTS: Yes, but at what level will it satisfy the requirement of critical mass?

MR. GARRE: When we have an environment in which African Americans do not -

CHIEF JUSTICE ROBERTS: When—how am I supposed to decide whether you have an environment within particular minorities who don’t feel isolated?⁷

[and after more exchange between Justice Roberts, Justice Alito, and Mr. Garre]

JUSTICE SOTOMAYOR: Mr. Garre, I think that the issue that my colleagues are asking is, at what point and when do we stop deferring to the University’s judgment that race is still necessary? That’s the bottom line in this case.

The comparative data in this section of the article are particularly

6. Fisher v. Univ. of Tex., Transcript of Supreme Court Oral Argument (Oct. 10, 2012), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf.

7. *Id.* at 47–49. In a similar vein, Justice Sotomayor queried, “But you can’t seriously suggest that demographics aren’t a factor to be looked at in combination with how isolated or not isolated your student body is actually reporting itself to feel?” *Id.* at 14.

relevant – perhaps even uniquely so – to addressing the Chief Justice’s difficult set of questions.⁸ The recent data herein allows for comparisons of how welcome and respected African Americans feel at research universities like UC Berkeley, UCLA and UC San Diego (where they are two, three or four percent of the student body) versus UT Austin and other research universities (where they represent five percent or more of the student body). Comparative data for Latinos and Whites are also analyzed.

UT Austin initiated its limited consideration of race and ethnicity post-*Grutter v. Bollinger* after the University conducted a systematic study of diversity in its classrooms (including an analysis of diversity levels in large and small classrooms), and the University’s survey of undergraduates found minority students “reported feeling isolated.”⁹ In particular, UT Austin officials recognized that “critical mass is a necessary (but not sufficient) condition of achieving diversity” and that the University “could not accomplish its diversity goals without considering race in admissions.”¹⁰ Conversely, affirmative action bans (including UT Austin’s experience under *Hopwood v. Texas*¹¹) can exacerbate the vulnerability of underrepresented minority students and erode the quality of educational experiences these students have on campus.¹²

8. Difficult because, as described *infra* in more detail, a supportive educational environment for underrepresented minorities is dependent on several interactive factors; enrollment numbers matter but so too do other aspects of campus climate. Social scientists in this area tend to emphasize the nuance that policymakers and jurists are often inclined to eschew. Relatedly, Chief Justice Roberts’ line of questioning is also challenging because he seemingly starts from the premise that a University’s desired level of “critical mass” should be satisfactorily defined *ex ante*. See Vinay Harpalani, *Fisher’s Fishing Expedition*, 15 U. PA. J. CONST. L. HEIGHT. SCRUTINY (forthcoming 2013), available at ssrn.com.

9. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 225 (5th Cir. 2011).

10. Joint Appendix at 432a (B. Walker Affidavit), *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), cert. granted, 132 S.Ct. 1536 (2011) (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/Joint%20Appendix.pdf>; *supra* note 9, at 275 (Defendant’s statement of facts: “Officials discovered when talking with students that minority students still felt isolated in the classroom and a majority of undergraduates believed there was no diversity in the classroom. Walker Aff. ¶ 12; Walker Dep. 21:6–12”).

11. 78 F.3d 932 (5th Cir. 1996) (successful challenge by White applicants to the consideration of race in admissions at the Univ. of Tex. Law School, which effectively ended affirmative action within the Fifth Circuit until abrogated by *Grutter*).

12. Anne-Marie Nuñez, *A Critical Paradox? Predictors of Latino Students’ Sense of Belonging in College*, 2 J. DIVERSITY IN HIGHER ED. 22, 23 (2009) (Recent challenges to public universities’ affirmative action policies “can send signals to Latino students that they are neither qualified nor welcome in these institutions,” an effect that may be particularly strong in selective public flagship research universities) (citations omitted). These policy conditions can exacerbate the negative effects of exclusionary racial/ethnic climates and stereotyping on Latino students’ sense of belonging in these universities.); Sylvia Hurtado et al., “*Time for Retreat*” or *Renewal? The Impact of Hopwood on Campus*, in THE STATES AND PUBLIC HIGHER EDUCATION: AFFORDABILITY, ACCESS, AND ACCOUNTABILITY (Donald Heller ed., 2000).

While the amici supporting Petitioner in Fisher attempt to dismiss the University's claims that prior to the restart of affirmative action, underrepresented minority students at UT Austin felt isolated and the import of this information,¹³ there is already a substantial literature documenting the importance of a healthy racial climate on campus as a necessary but not sufficient means of enhancing learning and success.¹⁴ Students who feel respected and have a sense of belonging perform better academically, including in targeted interventions aimed at African American university and college students.¹⁵ In this paper my practical goal related to Fisher is to augment the larger literature with recent, illuminating climate survey data that "names names" and specifically includes UT Austin (as will be explained, this goal is partly satisfied by specifying for UT Austin and eight University of California campuses—supplemented by a couple unnamed peer universities). As will be demonstrated, comparative data from UT Austin and the University of California supports the educational judgment of UT Austin that achieving its diversity goals via express consideration of race in admissions decisions outside of the Top Ten Percent program.

While UT Austin resumed consideration of race after careful review in 2004, UC continues to be under an affirmative action ban because of Proposition 209. By 2001, the UC Board of Regents recognized a mistake and the Board rescinded their 1995 resolution banning affirmative action (the precursor of Prop 209), in part because the Board of Regents specifically found that the SP-1 resolution in 1995 caused some "individuals [to] perceive that the University does not welcome their

13. Brief of Scholars of Economics and Statistics as Amici Curiae in Support of Petitioner at 20–21, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2011) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2372 at *31–32.

14. See Sylvia Hurtado et al., *Assessing the Value of Climate Assessments: Progress and Future Directions*, 1 J. OF DIVERSITY IN HIGHER ED., 204, 213 (2008) ("Perhaps one of the greatest contributions of climate research to date has been its link with educational outcomes to understand the impact of both subtle forms of discrimination (the psychological climate) and the value of interaction with diverse peers or contact experiences during college (the behavioral climate and intergroup relations)."); Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 32 (2004) ("For diverse students to learn from each other and become culturally competent citizens and leaders of a diverse democracy, institutions of higher education have to go beyond simply increasing enrollment of students of different racial and ethnic backgrounds. These institutions must also attend to both the quality of the campus racial climate and the actual interactions among diverse students.").

15. See Gregory M. Walton & Geoffrey L. Cohen, *A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students*, 331 SCIENCE 1447, 1447 (2011); Angela M. Locks et al., *Extending Notions of Campus Climate and Diversity to Students' Transition to College*, 31 REV. HIGHER ED. 257, 260 (2008).

enrollment at its campuses.”¹⁶ Unfortunately, as shown in the climate survey data discussed below, many years after Prop 209, UC continues to struggle with the reality that many underrepresented minorities continue to experience a diminished sense of feeling respected.

We have data from UT Austin, eight University of California campuses and two other peer universities that administer an identical survey to undergraduates, which allows for apples-to-apples comparisons on questions about student attitudes, including one that is an important indicator of racial climate. We can, and shall later, break down the UC data by campus. The UT data comes entirely from UT Austin, the state’s flagship university, which is the subject of the present legal challenge. The data for “AAU University #1” and “AAU University #2” were provided to me upon condition that their institutions were not specified. Both are members of the Association of American Universities (the AAU represents the top sixty-two universities in the country), one is private and one is public; one is ranked somewhat higher than UT Austin in the U.S. News rankings and the other is somewhat lower ranked.¹⁷ AAU

16. *Resolution RE-28*, THE REGENTS OF THE UNIV. OF CAL., (May 2001), <http://www.universityofcalifornia.edu/regents/regmeet/may01/re28new.pdf>.

17. I cannot provide much more than this in the way of descriptive information because relevant information is such that it would enable others to quickly deduce the identities of these two universities. For background, I emailed each of the universities administering the Student Experience in the Research University (SERU) survey and requested that they share their data on the “respect” question. Several universities declined to share their data, while others only had 2012 SERU surveys that were underway and would not be available in time. Two other universities provided me with data that is not reported in the text for a combination of small samples and categorization challenges. One is a public AAU located in a state with relatively few African Americans or Latinos. Consequently, the minority presence on campus even with affirmative action is low and the sample of minority respondents is very low. Those minorities who did respond report a high level of feeling respected (19 of 22 African Americans and 18 of 21 Latinos), but again these samples are very meager compared to the 1,830 African Americans and 7,920 Latinos responding to the same survey question at the eleven universities featured in the text. Their responses are quite unlike the response of students at UC, where California has both a high minority population and an affirmative action ban. I leave it for others to test with other data the hypothesis that part of the context-dependency of critical mass is that underrepresented minority students at this university (unlike UC) have a stronger sense of feeling respected by virtue of having a less jarring dissimilarity between their high school and university-level experience. That said, the data from this university is not inconsistent with my theme in the text that where an affirmative action ban is accompanied by low critical mass, the net effect can be to erode campus climate for underrepresented minority students. The other responding university (also a public AAU member) whose data I chose not to include was one in which the student body was undergoing transformation as cohorts who entered with affirmative action were graduating and being replaced by post-affirmative action cohorts. The data from this university is not inconsistent with what one finds from the data I present but sample sizes were small and the trajectory of a changing minority presence confuses any conclusions that one might otherwise draw.

University #1 employs affirmative action and, like UT Austin, has an undergraduate student body that is about 5% African American. AAU University #2 has a somewhat higher proportion of African American students than either UT Austin or the UC system. The survey response rates are solid or better at all of the universities included in this analysis, and all of the available survey administrations in recent years (2008 to 2011) are included.¹⁸

The data reveals that across eight UC campuses only 62.2% of African American students in 2008-10 report feeling that students of their race are respected on campus, compared to 92.6% of whites. At UT Austin in 2010-11, 72.3% of African Americans reported feeling that students of their race are respected on campus, compared to 96.4% of whites. To Justice Roberts' line of questions at oral argument in *Fisher*, the UT Austin data show a 24-point gap between African Americans and whites in terms of feeling respected on campus, so things are surely less than satisfactory (two to three years after Ms. Fisher applied) as far as attaining a campus racial climate where nearly all African American students feel respected and welcome.¹⁹ And these data represent a conservative measure of average racial differences in student reports of feeling respected.²⁰

18. As far as overall response rates, the University of California Undergraduate Experience Survey (UCUES) is administered to *all* UC undergraduates (not just freshmen or large lecture classes that are easier to capture) and had a respectable overall response rate of 39% in 2008 and 43% in 2010 (note the question above is in one of the modules and is given to a random subset of UCUES respondents). The SERU response rate for UT Austin in 2011 was 42%, and both AAU Universities #1 and #2 had response rates equal to or higher than UT and UC (being more specific could effectively disclose the identity of these institutions). Another judgment call was to include UT Austin's 2010 SERU survey, notwithstanding the fact that it had a lower response rate of 21% (that was the first time UT Austin administered the SERU survey). The results for UT Austin's 2010 and 2011 surveys were nearly identical despite the large difference in response rates, and including both years raises the statistical power where it matters most in light of the *Fisher* case (and 2011 counts more in the average because of the larger sample). Additional details are available in Appendix A of "The Saliency of Racial Isolation," *supra* note *. Suffice it to say that analysis suggests that response bias on either SERU or UCUES are not a major problem overall. UC administers UCUES every other year (2008, 2010, 2012, etc.), whereas AAU University #2 thus far does the same thing but in odd-numbered years (2009, 2011, etc.).

19. To the extent skeptics may emphasize that the UT Austin figures result from stigma-reduction effects associated with the Ten Percent Plan rather than the presence of affirmative action and/or critical mass, the 2011 UT Austin data can be further disaggregated by those who were admitted under the Ten Percent Plan and those who were not. For both African Americans (73% versus 70%) and Latinos (92% versus 91%), the disaggregated data are not significantly different. Additional discussion of alternative hypotheses is in Appendix A of "The Saliency of Racial Isolation," *supra* note *.

20. In other words, African Americans are much more likely than Whites to respond to the survey question about feeling respected on campus by stating they "somewhat agree" rather than "agree" or "strongly agree." Restricting analysis to respondents who "agree" or "strongly agree" would have magnified racial differences

Secondly, the data in Chart 1 are also illuminating with respect to Justice Sotomayor's question at oral argument about when to "stop deferring to the University's judgment that race is still necessary?" The African Americans at UT-Austin report feeling respected at rates that are ten-points higher than at UC where affirmative action is prohibited; this gap is significant on both a statistical and a practical level.²¹ AAU University #1 likewise reports higher levels of African American (75.0%) and students feeling respected on campus, and at AAU University #2 the figure for African Americans is 76.3%. UT Austin and AAU Universities #1 and #2 have higher proportions of African Americans in the student body than UC, and all of these universities report statistically significant levels of black students being more likely to report feeling respected on campus as compared to UC.

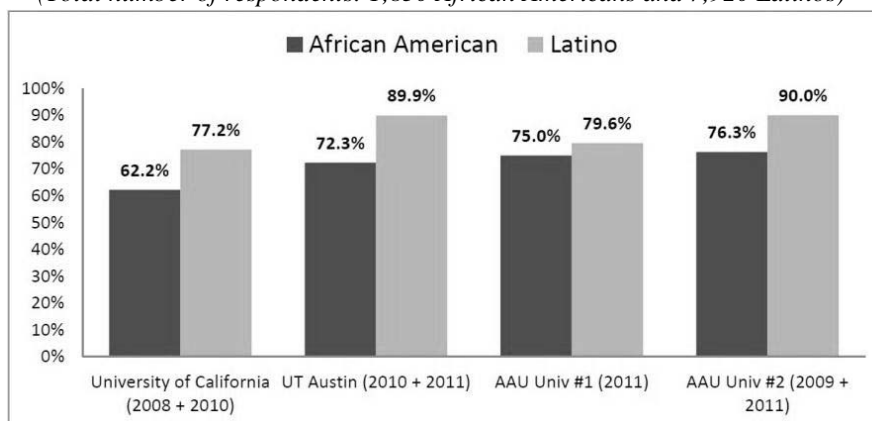
Looking at Chart 1, across the UC system 77.2% of Latinos feel that students of their ethnicity are respected, compared to 89.9% at UT Austin. At AAU University #1 79.6% of Latinos feel respected, and at AAU University #2's 90.0% of Latino students report feeling respected. UT and the two AAU universities all edge out UC in terms of their all have higher rates of Latino students feeling respected.

in the results at UT Austin and other universities in this data set.

21. Regarding statistical significance (two-tailed P values), the following comparisons were significant at the .05 level: (a) African Americans at UC versus UT Austin; and (b) African Americans at UC versus AAU #1. The following comparisons were significant at the .01 level: (c) African Americans at UC versus AAU #2; (d) Latinos at UC versus UT; and (e) Latinos at UC versus AAU #2. However, the smaller gap among (f) Latinos at UC versus AAU #1 was not statistically significant. Both social scientists and lawyers alike underappreciate the distinction between practical significance and statistical significance. See David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211, 252 (3d ed. 2011) ("When practical significance is lacking—when the size of a disparity is negligible—there is no reason to worry about statistical significance."); Richard Lempert, *The Significance of Statistical Significance*, 34 LAW & SOC. INQUIRY 225 (2009) (reviewing STEPHEN T. ZILIAK & DEIRDRE N. MCCLOSKEY, *THE CULT OF STATISTICAL SIGNIFICANCE: HOW THE STANDARD ERROR COSTS US JOBS, JUSTICE, AND LIVES* (2008)).

**Chart 1: “Students of my race/ethnicity are respected on this campus” for
UT Austin, UC, and Two Other Peer Universities²²**

(Total number of respondents: 1,830 African Americans and 7,920 Latinos)



The benefits associated with “critical mass” are highly context-dependent and not amenable to a one-size-fits-all admissions target, but these benefits are no less real and measureable because they are manifest in the complex ecosystem of higher learning. The overall differences reported in Chart 1 above are, as noted, statistically significant. When performing a finer-grained analysis (Chart 2) the smaller numbers mean that individual comparisons are often not statistically significant—but as will become evident in a moment, the overall pattern surely matters. Treating each administration of a survey at each of these universities separately, the 1,830 African Americans in these surveys are distributed among twenty-one campus data points and a total of ninety-eight comparisons are possible between campuses with 2-4% African Americans versus the campuses with 5% or more African Americans. For example, one can compare UC

22. The breakdown for these grand totals of 1,830 African Americans and 7,920 Latinos are as follows: UC in 2008 563 African Americans and 3,047 Latinos; UC in 2010 447 African Americans and 2,741 Latinos; UT Austin had 102 African Americans and 432 Latinos in 2011 (and 39 and 199 in the smaller 2010 survey); AAU University #1 had 72 African Americans and 211 Latinos; and AAU University #2 had 255 African American and 615 Latino respondents in 2011 and 352 African Americans and 675 Latinos in 2009. Univ. of Cali., *2012 Accountability Report*, Univ. of Cali., <http://www.universityofcalifornia.edu/accountability/index/8.3.1> (last visited 12/1/2012) (showing UC data, and showing results for 2008 and 2010 for the UC system were nearly identical on this question). UC Merced totals are not reported by University of California, Office of the President (UCOP) because the much smaller Merced campus did not administer this question (at least not in both 2008 and 2010). The 2012 UCUES administration has not closed and been analyzed yet, so it will not be available in time for the *Fisher* case; the same goes for 2012 SERU surveys.

Berkeley in 2010 with UT Austin in 2011, UC San Diego in 2008 with UC Riverside in 2008, and so on.

Chart 2: Head-to-Head Campus Comparisons of African Americans Reporting “Students of my race/ethnicity are respected on this campus”

	2011	2010	2009	2008
African Americans = 5-10% Enrollment	AAU #2: 82.4%	UCR: 87.1%	AAU #2: 71.9%	UCR: 80.0%
	AAU #1: 75.0%	UT Austin: 74.3%		
	UT Austin: 71.6%			
African Americans = 2-4% Enrollment		UCB: 54.9%		UCB: 56.8%
		UCD: 68.1%		UCD: 62.7%
		UCI: 62.2%		UCI: 70.6%
		UCLA: 61.6%		UCLA: 55.7%
		UCSD: 31.5%		UCSD: 66.7%
		UCSB: 53.1%		UCSB: 48.1%
		UCSC: 61.1%		UCSC: 49.2%

When comparing campuses with lower (2%-4%) African American enrollments and an affirmative action ban to campuses with higher African American enrollments (5-10%)—some with affirmative action and some without—it is notable that in ninety-eight out of ninety-eight head-to-head comparisons, the African Americans at the campuses where they are 5% or more of the student body report higher levels of believing that students of their race are respected. That may not be quite as impressive as it sounds, but the likelihood this would happen by chance is, to put it mildly, quite small. There is no ironclad threshold where the educational benefits of “critical mass” always begin to firmly take hold, and to make such an assertion is not my goal.

Rather, I began this section of the article by noting that campus racial climate is highly context-dependent and the percentage of underrepresented minority students occurs within a complex ecosystem on campus. Thus, there is not what social scientists call a “monotonic relationship”—where the campus comparisons would show that a rise in diversity is never associated with a decline in students feeling respected. For example, in 2008 UC San Diego’s student population was 1.6% African American and 66.7% of African American students there felt respected. In 2010 the proportion of African Americans in the student body increased marginally to 1.8%, but the percentage who felt respected plummeted to 31.5% (almost certainly because the campus became embroiled in a set of high-profile racial incidents in 2010 that made African Americans feel far less welcome).²³

23. In 2010 there was a set of race-related incidents affecting the UCSD campus community—stemming from a flashpoint February 2010 “Compton Cookout” fraternity party off campus that evoked a number of deeply offensive stereotypes. In 2012, UCSD reached a voluntary settlement with the U.S. Department of Education’s

Chart 3 displays equivalent head-to-head comparisons for Latino undergraduates. The 7,920 Latinos completing the “respect” survey item are distributed among twenty-one campus data points and a total of 104 comparisons are possible between campuses with 12-17% Latinos in the student body versus the campuses with 18-31% Latinos (actually, most of these are within a range of 18-23%, UC Riverside is the outlier at 28-31% Latino). The university campuses with 18%+ Latino students have higher levels of their Latino students feeling respected in 86 of 104 head-to-head comparisons (83%) with the lower-diversity institutions where Latinos are 12-17% of the student body.²⁴

Equally important, in nearly all cases (16 losses and one tie out of 18) where the campus with higher Latino diversity did not have Latino students who were more likely to feel respected, it was on a “low African American diversity, no affirmative action” campus (UC Santa Barbara or UC Santa Cruz) dragging down the win rate. Conversely, within the group of 12-17% Latino campuses, the one with the highest proportion of Latino students who feel respected is the campus with the highest African American enrollment (AAU #2). These findings may seem surprising at first blush, but actually the pattern is consistent with the literature on the interdependent and multi-racial nature of campus climate.²⁵

Office for Civil Rights. See Tony Perry, *U.S. Ends Probe of Racial Bias at UC San Diego*, L.A. TIMES, April 14, 2012, <http://articles.latimes.com/2012/apr/14/local/la-me-0414-ucsd-harassment-20120414>. In this light, my personal view is that UC San Diego may be like the proverbial canary in the mineshaft, and when the percentage of African Americans is that low it is more vulnerable and less resilient in the face of such hostile climate incidents. It is difficult to test this hypothesis with the UCUES data (e.g., such events of this scale are fortunately infrequent—unlike more subtle microaggressions—and sometimes occur in the off-cycle years when UCUES is not given, such as a mocking “Tijuana Sunrise” party in 2007 at one of the other UC campuses described in the article below, or the anti-Asian American YouTube rant that went viral in 2011. See *Racist Incidents, Protests Spread At UC Campuses*, HUFFINGTON POST (March 2, 2010, 9:47 PM), http://www.huffingtonpost.com/2010/03/03/racist-incidents-protests_n_483436.html.

24. A decision needed to be made about where to set the threshold for comparisons, even if this has an element of arbitrariness. For example, if the threshold was set at 16% instead of 18%, then the higher Latino diversity campuses would have higher respect levels in 81% of comparisons.

25. The finding that Latinos perceive a more welcome climate where there are more African American students (and/or vice versa), is consistent with the recent large multi-institution Diversity Learning Environments survey findings. See Sylvia Hurtado & Adriana Ruiz, *The Climate for Underrepresented Groups and Diversity on Campus*, HIGHER EDUC. RES. INST. UCLA, 3 (June 2012), available at <http://heri.ucla.edu/briefs/urmbriefreport.pdf> (“It is important to note that Black students feel more included on more diverse campuses even when they are not the predominant minority on a campus.”). For similar reasons, there can also be positive spillover effects associated with greater exposure to diverse groups in higher education. See Nicholas A. Bowman & Tiffany M. Griffin, *Secondary Transfer Effects of Interracial Contact: The Moderating Role of Social Status*, 18 CULT. DIVERSITY & ETHNIC MINORITY PSYCHOL. 35, 38 (2012) (“Black students’ contact with Asians was

black and Latino undergraduates “reported feeling isolated,” and the University took action in recognition that race conscious measures were needed to reach its educational goals.²⁶ So in a very real sense, UT Austin’s holistic admissions policy was developed “working forward from some demonstration of the level of diversity that provides the purported benefits” in contrast to racial balancing “achieved for its own sake.”²⁷

It is also evident in Chart 2 above that African American students at UT Austin feel more respected than African Americans in all twenty-eight instances (2 x 14) when compared to UC campuses without affirmative action *and* with relatively low African American enrollments. The only case in a different category is UC Riverside, which has a much higher percentage of African Americans in the student body (nearly eight percent in 2008 and 2010).²⁸ Likewise, as displayed in Chart 3, applying the identical set of comparisons for Latinos reveals that students at UT Austin feel more respected (91.4% in 2011 and 86.4% in 2010) in all twenty-eight instances when compared to the aforementioned seven UC campuses. Again, UC Riverside is the only distinguishable case (narrowly winning three of four comparisons with UT Austin). To Justice Sotomayor’s (and the other Justices’) question about *when* courts might stop deferring to a university’s academic judgment rooted in concerns about racial isolation, UC Riverside shows that racial gaps are not inevitable and permanent (at UCR in 2010 87.1% of African Americans, 92.9% of Latinos, 89.5% of Asian Americans and 88.8% of whites reported feeling respected). At the

26. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 225 (5th Cir. 2011); Joint Appendix at 432a, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2011) (No. 11-345), *available* at <http://www.utexas.edu/vp/irla/Documents/Joint%20Appendix.pdf>.

27. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007).

28. The issue of “academic mismatch” is discussed in Part III of this paper. Suffice it to say mismatch does *not* explain the higher sense of respect and belonging among African American and Latino students at UC Riverside and lower levels at other UC campuses. With the warning about not over-interpreting SAT scores (discussed in Part III) as a caveat, note that in the five entering freshmen classes preceding the 2010 UCUES (2005 to 2009 cohorts) the combined Black-White gap in SAT scores at UC San Diego and UC Riverside were virtually identical (even though San Diego is more selective): 144 points and 139 points on the 1600 point scale. The Latino-White gaps in SAT scores were also very similar on these two campuses: 177 points and 158 points (and that fact poses a second problem for the “mismatch” explanation because these gaps are larger than for African Americans). Likewise, the black-white gap in SAT scores is 150 points at UC Santa Cruz (another example of a campus with low African American “respect” survey results). Even Antonovics & Sander—who make claims that I criticize in subsequent sections of this article—acknowledge the possibility of different climate dynamics at UC Riverside: “[T]his may reflect the more general perception, unrelated to signaling, that UCR was the most welcoming campus for minorities after Prop 209.” *See generally* Kate Antonovics & Richard Sander, *Affirmative Action Bans and the “Chilling Effect”* at 34, UNIV. OF CAL. AT SAN DIEGO, DEPT. OF ECON. (June 2012), http://econ.ucsd.edu/~kantonov/chilling_effect_2012_09_25.pdf.

same time, the Riverside example is so atypical that it highlights the magnitude of the challenge of achieving such positive outcomes more broadly (especially if very selective universities and colleges were to be denied the tool of affirmative action), as Riverside has one of the highest ratings on racial diversity in the *U.S. News & World Report* rankings²⁹ and Riverside is one of a small number of research universities eligible for federal grants as a Hispanic-Serving Institution (HSI).

The comparative data confirm both the importance of the educational benefits UT Austin seeks to achieve and the educational harms it seeks to avoid. These campus-level findings about the University of California are buttressed by earlier analyses of the 2006 and 2008 UCUES results by Chatman³⁰ and Thomson.³¹ Moreover, the qualitative study of racial climate at UC Berkeley by Solorzano, Allen & Carroll, conducted a couple of years after the implementation of Prop 209, reported evidence of students of color feeling marginalized and not respected, which had negative consequences on the classroom learning for everyone because these students employed coping strategies (e.g., keeping silent in class) that work against the types of robust discussions and interpersonal relationships that the Court in *Grutter* highlighted as so beneficial.³² Since *Grutter*, a

29. This has been true for several years. For the latest *U.S. News* ranking of national universities and racial/ethnic diversity, see *Campus Ethnic Diversity*, U.S. NEWS, <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/campus-ethnic-diversity> (last visited Jan. 19, 2013).

30. SERU director Steve Chatman reached the following conclusion with respect to issues around African Americans, belonging and critical mass (note that “FB” is an anonymous designation for one of the UC campuses; other contextual information indicates this must be UC Riverside); see Steve Chatman, *Does Diversity Matter in the Education Process?: An Exploration of Student Interactions by Wealth, Religion, Politics, Race, Ethnicity and Immigrant Status at the University of California*, CTR. FOR STUD. IN HIGHER ED. 30 (2008), available at <http://cshe.berkeley.edu/publications/docs/ROPS.Chatman.Exploring.3.5.08.pdf> (“The most pervasive problem found was lower ratings of belonging by African Americans overall and a couple of campuses where the ratings by African Americans were much lower. However, even among the consistently low ratings by African Americans there was one campus where ratings were actually higher than the campus average, FB . . . African American students at FB rated belonging as high as the UC average and higher than the overall student body at FB.”).

31. See Gregg Thomson, *Diversity Matters: New Directions for Institutional Research on Undergraduate Racial/Ethnic and Economic Diversity*, CTR. FOR STUD. IN HIGHER ED., (May 2011), available at <http://cshe.berkeley.edu/publications/docs/ROPS.Thomson.CampusClimate.5.5.11.pdf> (“Using 2006 UCUES results, Chatman examined sense of belonging . . . and found that African American students report significantly lower sense of belonging (Chatman, 2008). Only at the one UC campus [Riverside] where there are notably higher proportions of African American and Chicano students is this not the case. Analysis of more recent (2008 and 2010) UCUES results replicates and extends these findings (Thomson & Alexander 2011).”).

32. Daniel Solorzano et al., *Keeping Race in Place: Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15 (2002) (employing multiple methods, including focus group interviews in

number of quantitative studies show that increasing representation of students of color (structural diversity) is directly associated with a positive racial climate and other benefits like cross-racial understanding.³³

Enrolling the proportion of African Americans that UT Austin has achieved in part through its race-conscious holistic program is certainly not a panacea (after all, a substantially higher percentage of white students report feeling that students of their race are respected on campus), but it is an achievement that both matters and is rooted in an educational judgment deserving of the Supreme Court's deference. Those with a sense of history can appreciate how far UT Austin has come in striving to overcome its ignoble past of segregation, discrimination and a hostile campus climate toward African American and Latino students.³⁴

the Spring of 2000). See also Tara J. Yosso et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate for Latina/o Undergraduates*, 79 HARV. ED. REV. 659 (2009).

33. See Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 HARV. ED. REV. 615 (2008); Victor B. Saenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 RES. HIGHER ED. 1 (2007); Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. HIGHER EDUC. 529 (2004); Gretchen E. Lopez, *Interethnic Contact, Curriculum, and Attitudes in the First Year of College*, 60 J. SOC. ISSUES 75 (2004).

34. For example, the Texas Constitution mandated racially segregated schools at all levels, including higher education. TEX. CONST. art. VII, § 7 (repealed 1969). See also LULAC v. Clements, 999 F.2d 831, 866 (5th Cir. 1993) (“Texas’ long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute.”). *Sweatt v. Painter*, 339 U.S. 629 (1950), concerning the University of Texas Law School, was an important forerunner of *Brown v. Board of Education*, 347 U.S. 483 (1954), but the plaintiff, Heman Sweatt, was forced to relinquish his own dream of the “path to leadership” though his case leaves an enduring constitutional legacy. See Jonathan L. Entin, *Sweatt v. Painter, the End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3, 70–71 (1986) (noting that Mr. Sweatt eventually withdrew from UT Law after he was forced to endure cross burnings and “KKK” graffiti on or adjacent to the Law School grounds, a barrage of racial slurs from students and faculty, and had his tires slashed); Thomas D. Russell, ed., *Sweatt v. Painter Archival and Textual Sources*, <http://www.houseofrussell.com/legalhistory/sweatt/> (revised Sept. 25, 2008); A. Leon Higginbotham Jr., *Breaking Thurgood Marshall’s Promise*, DIVERSE ISSUES IN HIGHER EDUC., (July 12, 2007), <http://diverseeducation.com/article/8408/>. The family of Heman Sweatt filed a sober amicus brief in *Fisher*. See Brief of the Family of Heman Sweatt as Amicus Curiae in Support of Respondents, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), cert. granted, 132 S.Ct. 1536 (2011) (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/ACR%20Family%20of%20Heman%20Sweatt.pdf>.

Likewise, as the District Court noted in *Hopwood*, “[D]uring the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students. Mexican American students were segregated in on-campus housing and assigned to a dormitory known as the ‘barracks,’ as well as excluded from membership in most university-sponsored organizations.

LESSON #2: AFFIRMATIVE ACTION BANS AND “CHILLING EFFECTS”

Contrary to recent claims by groups opposing affirmative action, Proposition 209 triggered a series of educationally harmful “chilling effects.”

Data on UC’s freshman admit pools spanning a dozen years show that underrepresented minorities (more so for those with the strongest credentials, and especially for African Americans) are more likely to spurn an offer from UC than they were before Prop 209, and the difference compared to whites and Asian Americans has gradually widened under Prop 209. In combination with the survey data above, these findings about students’ enrollment choices again cast doubt on claims by affirmative action critics that Prop 209 benefited underrepresented minorities by lessening racial stigma. Declines in law school applications and undergraduate enrollments are also reviewed and contextualized.

UT Austin and other Texas universities already have a reservoir of experience from what was collectively referred to as the “Hopwood Chill”—a series of negative phenomena arising after the Fifth Circuit’s 1996 ruling (later abrogated by *Grutter*) that “severely undermined these universities’ efforts to create diverse multiracial campuses.”³⁵ Prop 209-related chilling effects at the University of California are evident at the stages controlled by candidates (choosing where they apply and which offer of admission to accept), at the enrollment stage (reflecting these choices plus admission decisions by universities, financial aid packages, students’ takeaways from campus visits, etc.), as well as in the climate students face once they are on campus. For analytical clarity, different chilling effects are described below at various stages in the educational process, but keep in mind that they are interrelated in terms of the arc of a student’s higher education experiences. For example, in Deirdre Bowen’s study of talented underrepresented minority college students looking to apply to graduate biomedical programs, students are drawing on their undergraduate experiences in the signaling and sorting process leading them to make decisions about where to apply and enroll in graduate

Additionally, until the mid-1960s, the Board of Regents policy prohibited blacks from living in or visiting white dormitories.” *Hopwood v. Texas*, 861 F. Supp. 551, 555 (W.D. Tex. 1994). See also Greg Moses, *Texas Bad: A Concise History of Civil Rights Findings 1978–2001*, TEX. CIV. RTS. REV. (Aug. 25, 2000), <http://texascivilrightsreview.org/wp/?p=32> (reviewing OCR investigations/reviews and voluntary desegregation plans in the 1970s–1990s).

35. Susanna Finnel, *The Hopwood Chill: How the Court Derailed Diversity Efforts at Texas A&M*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 71 (Gary Orfield & Edward Miller eds., 1998). See also Lisa M. Dickson, *Does Ending Affirmative Action in College Admissions Lower the Percent of Minority Students Applying to College?*, 25 ECON. EDUC. REV. 109 (2006) (documenting the drop immediately after *Hopwood* in African American and Latino college applications in Texas).

programs.³⁶

A. Chilling Effects and Minority Student Enrollment Choices: A Test of the “Stigma” Hypothesis

This section focuses attention on enrollment choices among those who were offered admission to the University of California. While the entire pool is analyzed, an area of specific attention and interest is the top one-third of UC’s admit pool because this is the subset of admitted students with the strongest credentials and the most and best enrollment choices inside UC and at competitor institutions, such as elite private universities. I begin with the scholarly debate about Prop 209 and “chilling effects” versus “warming effects,” which is framed by affirmative action critics Antonovics & Sander as follows:

[A]rguments for chilling effects played a prominent role in the debate over Prop 209. The idea that Prop 209 could have had an opposite “warming effect” was never advanced in the public debate, to our knowledge . . . A black candidate deciding between Berkeley and Stanford, for example, might conclude after Prop 209 that the signaling value of a degree from Berkeley, where there is little or no suspicion of racial preferences in admission, is greater than the signaling value of a degree from Stanford, where the suspicion of racial preferences in admissions is substantially higher. Thus, while the policy debated has focused on the chilling effects of affirmative action bans, warming effects are plausible as well.³⁷

The above quote is a point of entry into the related debate over contrasting theories about “stigma” and affirmative action. In *Fisher* the Petitioner and several of her amici warn of the stigmatic harm of affirmative action,³⁸ and Justice Thomas has long argued that affirmative

36. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197 (2010).

37. Antonovics & Sander, *supra* note 28, at 7. This paper was updated after Sander & Taylor’s *Fisher* amicus brief was filed, which cites to the 2011 version of the same paper. Antonovics & Sander frame their findings around the “signaling value” of Prop 209, but the opposite conclusion (i.e., that it is astute to accept an offer from Stanford, regardless of affirmative action) can also be explained as a manifestation of the signaling theory of higher education admissions, so it is not the signaling theory per se but its specific application to post-209 UC admissions that I dispute.

38. Brief of Petitioner at 41–42, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2011) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2263 at *66–67; Amicus Curiae Brief of the Center for Individual Rights in Support of Petitioner at 13–14, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2011) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2383 at *17–19; Brief for The Cato Institute as Amicus Curiae Supporting Petitioner at 15, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2011) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2368 at *21–22; Brief Amicus

action programs “stamp minorities with a badge of inferiority,” *Adarand Constructors, Inc. v. Pena*³⁹ and his impassioned opinion in *Grutter* about stigma invites examination by social scientists.⁴⁰ Former UC Regent Ward Connerly, who led the Prop 209 campaign, insists that stigmatic harm of affirmative action is a major issue,⁴¹ and other critics of affirmative action decry the notion that affirmative action “robs” the most accomplished minority students of the pride of accomplishment and other benefits of being admitted under race-blind criteria (sometimes echoing the Stanford or post-Prop 209 Berkeley theme highlighted by Antonovics & Sander).⁴²

Many scholarly supporters of affirmative action concur that “the stigma argument matters” and attempt to test it empirically by surveying student attitudes at institutions with and without affirmative action (much like the “respect” data in Part 1 of this paper, which is also a disconfirming test of the stigma hypothesis)⁴³ or by attempting to understand boundary

Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 19–20, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2011) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2360 at *33–34; Brief for Mountain States Legal Foundation as Amicus Curiae Supporting Petitioner at 6–7, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2011) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2381 at *8–10.

39. 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

40. André Douglas Pond Cummings, *The Associated Dangers of “Brilliant Disguises,” Color-Blind Constitutionalism, and Postracial Rhetoric*, 85 *IND. L.J.* 1277, 1283 (2010) (“In *Grutter*, Justice Thomas almost invites social scientists to test his stigma theory, so confident was he in the result that because *he* feels stigmatized and because *he* feels a badge of inferiority attached to him by his white peers, that all students of color are similarly stigmatized.”).

41. Interview by Charles Michael Byrd with Ward Connerly, Former Regent-University of California, in *INTERRACIAL VOICE* (Apr. 24, 1999), <http://198.66.252.234/interv6.html> (“When I go to college campuses, I hear a lot of students say, ‘You know, you’re right. Every day that I walk into class I have this feeling that people are wondering whether I’m there because I got in through affirmative action.’ The reality is that the stigma exists. It exists, and they know it exists.”).

42. See JOHN MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 248 (2000) (an African American critic of affirmative action explaining, “I was never able to be as proud of getting into Stanford as my classmates could be. . . [H]ow much of an achievement can I truly say it was to have been a good enough *black* person to be admitted, while my colleagues had been considered good enough *people* to be admitted?”); Marie Gryphon, *The Affirmative Action Myth* at 9, *CATO INST.* (Apr. 6, 2005), <http://www.cato.org/pubs/pas/pa540.pdf> (“[P]references dilute those credentials for minority students who would be admitted to selective schools without them. To the extent that an acceptance letter from a ‘top school’ is a trophy signifying an extraordinary accomplishment, America’s highest achieving minority students are being robbed of the recognition they deserve.”).

43. See Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 *CAL. L. REV.* 1299, 1306 (2008) (analyzing student survey responses from the law schools at UC Berkeley, UC Davis, Cincinnati, Iowa, Michigan, Virginia, and Washington, comparing four schools that admitted students with affirmative action with three that were prohibited from using affirmative action); Bowen, *supra* note 36, at 1220–22 (finding the stigma argument against affirmative

conditions⁴⁴ or moderating variables like stereotype threat vulnerability.⁴⁵ In the wider public debate about stigma and Prop 209, Eva Jefferson Paterson, an African American civil rights activist and leading spokesperson against Prop 209, responded to the question about stigma by stating tongue-in-cheek: “Well, as I’ve often said, ‘Stigmatize me, give me that degree.’ As though if you don’t have the [elite] degree you’re not stigmatized as a black person.”⁴⁶ In other words, the prospect that ending affirmative action would result in tangible stigma reduction benefits for African Americans seemed highly dubious to her, especially when accompanied by the (soon-to-be-realized) prospect of doors of educational opportunity being closed for many students.

The review of the data begins with African Americans and will later expand to underrepresented minorities combined (the African American data is more revealing in some ways, but more comprehensive longitudinal data is available for African Americans, Latinos and American Indians combined). The “Door #1 or Door #2?” graphic below highlights some of the potential judgments and factors that a highly accomplished African American high school graduate might informally consider in the paradigmatic example of weighing admission offers from Stanford and UC Berkeley. Choosing between admission offers from USC and UCLA—ranked #23 and #25 in this year’s U.S. News rankings—is likewise a good example relevant to questions of whether stigma avoidance is a salient motivator when stacked up against an African American student being concerned by the “chilly” prospect of having too few African American classmates to have a sense of belonging, comfort and support on campus⁴⁷

action to be of questionable validity after analyzing accomplished underrepresented minority students looking to biomedical graduate school programs, and finding that the students in California and three other states with affirmative action bans report *higher* levels of stigmatization than similarly accomplished underrepresented minority students from 23 states with affirmative action).

44. Faye J. Crosby, *Affirmative Action: Psychological Data and the Policy Debates*, 58 AM. PSYCHOL. 93, 106 (2003) (“Thus, under certain conditions, members of disadvantaged groups may be immune to the stigma attached to being considered an affirmative action recipient . . . In everyday work situations outside the laboratory, where people learn much more about their own competence and the competence of others than in laboratory settings, the affirmative action label seems not to produce the negative effects that have been found under certain laboratory conditions. Similarly, large-scale surveys have shown that the direct beneficiaries of affirmative action do not seem to feel undermined by the policy.”).

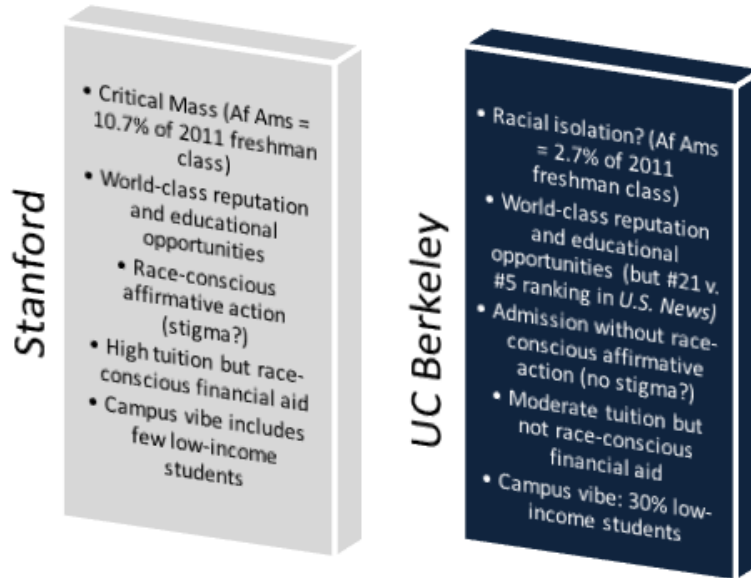
45. JIM SIDANIUS ET AL., *THE DIVERSITY CHALLENGE: SOCIAL IDENTITY AND INTERGROUP RELATIONS ON THE COLLEGE CAMPUS* 287–88 (2008).

46. Eva Jefferson Paterson, *Affirmative Action and the California Civil Wrongs Initiative*, 27 GOLDEN GATE U. L. REV. 327, 334 (1997).

47. For description of the “intimidation factor” that African American prospective freshmen are often mindful of when they see that a college campus lacks diversity and critical mass, see Robert T. Teranishi & Kamilah Briscoe, *Contextualizing Race: African American College Choice in an Evolving Affirmative Action Era*, 77 J. NEGRO EDUC. 15 (2008); Kassie Freeman, *Increasing African Americans’ Participation in*

and/or being motivated by reputation and a sense of how that may open future doors of opportunity.⁴⁸

**Chart 4: Door #1 or Door #2?
Stylized Choice Set for a High-Achieving African American
Student Weighing Admission Offers**



The following data tables are comprehensive, and include yield rates to the UC system for the pre-209 period of 1994-97 and the post-209 period of 1998-2011, though when focusing more closely on the few years before and after Prop 209, similar results obtain.⁴⁹ For African Americans, in the four years prior to Prop 209 (1994-97) an average of 39.0% of African Americans in the top third of UC's admit pool chose to enroll at UC, whereas in the fourteen years since Prop 209 (1998-2011) the yield rate declined to an average of 32.9%.⁵⁰ For African Americans in the middle third of UC's admit pool the corresponding yield rate averaged 60.5% in the years before Prop 209 and declined to 49.6% in the years after Prop

Higher Education: African American High School Students' Perspectives, 68 J. HIGHER EDUC. 523 (1997).

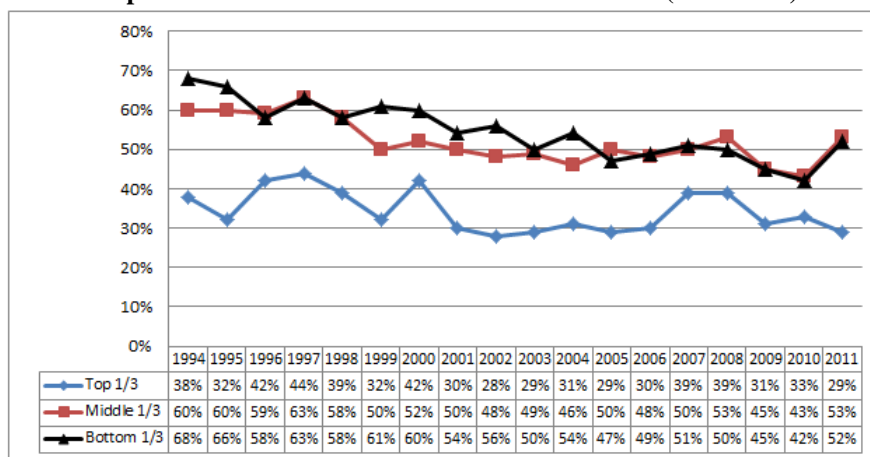
48. See discussion of the "mismatch" literature, *infra* Part 3 of this article.

49. Additional details and discussion are in Kidder, "The Salience of Racial Isolation," *supra* note * at Part II, Appendix B. There is some tradeoff with the comprehensive approach; for example, the very recent decline in underrepresented minority yield rates at elite privates in 2010 and 2011 would appear to be more likely associated with lingering effects of the challenging economy and high unemployment in California rather than a Prop 209 effect that was delayed fifteen years.

50. These data were provided by the UC Office of the President's institutional research unit. For ease of reference in relation to the charts and tables, the percentages in the text refer to unweighted averages.

209. And for African Americans in the bottom third of UC's admit pool (relevant, but much less so to the question of "stigma"⁵¹) the yield rate averaged 63.8% in the years before Prop 209 and declined to an average of 52.1% in the years after Prop 209. Accordingly, as shown in the chart below, within all segments of the admit pool African Americans were less likely to choose to enroll at the University of California in the years after Prop 209.⁵²

Chart 5: Freshmen Yield Rates to UC for African Americans, by Top/Middle/Bottom Thirds of the UC Admit Pool (1994-2011)



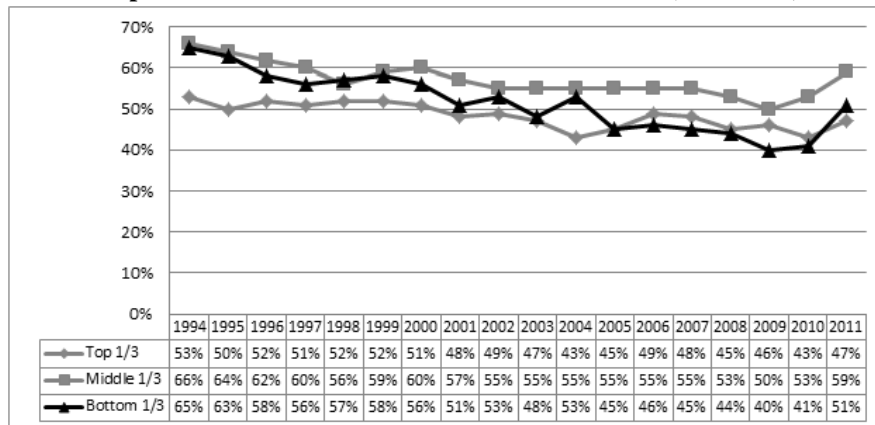
Turning to Latinos, Chart 6 confirms that Latinos in the top third of the UC admit pool had an average yield rate of 51.5% in the four years prior to Prop 209, and the overall post-209 yield rate declined to an average of

51. In the bottom third of UC's admit pool in 2001–11 46% of admits enrolled at a UC campus and only 2% of students enrolled at private selective institutions (including 4–7% of African American admits and 1–2% of Latino admits). In addition, in the bottom third of UC's admit pool 33% of all students end up choosing to enroll at the California State University or a California community college campus in 2001–11. This combination of large enrollment flow to non-selective institutions and meager enrollment flow to selective private institutions make it difficult to see how the bottom third of UC's admit pool yields illuminating tests of chilling effects versus warming effects and of stigma. In the top third of UC's admit pool only 8% enroll at a CSU or community college and 17% enrolled at selective private colleges and universities (including 39% of African Americans, 25% of Latinos versus 16% of Whites/Asian Americans/others). Accordingly, the top third of UC's admit pool is a far more fertile data set for assessing the "signal theory" and "stigma" in comparison to the bottom third of UC's admit pool. In their new book Sander and Taylor highlight "particularly impressive warming effects" at UC Berkeley and UCLA after Prop. 209, but I believe that Sander & Taylor are over-relying on yield rate data for underrepresented minority students with the lowest entry credentials. See RICHARD SANDER & STUART TAYLOR JR., *MISMATCH* 141 (2012). I have outlined my views of the Sander & Taylor book in a review for the *Los Angeles Review of Books*, available at <http://lareviewofbooks.org/>.

52. The data are more "choppy" in the top third of the pool due to the smaller numbers of African Americans.

47.5%.⁵³ In the middle third of the UC admit pool, the Latino yield rate to UC was 63.0% prior to Prop 209 and dropped to an average yield rate of 55.5% in the years since Prop 209. And within the bottom third of the admit pool the Latino yield rate was 60.5% in the years before Prop 209, which declined to an average of 49.1% in the fourteen years since Prop 209. Thus, once again within all segments of UC's admit pool Latinos were less likely to choose to enroll at the University of California in the many years after Prop 209 took effect.

Chart 6: Freshmen Yield Rates to UC for Latinos, by Top/Middle/Bottom Thirds of the UC Admit Pool (1994-2011)



While Charts 5-6 show that African Americans' and Latinos' yield rates to UC dropped in the top third of the admit pool post-209, for White/Asian American/Other admits in the top third of the pool the yield rate was essentially flat before and after Prop 209 (57% versus 58%). In the middle third of the admit pool the White/Asian American/Other yield rate declined (63% to 57%), but it was less than the decline for African Americans or Latinos. It is only in the bottom third of the pool where the decline for White/Asian American/Other admits is on par with the declines for African Americans and Latinos (and for reasons already noted, the bottom third of the UC admit pool that is least relevant to the policy debate about Prop 209, stigma and affirmative action).

The campus-level data complements the UC system data, though note that each campus admit pool is substantially smaller (especially when focused on underrepresented minorities in the top third of the pool). The

53. The Latino yield rate held steady for three years under Prop 209, but became consistently lower starting in 2001. An unusual confounding factor that may be at work here, and that is not appreciated by Sander & Antonovics, is that UC tuition was actually 12% lower in 1999–2001 as compared to 1994–97 even without adjusting for inflation (and thus UC's accrual of a price advantage vis-à-vis private competitors would have been even greater than that immediately after Prop 209).

data in Table 1 show that at all eight UC campuses analyzed, African Americans and Latinos in the top third of UC campus admit pools consistently had higher average yield rates in the years before Prop 209 (1994-97) than in the years since (1998-2011). The most pronounced case is African Americans at UCLA, where the yield rate in the top third of UCLA's admit pool dropped from 24% to 8%, a decline of two-thirds. Notably, there were thirteen times in the post-209 years when there was a *zero percent* yield rate for African Americans in the top third of the admit pools (13 of 98), including three times at UC Berkeley, twice at UC Davis and five times UC San Diego. In the pre-209 era of 1994-97 having a zero percent yield rate for African Americans in the top third of campus admit pools did not occur even once at the University of California (0 of 28 instances). The campus yield rates for White/Asian Americans/Others held steady at Berkeley and UCLA before and after Prop 209, and declined at other UC campuses, so overall the drop in campus yield rates was relatively larger for African Americans and Latinos.⁵⁴

Table 1: Average Freshmen Yield Rates at Eight UC Campuses, Top Third of UC Admit Pools, 1994-97 versus 1998-2011⁵⁵

	African Americans Pre-209	African Americans Post-209	Latinos Pre-209	Latinos Post-209
UCB	14%	8%	22%	15%
UCD	11%	4%	19%	8%
UCI	11%	5%	14%	8%
UCLA	24%	8%	17%	15%
UCR	17%	9%	21%	11%
UCSD	13%	4%	11%	7%
UCSB	10%	4%	12%	8%
UCSC	7%	5%	10%	8%

Consistently with the opening “Door 1 or Door 2?” chart, a final and important part of the story is to inquire about yield rates to selective private universities. If yield rates to selective privates show relative decline after Prop 209 for underrepresented minority candidates admitted to UC, that is consistent with the “warming effect” hypothesis and if the data show a relative increase, it is consistent with the “chilling effect” hypothesis. The data I could obtain on this question only spanned 2001-2011, but prior published research extends the comparison back to 1997 immediately before Prop 209 took effect.

The data for 2001-11 comes from UC's participation in the National

54. Comparing 1994-97 with 1998-2001, the data for Whites/Asian Americans/Others were as follows: UCB (32% v. 32%), UCD (16% v. 9%), UCI (12% v. 8%), UCLA (21% v. 21%), UCR (15% v. 8%), UCSD (13% v. 9%), UCSB (13% v. 9%), and UCSC (14% v. 9%).

55. The chart displays unweighted averages. UC Merced is excluded because it first enrolled students in 2005.

Student Clearinghouse,⁵⁶ and shows that among those in the top third of the UC admit pool African Americans are typically twice as likely as UC admits overall (39% average versus 18% overall) to attend a private selective college or university, and Latinos (25%) are also more likely to enroll at private selective institutions. Certainly this partly reflects the fact that proportionately more of these African American students are being offered admission to schools like Stanford, but it is still of considerable policy significance that this group of the most accomplished African Americans admitted to UC chose instead, by a wide margin relative to other students, to attend precisely the elite private universities that critics describe as burdening these students with affirmative action-related stigmatic harm.

Likewise, while Justice Thomas and critics like Connerly and McWhorter speak with great personal conviction about stigmatic harm, detailed data in Wilbur's study of the 2005 admissions cycle indicates that among African Americans in the top third of UC's admit pool (n = 211), only 26.1% chose to attend UC, whereas 50.7% chose to attend selective private institutions with affirmative action.⁵⁷ In fact, nearly half of these African Americans in the top third of UC's admit pool who declined a UC offer ended up enrolling at Harvard, Stanford, Yale or Princeton (with Stanford and USC the top two choices for Latinos).⁵⁸ For African Americans in the middle third of UC's admit pool in 2005 (n = 428) 21.7% enrolled at selective privates with affirmative action (a far higher rate than whites or Asian Americans, as discussed further below). So far, there is nothing in the data to suggest a Prop 209 warming effect, as the reality on the ground is markedly different than the theory described above by affirmative action critics.

The potential dangers of stigmatic harm are most salient for African Americans for deep-seated reasons related to the broader U.S. society,⁵⁹ so the fact that African Americans are especially likely to enroll at elite private universities with affirmative action when they have the choice to

56. For clarification, this is not identical to the UCOP data set used earlier, though the UCOP data referenced earlier and the National Student Clearinghouse data both cover freshmen who are California residents. For additional discussion of the differences, see Kidder, "The Salience of Racial Isolation," *supra* note *.

57. Susan A. Wilbur, *Investigating the College Destinations of University of California Freshman Admits*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION — THE PAST AND FUTURE OF CALIFORNIA'S PROPOSITION 209 63, 72 (Eric Grodsky & Michal Kurlaender eds., 2010).

58. *Id.* at 76.

59. See Michael Inzlicht & Toni Schmader, STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION (2012); CLAUDE M. STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (2010); Crystal M. Fleming et al., *African Americans Respond to Stigmatization: the Meanings and Salience of Confronting, Deflecting Conflict, Educating the Ignorant and 'Managing the Self,'* 35 ETHNIC & RACIAL STUDIES 400 (2012).

enroll instead at Berkeley, UCLA and other UC campuses is something that poses a high explanatory burden for affirmative action critics advocating the stigma theory. Moreover, the freshmen destination data reviewed in this section can and should be viewed in tandem with the campus racial climate data discussed in Part 1 of this article, as both streams of data provide convergent and consistent evidence that for African American college students the stigma reduction effects supposedly unleashed by Prop 209 are underwhelming if not entirely illusory.

So far, I've presented UC yield data on African Americans and Latinos going back to 1994 but summarized destination data for selective private institutions that only goes back to 2001 (due to current availability constraints). What follows is a synthesis of other previously published National Student Clearinghouse data on UC admits from Geiser & Caspary's study and a recent UC faculty admissions committee report.⁶⁰ These data represent somewhat of a compromise format compared to the analyses above, and help to round-out an otherwise partly incomplete picture of UC admits choosing to enroll at selective private universities and colleges. The tables and discussion below focus on underrepresented minorities overall (not African Americans and Latinos separately), but these data span 1997 to 2008 so at least one pre-209 comparison year is available.⁶¹ In addition, these data allow a comparison of differences over time vis-à-vis whites/Asian Americans/others.

In 1997, before Prop 209 took effect, 19% of underrepresenting minority

60. Saul Geiser & Kyra Caspary, "No Show" Study: College Destinations of University of California Applicants and Admits Who Did Not Enroll, 1997–2002, 19 EDUC. POL'Y 396, 408, 410 (2005); UNIV. OF CAL. BD. OF ADMISSIONS AND RELATIONS WITH SCH. (BOARS), COMPREHENSIVE REVIEW IN FRESHMAN ADMISSIONS AT THE UNIVERSITY OF CALIFORNIA 2003–2009, app. C at 86–87 (2010), available at http://www.universityofcalifornia.edu/senate/reports/HP_MGYreBOARS_CR_rpt.pdf. All three National Clearinghouse sources discussed herein have slightly different parameters — namely that Geiser & Caspary excluded colleges and universities that were not in the Clearinghouse as of 1997, my UCOP data excludes colleges and universities in the same way as of 2001, and the BOARS data do not impose such controls. The number of "unknown" cases gradually lessened over the years as more institutions participated in the National Clearinghouse, which is relevant to the BOARS figures. Another difference between the tables below and the original studies upon which it is based is that in both Geiser & Caspary's article and the BOARS report, I have subtracted URM from overall UC totals to produce the "White/AAPI/Other" category. I believe this modification is preferred because it allows a somewhat more precise set of comparisons.

61. 1995 is for some purposes a preferred "pre-209" baseline for undergraduate changes because to some extent pre-209 chilling effects were manifest by 1996 and 1997, but this is complicated and 1997 data should not be ignored. Cf. Eric Grodsky & Michal Kurlaender, *The Demography of Higher Education in the Wake of Affirmative Action*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION — THE PAST AND FUTURE OF CALIFORNIA'S PROPOSITION 209 33, 44 (Eric Grodsky & Michal Kurlaender eds., 2010) UNIV. OF CAL. OFF. OF THE PRES., UNDERGRADUATE ACCESS TO THE UNIVERSITY OF CALIFORNIA AFTER THE ELIMINATION OF RACE-CONSCIOUS POLICIES, 15 (March 2003).

admits to UC in the top third of the admit pool choose to enroll at selective private universities with affirmative action (African Americans' rates, if reported separately, would be much higher). In the first couple years under Prop 209 (1998 and 1999) this dropped to 16% of underrepresented minority freshmen admits, but the pattern reversed by 2000 – growing to 22-24% in 2000-2002 and to 30-35% in 2003-2008.⁶² In other words, in 1997 there was a +7.5 point difference between underrepresented minorities and whites/Asian Americans/Others in the top third of UC's admit pool choosing to attend selective private universities, but under Prop 209 (1998 to 2008 average) this jumped to +12.1 points.

Table 2: UC Admits going to Selective Privates, from the Top Third of UC's Freshmen Admit Pool, Underrepresented Minorities (URM) versus White/Asian Americans/Others, 1997-2008⁶³

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
URM	19.1%	16.3%	15.7%	22.2%	23.5%	23.9%	30.2%	33.5%	35.1%	32.6%	31.1%	34.4%
Wh/As/O	11.6%	10.9%	11.2%	12.9%	12.4%	12.7%	15.7%	17.3%	17.4%	17.8%	18.2%	18.9%
Difference	+7.5	+5.4	+4.5	+9.3	+11.1	+11.2	+14.5	+16.2	+17.7	+14.8	+12.9	+15.5

Unless the white/Asian/other students had somehow become significantly less academically competitive over these dozen years (which would make no sense),⁶⁴ this growing gap in enrollments at selective private universities is evidence that stigma avoidance does not seem to be a key driver of enrollment behavior for highly accomplished underrepresented minority (URM) students. With respect to URM students in the top third of the admit pool who choose to enroll at UC, there was a transitory uptick in 1998 and 1999 (perhaps the Antonovics & Sander paper is picking up on this), but overall the rate at which URMs in the top third of

62. More detailed information on specific schools is available for 2008. Of the top dozen destinations of underrepresented minorities in the top third of the admit pool who enroll outside UC, eight of the twelve are also in the top dozen list for all UC admits in the top third (USC, Stanford, Cal Poly, MIT, Harvard, Brown, Penn and Cornell). Thus, while a typical underrepresented minority admit in this upper echelon is being given an affirmative action plus factor at elite privates, the Asian Americans and whites in this group also have overlapping enrollment choices outside UC. See BOARS report, *supra* note 60, at 83. The same was true (nine of the top dozen) for the top third of the UC admit pool in 2002. Geiser & Caspary, *supra* note 60, at 402 tbl.2.

63. Note that a strong majority of these underrepresented minority students in the top third of the admit pool were in fact admitted to Berkeley and/or UCLA (obviating the need for a separate table of only Berkeley/UCLA admits). In 2003–2008, about two-thirds of these underrepresented minority students were admitted to either Berkeley or UCLA or both. See BOARS report, *supra* note 60, at 87, 91. The destinations of URMs admitted to Berkeley/UCLA yields the following percentages of students enrolling at selective privates (which are quite similar the table above): 2003 30.8%, 2004 34.2%, 2005 35.8%, 2006 33.9%, 2007 32.0%, and 2008 36.8%. See also Geiser & Caspary, *supra* note 60, at 410–14.

64. Cf., Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487 (2007).

UC's admit pool accept UC offers has been flat. More importantly, the gap between URM students and Whites, Asian Americans or Other students in the top third of the UC admit pool has widened beyond the pre-Prop 209 baseline in every year in the 2000-2008 period.

Repeating the same analysis for the middle third of UC's admit pool reveals that underrepresented minority students are more likely to enroll in selective private universities than whites/Asian Americans/others, and the gap increased slightly in the years since Prop 209. Underrepresented minority admits in the middle third of the pool are also slightly (but consistently) less likely to choose to enroll at UC and that gap also widened in the years since Prop 209 (data in the middle third of the admit pool are a bit more "noisy" but the overall pattern is more relevant than fluctuations from year-to-year).

Table 3: UC Admits Going to Selective Privates in the Middle Third of UC's Freshmen Admit Pool, Underrepresented Minorities versus White/Asian Americans/Others, 1997-2008

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
URM	8.4%	9.9%	9.4%	8.8%	8.5%	7.9%	11.1%	12.3%	11.1%	9.7%	10.3%	9.1%
Wh/As/O	5.8%	6.4%	5.5%	5.8%	4.3%	4.3%	5.7%	6.5%	5.6%	5.6%	6.7%	4.9%
Difference	+7.5	+5.4	+4.5	+9.3	+11.1	+11.2	+14.5	+16.2	+17.7	+14.8	+12.9	+15.5

While some of the UC yield/destination data in this article are newly reported, it is also true that previously published findings on the destinations of UC admits are ignored by affirmative action critics now claiming that Prop 209 brought about a mild "warming effect" for underrepresented minorities — including in Sander & Taylor's book and Fisher amicus brief⁶⁵ as well as Antonovics & Sander's false claim that no one has done a pre- and post-Prop 209 analysis of UC.⁶⁶ To the contrary,

65. SANDER & TAYLOR, *MISMATCH*, *supra* note 51, at 139 (claiming that at UC under Prop 209 "the aura of race-neutrality attracted many more black and Hispanic students than it repelled."); Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 12, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2384 at *28 ("And the court below suggested that minorities were discouraged from attending UT after it implemented *Hopwood*. But the best available evidence suggests that this is a myth, and that, on the contrary, bans on racial preferences seem to produce a 'warming effect,' making the affected institutions more desirable — not less — to prospective black and Hispanic students.").

66. Antonovics & Sander, *supra* note 28, at 9 ("Several authors have been specifically interested in the chilling effect, but have not analyzed it robustly for a variety of reasons: writing before the results of such bans could be observed (Orfield and Miller, 1998); using aggregate-level data that does not allow the modeling of individual student choices (Barrios, 2006); or examining admission and yield behavior after, but not before, the implementation of a racial preference ban (Wilbur, 2010)."). The table and text in this paper shows such a claim to be erroneous, for it simply incorporates 1997–2008 pre- and post-209 data that were already published in Geiser & Caspary's study and the BOARS report. Moreover, my co-authors and I cited Geiser &

in their earlier analysis of the 1997-2002 UC admit pools, Geiser & Caspary found that “private selective institutions have been the main beneficiary of UC’s loss of top underrepresented minority admits” after Prop 209, and they concluded:

A further part of the explanation may lay in the symbolic message that SP-1 and Proposition 209 sent to underrepresented minorities, many of whom may have come to view UC as less welcoming than in the past. Whatever the precise reasons for it, however, the trend is clear: Following UC’s elimination of affirmative action, private selective enrollment of top underrepresented minority admits to UC jumped by approximately six percentage points in 1999-2000, while the UC enrollment rate for these students fell by almost the same amount.⁶⁷

As indicated in the tables above, the problem has only worsened in the years not covered in Geiser & Caspary’s study (2003 to 2008). While it is unclear why the gap widened even more so many years after Prop 209 took effect (e.g., it could be that UC’s tuition and financial aid package advantage gradually lessened as tuition increased in the state budget downturn of 2003-04 and thereafter⁶⁸), stigma avoidance does not exert much pull to stop it, and that is the main point for present purposes. In addition, using a different approach and IPEDS data, Grodsky & Kurlaender also found a shift from UC to private institutions among African American freshmen after Prop 209.⁶⁹

Moreover, the data described herein provide a better basis for testing

Caspary’s study in our earlier *Stanford Law Review* critique of Sander’s law school mismatch study – specifically on the point about declining yield rates for top URM admits pre/post Prop 209. See also David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855, 1865 n.32 (2005). Note that data going back to 1995 would have been preferable to 1997, but were not available due to limitations at that time in the National Clearinghouse data set.

67. Geiser & Caspary, *supra* note 60, at 401.

68. For example, Geiser & Caspary observe “After taking into account differences in financial aid packages, the net savings of choosing UC over a private school is on average \$4,000 less for African Americans and Latinos than for other students, according to a recent UC study (University of California, 2003).” *Id.* at 401. This pricing advantage could have diminished even more or become negative between 2003 and 2008 vis-à-vis highly selective private universities.

69. Grodsky & Kurlaender, *supra* note 4, at 48. See also José L. Santos et al., *Is “Race-Neutral” Really Race-Neutral?: Disparate Impact Towards Underrepresented Minorities in Post-209 UC System Admissions*, 81 J. HIGHER EDUC. 675, 693 (2010) (“There was also disparate impact in the post-209 enrollment phase of the college selection process. Those URMs who did gain UC admissions attended other institutions at significantly higher rates than their majority counterparts and this trend is growing. This reinforces Geiser and Caspary’s (2005) findings, and is cause for concern as the UCs are losing students to both their private competitors and out-of-state schools.”)

“warming effects” and stigma. A critical flaw in Antonovics & Sander’s approach is that they analyzed students admitted to eight UC campuses in the 1995 to 2000 period, but what happened to students admitted to UC but who chose to enroll elsewhere was beyond the purview of their study.⁷⁰ Given that only three-fifths of UC admits end up enrolling at UC (and with race-differential patterns), the Antonovics & Sander study misses the part of the story that is arguably most relevant to the stigma and affirmative action debate.⁷¹ Rather, the scholarly and policy debate about affirmative action and stigma is effectively pushing the analytical inquiry toward comparisons of similar institutions with and without affirmative action as the way to test the potential causal role of stigma. To some extent this is true on both sides of the debate—examples include studies by Onwuachi-Willig, Houh & Campbell, and by Bowen on one end, and critique by Gryphon and the opening quote of this section from Sander from Antonovics & Sander at the other end.⁷² In other words, without firm data on UC admits who enroll at Stanford, Harvard and other selective private institutions, it is highly questionable for Antonovics & Sander to “hypothesize that Prop 209 may have increased the signaling value of attending a UC” for underrepresented minorities and to claim that “the warming effect is strongest at the most selective UC campuses.”⁷³

Returning to the opening quote from Antonovics & Sander about an African American student choosing between admission offers from UC Berkeley and Stanford, the data from both the top and middle thirds of UC’s admit pools over a dozen years provide a limited refutation of the stigma critique of affirmative action, by showing that to the extent the most accomplished underrepresented minorities have a choice between enrolling at the University of California or selective private universities, URM students are relatively more likely than other students to spurn an offer from UC in favor of elite private universities with affirmative action. Again, this trend has widened in recent years.

The above two tables represent a conservative test of underrepresented minority enrollment choices, since by definition, in the UC admit pool

70. Antonovics & Sander, *supra* note 28, at 12–13, figs. 1–4, tbls. 1–8. It appears that such data was not obtained by Antonovics & Sander: “[o]ur data do not allow us to directly examine what happened to URM’s relative chances of being admitted to schools outside the UC system after Prop 209.” *Id.* at 25. Rather, Antonovics & Sander attempt crude estimates of students enrolling outside UC treated as a single undifferentiated category (e.g., California Community Colleges and elite private universities would be lumped together in this constructed category) and using proxies based on SAT test-taker patterns. *Id.* at 26.

71. Economists have long recognized the dynamic and interdependent nature of higher education admissions. *See, e.g.*, ROBERT KLITGAARD, CHOOSING ELITES 78 (1985).

72. Onwuachi-Willig et al., *supra* note 43; Bowen, *supra* note 36; Gryphon *supra* note 42.

73. Antonovics & Sander, *supra* note 28, at 36.

100% of these students were offered admission to UC Berkeley, UCLA and/or other UC campuses, whereas only a smaller subset would have been offered admission at Harvard, Stanford, USC, Cornell, etc. While it is not possible to parse from these data the contribution of students' concerns about stigma per se, the important point is the robust "negative evidence" that whatever stigma-avoidance effects URM students might care about in theory, judged by the standard of how thousands of students "vote with their feet," such concerns are certainly swamped by the combination of other factors (e.g., prestige and signals of welcoming and critical mass) that URM students seem to care about more when deciding which admission offer to accept.⁷⁴

In conclusion, race-related stigma is a thorny and complicated issue in U.S. society with deep roots and history (that too was part of the take-home message of the earlier quote above from civil rights attorney Eva Paterson).⁷⁵ The affirmative action critics seem to conceptualize stigma as something that should go away or be dramatically reduced by virtue of banning affirmative action, but such claims merely pantomime aspects of the scholarly literature on stigma and the data reviewed in this paper thus far reveal the impoverishment of conceiving stigma in such a simplistic way. First, Part I of this paper shows that at appreciably lower percentages African American and Latino undergraduates at UC report feeling respected on campus compared to UT Austin.. Second, to the degree that many affirmative action critics posit that reducing racial stigma through elimination of race-conscious admissions is a valuable social good,⁷⁶ Part II.A. of this paper reveals that thousands of underrepresented minority students seem to not buy-in to their paradigm when presented with the choice of attending a selective private university that employs affirmative action.

C. Chilling Effects and Application Rates

Though application behaviors precede choices about where to attend college, yield rates are discussed above because they arguably represent somewhat more of an acid test (a decision point when college choices are

74. Namely, as represented in the figure with two doors, awareness of the reputation and "eliteness" of the institution offering them admission, financial aid packages (which can include race-conscious components at the privates), students' informal sense of climate and "vibe" based on campus visits and other recruitment activities, and the desire not to enter a learning environment where one is such a tiny minority that there is a risk of racial isolation).

75. For definitions and literature review, see generally Onwuachi-Willig et al., *supra* note 43.

76. Antonovics & Sander, *supra* note 28, at 31 ("Removing the stigma of being a 'special admit' has both social and economic advantages. Being a URM admitted without a racial preference could increase the signaling value of one's college degree; thus, Prop 209 may have increased the signaling value of a UC degree for URM students.")

very concrete and focused rather than abstract) and because of the stronger implications for the related debate about affirmative action and stigma. Nonetheless, application patterns can be important, too. At the freshmen level, the research on Prop 209-related chilling effects in UC application patterns is rather ambiguous, with Long finding declines and Card & Krueger reaching somewhat incongruous results regarding the immediate impact of affirmative action bans.⁷⁷ Dickson found that in Texas ending affirmative action led to an immediate modest drop in black and Latino applications to college, and that there was only a small rebound effect after the Texas Ten Percent plan in combination with new scholarship aid efforts.⁷⁸

Regardless, the evidence is unambiguous and consistent that affirmative action bans led to substantial drops in African American applications at the most selective law schools. As indicated in Chart 7, between 1996 and 1998 at both UC Berkeley Law and UC Los Angeles law schools African Americans applications dropped by over two-fifths when SP-1 took effect, and then the resulting paucity of African Americans garnered national media attention.⁷⁹ More detailed 1996-98 data from Berkeley indicates a 25% drop in African American applicants with the highest LSAT scores.⁸⁰ Over the same period at the University of Texas Law School applications likewise plummeted by nearly three-fifths in the wake of Hopwood. At the UC Davis School of Law and UC Hastings College of the Law, African American applications dropped too, although somewhat less dramatically (note that UC Hastings was not subject to SP-1 in 1997, but only the atypical applicant would have been aware of such a distinction).⁸¹ By 1999, African Americans dropped below 3% of the applicant pool at the UC Davis School of Law named after Dr. Martin Luther King Jr. (King Hall).

77. Mark C. Long, *College Applications and the Effect of Affirmative Action*, 121 J. ECONOMETRICS 319, 325 (2004). *But see* David Card & Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 INDUS. & LAB. REL. REV. 416 (2005). Card & Krueger relied on SAT score sending patterns rather than actual applications, though they tested for the relationship of the two. Note that Card & Krueger focused on underrepresented minority applicants with the highest credentials, which has an affinity with the focus in this article with respect to college destinations in Part II.A and sits in contrast to Sander & Antonovics. *See also* Jerome Karabel, *No Alternative: The Effects of Color-Blind Admissions in California*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 33 (Gary Orfield & Edward Miller eds., 1998).

78. Dickson, *supra* note 35, at 114–17.

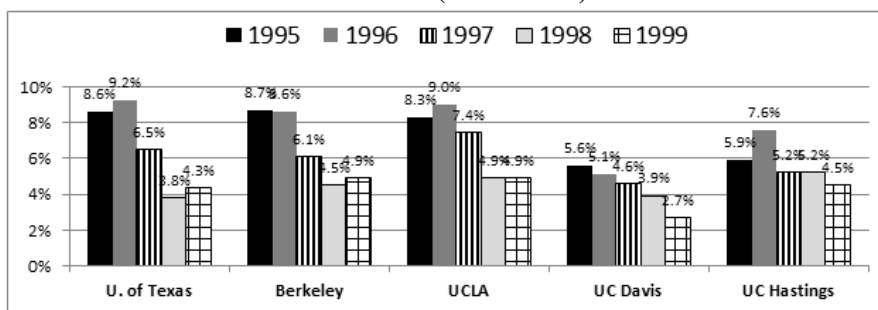
79. *See, e.g.*, ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION (2002).

80. *See* Chambers et al., *supra* note 66, at 1865 n.32.

81. During this period of application declines to law schools at UC and UT, the proportion of African Americans in the 1995–1999 national applicant pools to ABA law schools held constant.

In 1995 and 1996 African Americans were a combined 7.9% of the applicant pools to the law schools at UC Berkeley, UCLA and UC Davis, and a full decade later (after years of energetic efforts to counteract this chilling effect) African American applications were still more than a third below pre-Prop 209 levels, as the percentage had still only inched back to 5% of the applicant pools at these same law schools.⁸² Even at Berkeley Law where they have had the most recent success increasing African American applications (from 4.8% in 2006 to 5.7% in 2009 and 7.1% in 2011⁸³), this is still considerably below pre-Prop 209 levels despite the passage of fifteen years, a dean who is one of the most high-profile African American civil rights scholars in the country, and a myriad of other outreach efforts that make the school more inviting.

Chart 7: Leading Public Law Schools in Texas & California: Percentage of African Americans in Applicant Pools Shortly Before and After Affirmative Action Bans (1995 – 1999)⁸⁴



D. Chilling Effects and Enrollment Outcomes

The limited consideration of race/ethnicity at UT Austin was a decision rooted in the University's determination that student and classroom diversity was still lacking at UT Austin despite the contributions of the Ten Percent Plan. UT Austin's 2004 Proposal to restart affirmative action concluded that diverse student enrollment "break[s] down stereotypes," "promotes cross-racial understanding," and "prepares students for an increasingly diverse workplace and society."⁸⁵ Thus, enrollment matters because of its obvious implications for the educational benefits of diversity

82. These are duplicated applications because each law school administers admissions autonomously (i.e., some applicants applied to two or all three of these law schools).

83. BERKELEY LAW UNIV. OF CAL., ANNUAL ADMISSIONS REPORT (2011) (on file with the author).

84. These data, on file with the author, are from official application figures I collected in prior years from the UT Law School, the UC Office of the President (Berkeley, Davis and UCLA Law Schools) and the UC Hastings College of the Law.

85. Fisher v. Univ. of Tex., 631 F.3d 213, 225 (5th Cir. 2011).

in higher education.⁸⁶

More than a decade after Prop 209 took effect African Americans remained 3.7% of new freshmen enrolling in the UC system, and the figures are lower at UC Berkeley (2.9%), UC Santa Cruz (2.6%), UC Irvine (2.1%), and UC San Diego (1.2%).⁸⁷ The 2006 freshmen class at UCLA included the lowest number of entering African Americans since the early 1970s.⁸⁸ An overlooked but important point is that the number of American Indian freshmen who enrolled in the UC system was greater in 1995 than in any year since Prop 209 went into effect even though the total number of freshmen seats at UC grew by more than half between 1995 and 2008 (due to the exceedingly small number of American Indian freshmen at UC).⁸⁹

To provide some comparative context, the table below displays nearly thirty of the top American research universities and elite colleges arranged by the proportion of African Americans in the entering 2011 freshmen class. Whereas Part I of this article addressed the points raised in the Fisher oral argument regarding “critical mass” and racial isolation by analyzing comparative survey data, this part of the article covers similar ground via the straightforward approach of looking at African American enrollment patterns among many leading universities. Due to constraints associated with Prop 209, UCLA (3.9%) and UC Berkeley (2.7%) come out at the very bottom of the list (despite energetic recruitment efforts, impressive privately administered scholarship fundraising efforts, etc.). The University of Michigan, which has been under an affirmative action ban that the full (en banc) Sixth Circuit court recently ruled is unconstitutional,⁹⁰ likewise had the third-lowest proportion of African

86. This is related to the themes of racial isolation and respect discussed in Part I of this article, but it is also much broader. The *Fisher* amici brief by the AERA and seven other top research associations provides a cogent synthesis of the peer-reviewed literature supporting the compelling educational benefits of diversity. See Brief of The American Educational Research Association et al. as Amici Curiae in Support of Respondents, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), cert. granted, 132 S.Ct. 1536 (August 13, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 3287. This literature has deepened considerably in the decade since *Grutter v. Bollinger*, 539 U.S. 306 (2003).

87. A chart illustrating these trends at UC campuses over more than a decade is not included herein because it is too difficult to read in black-and-white, but is available at UC President’s Accountability Indicator 8.2, <http://www.universityofcalifornia.edu/accountability/index/8.2>; <http://www.universityofcalifornia.edu/accountability/index.php?in=8.2&source=uw>.

88. Rebecca Trounson, *UCLA Agrees to ‘Holistic’ Approach to Admissions*, L.A. TIMES (Sept. 29, 2006), <http://articles.latimes.com/2006/sep/29/local/me-ucla29>.

89. See Cruz Reynoso & William C. Kidder, *Tribal Membership and State Law Affirmative Action Bans: Can Membership in a Federally Recognized American Indian Tribe be a Plus Factor in Admissions at Public Universities in California and Washington?*, 27 UCLA CHICANO-LATINO L. REV. 29 (2008).

90. *Coalition v. Regents of the Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012) (en

Americans. By comparison, at Ivy League universities in 2011 African American freshmen range from 12.5% at Columbia to 7.9% at Cornell.

Table 3: Percentage of African Americans, Entering Freshmen at 29 Top U.S. Universities & Colleges, Fall 2011⁹¹

1. Columbia 12.5%	11. MIT 8.7%	21. USC 7.0%
2. Duke 11.1%	12. Yale 8.7%	22. Rice 6.9%
3. N. Carolina-Chapel Hill 10.7%	13. Dartmouth 8.3%	23. Chicago 6.6%
4. Stanford 10.7%	14. Carnegie Mellon 8.1%	24. Washington U. 5.6%
5. Harvard 9.8%	15. Virginia 8.1%	25. Tufts 5.2%
6. Vanderbilt 9.6%	16. Cornell 7.9%	26. Notre Dame 4.9%
7. Penn 9.5%	17. Wake Forest 7.7%	27. Michigan 4.6%
8. Brown 9.3%	18. Emory 7.4%	28. UCLA 3.9%
9. Georgetown 9.3%	19. Northwestern 7.3%	29. UC Berkeley 2.7%
10. Princeton 9.3%	20. Johns Hopkins 7.1%	

With respect to Latinos, a couple additional points are worth noting. First, scholars with a range of political views agree that at the most selective UC campuses the impact of Prop 209 was more pronounced, a phenomenon that is hardly surprising.⁹² As indicated in the chart below, at UC Berkeley in 1990 Latinos were 22% of the freshmen class and there was a precipitous decline by the first few post-Prop 209 years in the late-1990s. While there has been some improvement since then, Berkeley's proportion of Latinos in the freshmen class basically flattened out since 2002 at about 12%-13%.

The second point is that Latinos' share of California public high school graduates nearly doubled over a twenty-year span, from 23% in 1990 to 44% in 2010, and that fact is driving the modest upward trend in Latino freshmen enrollment in the UC system after Prop 209 (as it did in the decades prior to Prop 209). Affirmative action critics like the Pacific Legal Foundation and Sander & Taylor, who filed amici briefs in *Fisher*, tend to obfuscate this important demographic driver of enrollment change when touting Prop 209.⁹³ In Texas there is a similar trend with Latino high

banc). The U.S. Supreme Court may elect to review this case, in part because of the conflict between the 6th Circuit and 9th Circuit. *See also Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

91. *JBHE Annual Survey: Black First-Year Students at the Nation's Leading Research Universities*, J. BLACKS IN HIGHER ED. (Dec. 2011), <http://www.jbhe.com/2011/12/jbhe-annual-survey-black-first-year-students-at-the-nations-leading-research-universities/>.

92. *See* Grodsky & Kurlaender, *supra* note 4, at 52–53; Alisa Hicklin, *The Effect of Race-Based Admissions in Public Universities: Debunking the Myths about Hopwood and Proposition 209*, 67 PUB. ADMIN. REV. 331 (2007).

93. Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner

school graduates.⁹⁴ Because most of the country does not have the demographics of California, the data cautions against casually concluding that affirmative action bans do not cause net harm to Latinos at selective public university systems. Rather, the gap between the percentage of Latinos among California's public high school graduates and UC's entering freshmen class grew from 17.0 points in 1996 to 18.9 points in 2002 and 21.4 points in 2010.⁹⁵ This is not to argue, and the defendants in *Fisher* do not argue, that the relationship between the ethnicity of students in a state's public universities and the state's population of high school graduates should be in some fixed (or even loose) proportion to each other. Rather, it is simply used here as a reference point for describing longitudinal change.

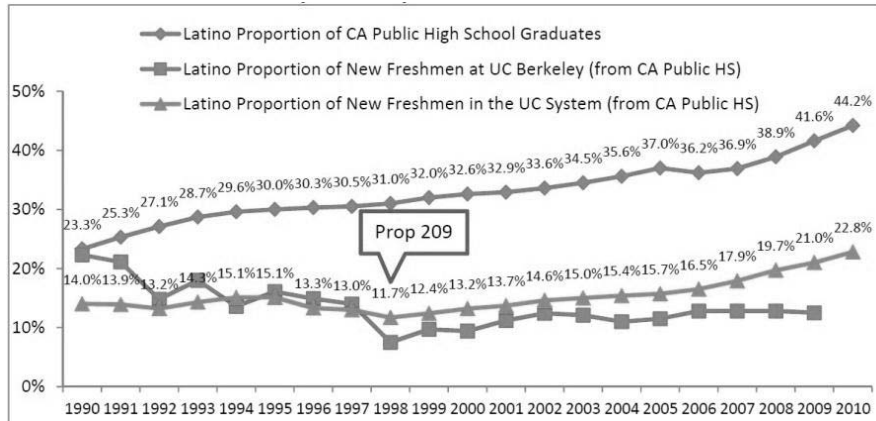
Chart 8: Latinos as a Percentage of California Public High School Graduates and New UC Berkeley and UC System Freshmen, Fall 1990 to 2010⁹⁶

at 15, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2360 at *26-28; Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 12, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2384 at *26-29.

94. See, e.g., Mark C. Long & Marta Tienda, *Changes in Texas Universities' Applicant Pools After the Hopwood Decision*, 39 SOC. SCI. RESEARCH 48 (2010).

95. Underlying these disparities are profound inequities in K-12 education. See generally PATRICIA GÁNDARA & FRANCES CONTRERAS, *THE LATINO EDUCATION CRISIS* (2009). For example, the rate at which California high school graduates enroll as freshmen at four-year institutions (UC, CSU and privates) is chronically among the worst in the 50 states, and this general pattern effects Latinos differentially.

96. UNIV. OF CAL. OFFICE OF THE PRESIDENT (relying on California Department of Finance figures for high school graduates). Very similar data is at CAL. POSTSECONDARY ED. COMM'N, *available at* http://www.cpec.ca.gov/StudentData/EthSnapshotTable.asp?Eth=4&Rpt=Grad_HS. Note that for reasons of internal consistency, the UC and UC Berkeley freshmen percentages are among Californians *who graduated from public high schools*. Because this is not normally reported externally, for UC Berkeley I have imputed small differences from Berkeley's enrolled California resident freshmen for the last few years.



LESSON #3 – THE AFFIRMATIVE ACTION CRITICS RELY UPON TWO RELATED MYTHS ABOUT CREDENTIALS AND PERFORMANCE.

As will be demonstrated in this section, Petitioner’s amici in Fisher combine two sets of fallacious claims intended as a rhetorical one-two punch against affirmative action.⁹⁷ The first maneuver is to scapegoat affirmative action as the overwhelming cause of racial/ethnic group differences in students’ entering SAT scores. The second maneuver is to then distort and exaggerate claims about associated negative outcomes (i.e., “academic mismatch”) and to contrast such evidence with (again) inflated claims about the positive results of race-blind admissions. These two sets of interrelated and hypertrophied claims mislead the Court and policymakers in important respects.

A. Myths about the Magnitude and Meaning of SAT Score Differences

Representative examples of the move to scapegoat affirmative action as the overwhelming cause of “staggering” differences in average SAT scores by race/ethnicity are found in several of the Fisher amici briefs:

Sander & Taylor:

Those African-Americans . . . and Hispanics who are admitted due to preferences typically enter with markedly less academic preparation (as measured by test scores and high school/college records) than nearly all of their Caucasian . . . and Asian classmates. For example, among freshmen entering the University of Texas at Austin in 2009 who were admitted outside the top-ten-percent system, the mean SAT score (on a scale of 2400) of Asians was a staggering 467 points above (and the mean

97. Nominally Sander & Taylor filed in support of neither party, but their criticism of affirmative action is abundantly clear.

score of whites was 390 points above) the mean black score.⁹⁸

Asian American Legal Foundation, claiming that among UT Austin students admitted outside the Top Ten Percent Plan in 2005:

[I]ndividuals of Asian ancestry achieve an average SAT score of 1322 compared to 1295 for similarly situated Whites, 1193 for similarly situated Hispanics, and 1118 for similarly situated African Americans . . . The statistics therefore confirm that UT Austin’s race-based policy requires individual Asians to work harder and achieve more than any other group⁹⁹

Gail Heriot et al. (3 USCCR Commissioners): Charging that affirmative action programs in higher education “have *created* a credentials gap up and down the academic pecking order.”¹⁰⁰

Brandeis Center and 80-20 National Asian American Educational Foundation et al. under the header that:

“Race Is Heavily Correlated to Prospects for School Admission” and claiming “Among enrolled students admitted to UT Austin outside the Top Ten Percent program in 2009, the mean SAT scores (out of 2400) were 1991 for Asians, 1914 for whites, 1794 for Hispanics, and 1524 for blacks¹⁰¹

98. Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 3, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2384 at *11. *See also* SANDER & TAYLOR, *MISMATCH*, *supra* note 51, at 288.

99. Brief of Amicus Curiae The Asian American Legal Foundation in Support of Reversal, *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822), 2009 U.S. 5th Cir. Briefs LEXIS 259. *See also* Brief for the Asian American Legal Foundation and The Judicial Education Project as Amici Curiae in Support of Petitioner at 2, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2366 at *7 (“At highly selective schools, such discrimination imposes an admissions penalty on Asian Americans equivalent to hundreds of SAT points relative to Hispanic and African-American applicants, and a lesser, but still significant, admissions penalty relative to White applicants.”).

100. Amicus Brief of Gail Heriot et al. in Support of the Petitioner at 6–7, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2385 at *12 (emphasis added).

101. Brief Amicus Curiae of the Louis D. Brandeis Center for Human Rights Under Law et al. in Support of Petitioner at 5–7, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2365 at *9–12. The Brandeis et al. brief is especially egregious in its promotion of junk science to argue that Asian Americans oppose affirmative action. Two short critiques of these claims (one authored by me, the other by Rob Teranishi of NYU), are as follows: William C. Kidder, *80-20’s Admissions Survey: Important Evidence or Junk Science?* ASIAN PACIFIC AMER. IN HIGHER EDU. (June 2012), available at <http://aaldef.org/APAHE%20Policy%20Brief.pdf>; Robert T. Teranishi, *The Attitudes of Asian Americans Towards Affirmative Action*, NATL. COM. ON ASIAN AMER. AND PACIFIC ISLANDER RES. IN EDU., available at <http://aaldef.org/CARE%20Policy%20Brief.pdf>.

These data claims stem from UT Austin admission reports, as shown in the table below (to maintain consistency across time and institutions the discussion here is to the two SAT sections that yield a 1600 point scale;

	2004	2005	2006	2007	2008	2009
Non-Top Ten Percent Freshmen (holistic admissions)						
Asian Am.	1304	1322	1310	1310	1346	1991
White	1267	1295	1286	1275	1300	1914
Latino	1189	1193	1154	1155	1211	1794
African Am.	1116	1118	1086	1073	1087	1524
Top Ten Percent Freshmen						
Asian Am.	1280	1288	1284	1277	1277	1874
White	1221	1226	1220	1225	1219	1864
Latino	1110	1122	1105	1115	1111	1628
African Am.	1046	1059	1067	1078	1068	1584

whereas the 2009 data cited by Sander & Taylor and the Brandeis Center, and shown in the far right column below, includes a third SAT section). The key issue is not the data, but the veracity of associated claims and conclusions.

Table 4: UT Austin Freshmen Enrollments, SAT averages by Race/Ethnicity, 2004-2009¹⁰²

Underlying these assertions by Sander & Taylor, the Asian American Legal Foundation and other groups and scholars critical of affirmative action like the Center for Equal Opportunity and the Cato Institute is the bedrock assumption that in the absence of race-conscious admission policies, racial differences in standardized test scores (e.g., SAT and LSAT) should become virtually non-existent (or at least dramatically less) within an institution.¹⁰³ The table above also begins a conversation about

102. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) Report No. 11* at 13–15, UNIV. OF TEX. AT AUSTIN OFF. OF ADMISSIONS (Oct. 28, 2008), <http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf>; *Implementation and Results of the Texas Automatic Admissions Law (HB 588) Report No. 12* at 15, UNIV. OF TEX. AT AUSTIN OFF. OF ADMISSIONS (Oct. 29, 2009), <http://www.utexas.edu/student/admissions/research/HB588-Report12.pdf>; *Implementation and Results of the Texas Automatic Admissions Law (HB 588) Report No. 13* at 14, UNIV. OF TEX. AT AUSTIN OFF. OF ADMISSIONS (Dec. 23, 2010), <http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf>. Affirmative action was restarted at UT Austin with the 2005 cycle, so the 2004 data in the table represent a transitional reference point.

103. See Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 2002 (2005) (defending his position about the black-white LSAT/GPA credential gap disappearing post-affirmative action by claiming, “[R]ace-neutral admissions do not eliminate 100% of the credentials gap at individual schools, only about 95% to 98% of it.”); STEPEHN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY 204 (2003) (displaying a stylized flowchart of the “fit hypothesis” claiming that in the absence of affirmative action the black-white SAT score gap should become zero—instead of 200 points under affirmative action—across a wide spectrum of colleges); Richard H. Sander, *Rational Discourse and Affirmative Action*, VOLOKH CONSPIRACY (April 1, 2012, 5:20 PM), <http://www.volokh.com/tag/mismatch/> (commenting on Duke University: “The university’s policy of giving large preferences based on race had created a large academic preparation gap across racial lines (e.g., an average 150-point

how things are more complicated than the portrayals quoted above, as the SAT score differences among those admitted to UT Austin through the formally race-neutral Ten Percent Plan are similarly large as the gaps among those admitted outside the Ten Percent Plan.

Before delving further into what some may regard as a rather technical discussion of SAT scores in the context of selective college admissions, it is important to have a sense of grounding about the meaning of SAT scores. To that end, readers should appreciate that at both UT Austin and UC, high school grades tend to be a better predictor of college success than scores on the SAT and have less adverse impact than SAT scores, points made clear in the course of parallel debates over the Ten Percent Plan in Texas¹⁰⁴ and over “comprehensive review” (i.e., holistic admissions) and

SAT gap, on the old 1600-point scale, between blacks and whites) and thus large differences in academic outcomes across racial lines. . . .”); Gryphon, *supra* note 42, at 11–12 fig.2 (arguing that affirmative action is the cause of a black-white SAT score gap of 150 points at Princeton, 182 points at Columbia, etc.); Gail L. Heriot & Christopher T. Wonnell, *Standardized Tests Under the Magnifying Glass: A Defense of the LSAT Against Recent Charges of Bias*, 7 TEX. REV. L. & POL. 467, 477 (2003) (arguing that if affirmative action were discontinued, many minority students would cascade to lower-ranked law schools and that at second, third and fourth tier schools “one would then find a much less dramatic correlation, if any, between race and the entering credentials of the students at those particular schools.”). The Center for Equal Opportunity (CEO) and its consultant Althea Nagai both signed amici briefs supporting the Petitioner in *Fisher*. Brief of Abigail Thernstrom et al. as Amici Curiae in Support of Petitioners, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2369; Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 1815. For examples of CEO’s and Nagai’s claims about average SAT score differences, see Robert Lerner & Althea K. Nagai, *Affirmative Action in Michigan Higher Education*, CTR. FOR EQUAL OPP., <http://198.173.245.213/michigan.html> (last visited Nov. 30, 2012); Robert Lerner & Althea K. Nagai, *Affirmative Action in Colorado Higher Education*, CTR. FOR EQUAL OPP., <http://ceousa.org/colorado.html> (last visited Nov. 30, 2012). The study of Colorado colleges and universities begins with the particularly indefensible salvo that the chances of their findings occurring without affirmative action are the “same as the probability of flipping a coin and getting 31 heads in a row.” A similar claim of “23 heads in a row” is found in CEO’s Michigan study. For the record, 31 heads in a row has a probability of 0.00000000046566. More recent CEO studies cover admissions to U.S. military academies and University of Virginia and continue claims about median SAT score differences, but omit the “coin flip” analogy. See Robert Lerner & Althea K. Nagai, *Preference at the Service Academies*, CTR. FOR EQUAL OPP., www.acri.org/blog/wp-content/ceousa-service-academies.pdf (last visited Nov. 30, 2012); Robert Lerner & Althea K. Nagai, *Preferences at the University of Virginia*, CTR. FOR EQUAL OPP., <http://ceousa.org/docs/virginia2.doc> (last visited Nov. 30, 2012).

104. See, e.g., Marta Tienda & Sunny Xinchun Niu, *Flagships, Feeders, and the Texas Top 10% Law: A Test of the “Brain Drain” Hypothesis*, 77 J. HIGHER EDUC. 712, 732 (2006) (“By admitting students without regard to ACT or SAT scores, Texas colleges and universities have reaffirmed the superiority of performance-based over test-based merit criteria. For example, at UT, top decile students not only outperform their lower-ranked counterparts with test scores 200–300 points higher (Faulkner,

standardized testing in California.¹⁰⁵ SAT scores are, as economist Jesse Rothstein found in analyzing the UC data, “highly correlated with student background, much more so than either [high school] GPA or [freshmen] GPA.”¹⁰⁶ Thus, it would be a serious mistake to regard the “SAT as destiny” when thinking about SAT test score differences between freshmen applicants (and in understanding the data discussed in this section). Even when high school grades and SAT scores are combined, this only explains 26-27% of the variance in freshmen GPA at UC for the entering classes of 2003 and 2004.¹⁰⁷ Taking into account other contextual information, like number of honors courses taken relative to opportunities at one’s high school results in incremental validity gains in predicting freshmen GPA at UC,¹⁰⁸ which is consistent with the wider literature.¹⁰⁹ In the remainder of this section about SAT scores, therefore, one should not forget that UT Austin’s holistic admissions program being challenged in the Fisher case considers far more information about applicants’ accomplishments and backgrounds—as the University should.¹¹⁰ An undercurrent in the arguments by Sander & Taylor, Gail Heriot, and the Center for Equal Opportunity is allegiance to a narrow definition of merit weighted heavily by SAT scores (one that if implemented would tend to exacerbate the

2000, 2002), but they also defy predictions that high-achieving students from underperforming schools are destined for failure because they are ill-prepared for college level academic work.”); *Implementation and Results of the Texas Automatic Admissions Law (HB 588) Report No. 12* at 13 tbl.6c, UNIV. OF TEX. AT AUSTIN OFF. OF ADMISSIONS (Oct. 29, 2009), <http://www.utexas.edu/student/admissions/research/HB588-Report12.pdf>.

105. See Saul Geiser & Roger Studley, *UC and the SAT: Predictive Validity and Differential Impact of the SAT I and SAT II at the University of California*, 8 EDUC. ASSESSMENT 1, 5 tbl.1 (2002). See also Jennifer M. Chacon, *Race as a Diagnostic Tool: Latinas/os and Higher Education in California, Post-209*, 96 CALIF. L. REV. 1215, 1250–54 (2008) (discussing the redefinition of merit, UC campus admissions policies, and efforts by UC’s faculty admissions committee to expand comprehensive review).

106. Jesse M. Rothstein, *College Performance Predictions and the SAT*, 121 J. OF ECONOMETRICS 297, 311 (2004).

107. Brown et al., *supra* note 5, at 140 tbl.7.1.

108. *Id.*

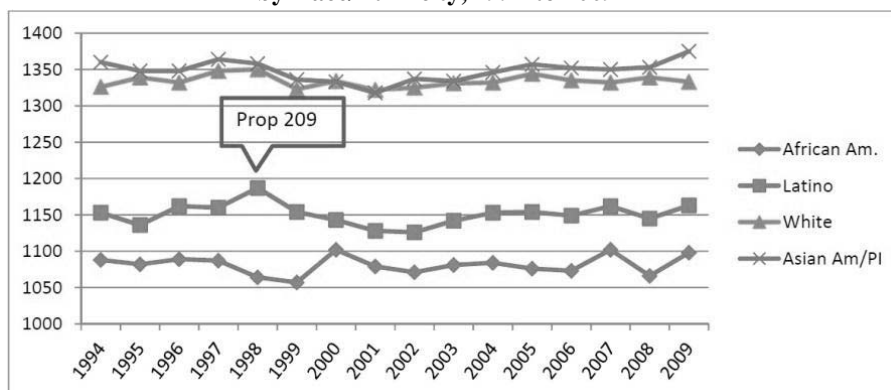
109. See, e.g., Stephen B. Robbins et al., *Do Psychosocial and Study Skill Factors Predict College Outcomes? A Meta-Analysis*, 130 PSYCHOL. BULL. 261 (2004).

110. See Affidavit of Kedra B. Ishop, *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587, 597 (W.D. Tex. 2009), available at <http://www.utexas.edu/vp/irla/Documents/Ishop.Kedra.Affidavit.2.23.2009.pdf>. See also Bruce Walker et al., *A Review of the Use of Standardized Test Scores in the Undergraduate Admissions Process at the University of Texas at Austin: A Report President Larry R. Faulkner*, (Jan. 25, 2002), http://www.utexas.edu/student/admissions/research/taskforce.html#_edn22 (“There is no replacement for the reasoned judgment of professionals in the admissions process. While the elements of the Personal Achievement Index (Leadership Score and Essays) have a moderate relationship to freshman GPA, their use contributes to the educational mission of the University.”).

exclusion of African American and Latino students).¹¹¹

Now addressing the aforementioned affirmative action critics' claims about SAT scores, the two charts below confirm that like UT Austin, there is a quite similar pattern in average SAT scores by race/ethnicity among UC Berkeley's and UCLA's domestic freshmen from 1994 to 2009. In fact, the magnitude of the average gap in SAT scores between Asian Americans and African Americans or Latinos is actually larger at UC Berkeley than at UT Austin. Importantly, the size of racial/ethnic disparities in SAT scores changed little after Prop 209 took effect, contrary to the strong expectations of affirmative action critics like Cole & Barber (referenced above). This is so despite the fact that African American and Latino freshmen enrollments dropped precipitously at Berkeley and UCLA in the years immediately after Prop 209¹¹² and notwithstanding that empirically rigorous analysis shows that Berkeley's post-Prop 209 admission procedures are not covertly considering race.¹¹³

Chart 9: UC Berkeley Incoming Freshmen, Average SATs by Race/Ethnicity, 1994 to 2009¹¹⁴



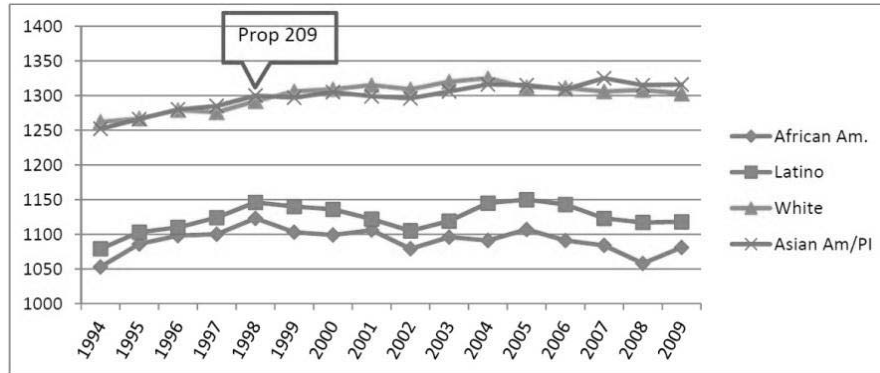
111. For a comparison of SAT score gaps and high school grade/rank differences by race/ethnicity, *see infra* notes 90–97 and accompanying text. *See also* Chacon, *supra* note 105, at 1252–53 (chronicling responses to reform of UC admissions by several affirmative action critics, including Gail Heriot describing UC's four percent plan (Eligibility in Local Context) as a legal "gray area" and of "controversial legal status") (citing Gail Heriot, *Thoughts on Grutter v. Bollinger and Gratz v. Bollinger as Law and as Practical Politics*, 36 LOY. U. CHI. L.J. 137, 169 & n.157 (2004)).

112. University of California- Office of the President, *Undergraduate Access to the University of California After the Elimination of Race-Conscious Policies* at 24 (Mar. 2003) (on file with author).

113. Michael Hout, *Berkeley's Comprehensive Review Method for Making Freshman Admissions Decisions: An Assessment* at 64 (May 2005), http://academic-senate.berkeley.edu/sites/default/files/committees/aepe/hout_report.pdf.

114. This custom table was created earlier in 2012 through the StatFinder data tool at the UC Office of the President, which was discontinued recently for budgetary reasons. The data may be requested from the Institutional Research office at UCOP.

Chart 10: UCLA Incoming Freshmen, Average SATs by Race/Ethnicity, 1994 to 2009¹¹⁵



Moreover, I report in an earlier article that even when removing from the UC Berkeley post-209 data the potential confounder of recruited athletes, among freshmen the African American seventy-fifth percentile SAT score and the white twenty-fifth percentile SAT score do not overlap¹¹⁶ (this too is unremarkable).

In light of the consistent data from UT Austin, UC Berkeley and UCLA, the question is why such large differences in SAT scores persist with or without affirmative action? As will be explained, rather large average differences on the SAT (especially when comparing African American and Latino students to whites and Asian Americans) are, in fact, a banal result (and in a constitutional sense, benign) that is to be expected whether or not selective universities have affirmative action. In fact, because arguments identical to those advanced by the likes of the Asian American Legal Foundation have garnered public attention in the past—namely the linchpin assumption in Herrnstein and Murray’s infamous book *The Bell Curve* that the average black-white difference in SAT scores on college campuses would disappear without affirmative action and the authors admonition that reducing the SAT gap to half a standard deviation is a good start but “not closely matched enough”¹¹⁷—there is already a substantial social science literature responsive to precisely this issue.

The strong consensus among scholars from a range of disciplines is that racial/ethnic average differences in SAT test scores at selective institutions, such as UT Austin, are to be expected for reasons that are fundamental to

115. This custom table was created earlier in 2012 through the StatFinder data tool at the UC Office of the President, which was discontinued recently for budgetary reasons. The data may be requested from the Institutional Research office at UCOP.

116. Chambers et al., *supra* note 49, at 1876 n.77.

117. RICHARD J. HERRNSTEIN & CHARLES A. MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 475–76 (1994).

selective higher education admissions and that function independent of affirmative action.¹¹⁸ This is especially so for the relatively larger gaps in average SAT scores for African Americans and Latinos. As explained by sociologists Claude Fischer et al.:

Race-neutral selection processes pass disparities in the applicant pool through to the freshman class. Therefore, we cannot read a gap in test scores as if it reflected an edge that the admission process gives to some students at the expense of others . . . Similarly, the fact that the average test score among freshmen of Asian American descent is higher than that among white [or Latino or African American] students does not prove that universities are discriminating against Asian Americans. It, too, reflects the distribution of test scores in the applicant pool. The admission process may simply reflect the higher average scores that Asian American applicants bring to the freshmen class.¹¹⁹

Nationally, and in the applicant pools to selective institutions, African Americans and Latinos consistently manifest score gaps in SATs that are larger than the gaps in high school rank or GPA,¹²⁰ as is the case in UT Austin's applicant pool.¹²¹

Thus, given that UT Austin's holistic admissions program outside the Ten Percent Plan considers a much broader array of information than simply SAT scores,¹²² it is a mathematically-driven inevitability that UT Austin's admission/enrollment outcomes will result in SAT disparities for African Americans and Latinos (versus whites and Asian Americans) that

118. See Chambers et al., *supra* note 66, at 1874–77 (reviewing expert opinion and data regarding the magnitude of average differences in test scores by race/ethnicity at both selective undergraduate institutions and law schools); William T. Dickens & Thomas J. Kane, *Racial Test Score Differences as Evidence of Reverse Discrimination: Less than Meets the Eye*, 38 INDUS. REL. 331 *passim* (1999); Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1064 (2002); Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 17, 19–20 (Gary Orfield & Edward Miller, eds., 1998).

119. CLAUDE S. FISCHER ET AL., *INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH* 46 (1996).

120. See Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487, 490, 497 *tbl.3* (2007); Jennifer L. Kobrin et al., *A Historical View of Subgroup Performance Differences on the SAT Reasoning Test passim*, THE COLLEGE BD. (2007), http://professionals.collegeboard.com/profdownload/pdf/06-1868%20RDCBR06-5_070105.pdf; Thomas J. Kane, *Basing College Admission on High School Rank 3* (Harvard Univ. Kennedy Sch. of Gov't, Working Paper, Jun. 14, 2000), available at http://www.texastop10.princeton.edu/reports/misc/basing_college_admission.pdf.

121. Long & Tienda, *supra* note 94, at 55 fig.1.

122. Fisher v. Univ. of Tex. at Austin, 645 F.Supp.2d 587, 591–92 (W.D. Tex. 2009).

are relatively substantial for both the holistic admissions and Ten Percent Plan tracks. Only in extremely rare circumstances (not applicable to UT Austin) is a contrary scenario even plausible.¹²³ These same dynamics explain why Latino and African American SAT gaps are large among Ten Percent Plan enrollees as well (because SAT scores are irrelevant to the high school rank-based Ten Percent Plan).

In short, the data does not support the Asian American Legal Foundation's irresponsible assertion that such SAT differences are a proxy for the degree to which race is taken into account in admissions and/or are evidence that Asian Americans must "work harder" to get an admission offer. Nor is Sander & Taylor's claim that affirmative action leads to "staggering" 400+ point differences at UT Austin any better or probative. Rather, as Bowen and Bok pointedly observe in *The Shape of the River*, "[t]he only way to create a class in which black and white students had the same average SAT scores would be to discriminate against black candidates."¹²⁴ At the same time I was writing this article, Professor West-Faulcon filed an amicus brief in *Fisher* that develops a parallel critique of the claims about SAT scores made by Petitioner and her amici.¹²⁵

B. Misleading Claims about "Mismatch" in the Undergraduate, STEM and Law School Areas

The amici in *Fisher*, such as Sander & Taylor who are critical of affirmative action, correctly assert that the empirical literature assessing net benefits and harms "has overwhelmingly focused on graduation rates from college," but they then provide a misleading portrayal of this research

123. Dickens & Kane, *supra* note 118, at 338 ("There are two reasons why introducing other qualifications besides test scores into consideration will result in blacks' test scores being lower than whites'. First, blacks' test scores tend to be their weakest credential relative to whites. Second, test scores (or what they represent) are only a small part of what is considered in most selection processes."). Thus, one exception is if there were very high inter-correlations between SAT scores and the other factors in the admissions process, but the national data do not support such a scenario. See, e.g., Robbins et al., *supra* note 109, at 272 tbl.6. For another possible exception to this general rule, see Dickens & Kane, *supra* note 118, at 338 ("As long as the distribution of test scores is normal, blacks and whites meeting the same standard will have different average test scores unless the standard is so narrow as to specify that everybody must have the same test score."). Caltech probably comes closest to satisfying the narrow conditions under which the exception applies to SAT scores, but Caltech is so far at the extreme edge of freshmen selectivity (and with so few African Americans: only 2 of 236 incoming freshmen in 2008) that it is the proverbial exception that proves the rule.

124. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 16 (1998).

125. Brief Amicus Curiae of Kimberly West-Faulcon in Support of Respondents at 6–9, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (August 13, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 3378 at *10–15.

literature as yielding a mixed and unclear answer (citing only studies that rely on 1970s data sets and that contain other limitations)).¹²⁶ Even worse are the three USCCR commissioners who decline to review overall college graduation rates but claim, in a brief supporting Petitioner, that there is “mounting empirical evidence showing these policies are doing more harm than good for their intended beneficiaries.”¹²⁷ In fact, a voluminous body of peer-reviewed social science research since Grutter (as was true of many studies before Grutter) confirms that underrepresented minorities do better in terms of graduation rates when affirmative action allows them to attend selective colleges and universities:

1. Bowen, Chingos & McPherson studied a set of twenty-one public flagship universities plus system data for four states, finding that there is a positive graduation rate effect if one attends more selective institutions, and it represents a positive tradeoff vis-à-vis the negative effect on class rank. They also found that for African Americans and Latinos in particular, students with the same high school GPA or SAT scores graduate at higher rates at more selective institutions.¹²⁸

2. Cortes studied UT Austin, Texas A&M and four other Texas public

126. Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 10, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2384 at *22. *See also* SANDER & TAYLOR, *MISMATCH*, *supra* note 51, at 107, 278. On this point Sander & Taylor rely on Linda Datcher Loury & David Garman, *College Selectivity and Earnings*, 13 J. LAB. ECON. 289 (1995) (utilizing data from the National Longitudinal Study of the high school class of 1972). Apart from the fact that the students in their study entered college forty years ago, Kane points out other limitations with the Loury & Garman study, including the strong pull in the data by historically black institutions (which had high graduation rates and low SAT scores) and their reliance on the questionable assumption that “B.A. completion has the same impact on earnings regardless of the college attended.” Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *THE BLACK-WHITE TEST SCORE GAP* 431, 445, 447 n.23 (Christopher Jencks & Meredith Phillips eds., 1998). Sander & Taylor also rely on Audrey Light & Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?*, 35 J. HUM. RESOURCES 299, 306 (2000) (using the 1979 National Longitudinal Survey of Youth, which tracked students born between 1957 and 1964). What is noteworthy is that Light & Strayer published a study a couple years later focusing more precisely of affirmative action and using the very same data set in which they caution against over-interpretation but conclude their findings were consistent with the interpretation that affirmative action policies “in college admissions boost minorities’ chances of attending college and that retention programs directed at minority students subsequently enhance their chances of earning a degree.” Audrey Light & Wayne Strayer, *From Bakke to Hopwood: Does Race Affect College Attendance and Completion?*, 84 REV. ECON. & STAT. 34, 43 (2002).

127. Amicus Brief of Gail Heriot et al. in Support of the Petitioner at 5, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2385 at *11.

128. WILLIAM BOWEN, MATTHEW CHINGOS & MICHAEL MCPHERSON, *CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA’S PUBLIC UNIVERSITIES* 106–08, 208–16, 313–14 n.7 (2009).

university campuses to determine if pre- and post-Hopwood data showed evidence of mismatch outside the Top Ten Percent students (who were used as a control group) and that Hopwood actually widened racial gaps in graduation rates: “most of the increase in the graduation gap between minorities and non-minorities in Texas, a staggering 90%, was driven by the elimination of affirmative action in the 1990s.”¹²⁹

3. Since *The Shape of the River*, several more recent studies have used the College & Beyond (C&B) data set. Alon & Tienda used C&B and multiple methods for accounting for selection bias, finding:

“Minority students” likelihood of graduation increases as the selectivity of the institution attended rises. Our findings, based on three data sets and several analytical methods, suggest that the mismatch hypothesis is empirically groundless for black and Hispanic (as well as for white and Asian) students who attended college during the 1980s and early 1990s. On the basis of the robust evidence we presented, we conclude that affirmative action practices both broaden educational opportunities for minority students and enable minority students to realize their full potential.¹³⁰

Similarly, using the C&B Small and Winship concluded, “[S]electivity increases the probability of graduation . . . Second, it is noteworthy that it helps blacks more than it does whites . . . [T]he strong effects of selectivity demonstrate a clear benefit of Affirmative Action in elite institutions.”¹³¹ Using a subset of eight C&B institutions, Espenshade & Radford find that affirmative action is associated with admits having lower class rank, but it still represents a net positive tradeoff vis-à-vis graduation rates and subsequent career and graduate and professional school outcomes.¹³²

4. Fischer & Massey, utilizing the National Longitudinal Survey of Freshmen to analyze the effects of affirmative action on a 1999 cohort of freshmen in twenty-eight selective colleges, found, “Our estimates

129. Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence From the Texas 10% Plan*, 29 ECON. EDUC. REV. 1110, 1110 (2010). The Ten Percent Plan students were used as a control group because their admission rates barely changed after *Hopwood v. Texas*, 861 F. Supp. 551, 555 (W.D. Tex. 1994), (96% v. 97%). Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence From the Texas 10% Plan*, 29 ECON. EDUC. REV. 1110, 1115 Tbl. 1 (2010).

130. Sigal Alon & Marta Tienda, *Assessing the “Mismatch” Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 SOCIO. EDUC. 294, 309 (2005).

131. Mario L. Small & Christopher Winship, *Black Students’ Graduation From Elite Colleges: Institutional Characteristics and Between-Institution Differences*, 36 SOC. SCI. RES. 1257, 1272 (2007).

132. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 233–36, 259 (2009).

provided no evidence whatsoever for the mismatch hypothesis.”¹³³

5. Melguizo studied NELS data (National Education Longitudinal Study) that covers an array of institutions ranging from the highly selective to the non-selective and deployed techniques controlling for selection bias, finding: “[M]inorities benefit from attending the most elite institutions . . . the selectivity of an institution attended has a positive and significant impact on the college completion rates of minorities.”¹³⁴ Similarly, Long also used NELS data and multiple empirical techniques and measures of “quality” in reaching the broader finding that college quality is associated with large positive effects on attaining a bachelor’s degree.¹³⁵

6. Recent articles and papers by economists have attempted to estimate the ultimate effect of affirmative action bans on the number of underrepresented minorities earning bachelor’s degrees. Backes concluded, using 1990-2009 IPEDS data, “All in all, although the effect sizes were modest, estimates show that there were fewer black and Hispanic students graduating from four-year, public universities following the bans, and those who did graduate tended to do so from less prestigious universities.”¹³⁶ Likewise, in weighing modest increases in minority graduation rates since affirmative action bans against the decrease in minority access to selective institutions, Hinrichs found that the rise in graduation rates may be attributable to other factors like “the changing composition of students at these universities. Moreover, the effects are small compared to the number displaced from selective universities due to affirmative action bans. Thus, on net, affirmative action bans lead to fewer underrepresented minorities becoming graduates of selective colleges.”¹³⁷

A similar success story is told in studies of labor market outcomes, although one would not know it from the amici briefs supporting the Petitioner in Fisher. After the Grutter ruling scholars like Sander and Nieli (now associated with briefs in Fisher) trumpeted a study by Dale & Krueger¹³⁸ as a “real blockbuster”¹³⁹ and as the “the most reliable way of

133. Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 SOC. SCI. RES. 531, 544 (2007).

134. Tatiana Melguizo, *Quality Matters: Assessing the Impact of Attending More Selective Institutions on College Completion Rates of Minorities*, 49 RES. HIGHER ED. 214, 232 (2008).

135. Mark C. Long, *College Quality and Early Adult Outcomes*, 27 ECON OF ED. REV. 588 (2008).

136. Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 J. HUM. RES. 435, 437 (2012).

137. Peter Hinrichs, *Affirmative Action Bans and College Graduation Rates* at 5–6, GEORGETOWN PUB. POL’Y INST. (June 2012), http://www9.georgetown.edu/faculty/plh24/affactionbans-collegegradrates_062612.pdf.

138. Stacy Dale & Alan Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q. J. ECON. 1491 (2002).

139. Russell K. Nieli, *The Changing Shape of the River: Affirmative Action and*

measuring mismatch effects.”¹⁴⁰ But these critics were misrepresenting Dale & Krueger’s findings for their own purposes in the affirmative action debate, and ignored the fact that there were too few African Americans in the data set that Dale and Krueger had available to allow for separate analysis.¹⁴¹ In a recent follow-up paper Dale and Krueger used C&B and Social Security Administration data sets, and they were able to look separately at underrepresented minorities:

We find that the return to college selectivity is sizeable for both cohorts in regression models that control for variables commonly observed by researchers, such as student high school GPA and SAT scores. However, when we adjust for unobserved student ability by controlling for the average SAT score of the colleges that students applied to, our estimates of the return to college selectivity fall substantially and are generally indistinguishable from zero. There were **notable exceptions for certain subgroups. For black and Hispanic students and for students who come from less-educated families (in terms of their parents’ education), the estimates of the return to college selectivity remain large, even in models that adjust for unobserved student characteristics.**¹⁴²

Dale and Krueger’s recent findings are consistent with other labor

Recent Social Science Research at 3 (Oct. 4, 2004), http://www.nas.org/images/documents/report_the_changing_shape_of_the_river.pdf (“[T]he Dale/Krueger study is a real blockbuster in terms of its authors’, iconoclastic conclusions and the sobering implications of these conclusions for the affirmative action debate.”); *see also* Gryphon, *supra* note 42, at 5 (“Attendance at a more selective school does not raise students’ future incomes, regardless of race. Economists Stacy Dale and Alan Krueger developed an ingenious method to solve these problems and compare students who were truly alike. . . Dale and Krueger found that when genuinely equivalent students were compared, students attending less selective schools *made just as much money* as students who attended more selective schools.”).

140. Sander, *Reply to Critics*, *supra* note 103, at 2016. *See also* SANDER & TAYLOR, *MISMATCH*, *supra* note 51 at 108.

141. Chambers et al., *supra* note 66, at 1882 n.101 (noting that Dale & Krueger “have a more nuanced message when read in context” and that there were too few African Americans in Dale & Krueger’s College & Beyond 1976 sample to allow for separate analysis of African Americans). In their 1999 working paper version of the same paper Dale & Krueger published in 2002 they found: “In general, these data suggest that black students benefit from attending more selective colleges just as much as other students, but we cannot draw a strong inference because of the small number of black students in our sample in 1976.” (emphasis added). *See* Stacy Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables* (Nat’l Bureau of Econ. Research, Working Paper No. 7322, Aug. 1999), <http://www.nber.org/papers/w7322>.

142. Stacy Dale & Alan B. Krueger, *Estimating the Return to College Selectivity over the Career Using Administrative Earnings Data* (Nat’l Bureau of Econ. Research, Working Paper No. 17159, June 2011), <http://www.nber.org/papers/w17159> (emphasis added).

market evidence that weighs against the mismatch hypothesis.¹⁴³

This research literature is an important backdrop when viewing the celebratory portrayal of Prop 209 found in the amicus brief by Sander & Taylor, who claim that “black and Hispanic enrollments at UC are higher than before Proposition 209” and “by the time the early post-209 cohorts had worked their way through the UC system, the University of California was graduating dramatically more blacks and Hispanics than at any time in its history.”¹⁴⁴ First, it is important to point out that freshmen enrollment in the UC system climbed from 21,999 California residents in 1995, to 26,826 in 2000, then to 30,083 in 2005 and 34,481 in 2008 before tapering off since 2008 for reasons related to California’s budget crisis.¹⁴⁵ This dramatic 57% rise in freshmen enrollment between 1995 and 2008 has nothing to do with Prop 209; rather, it reflects both increased entering classes on eight UC general campuses plus enrollment at the new UC Merced campus, which opened its doors in 2005. So even if voters had not approved Prop 209, one would still expect to have “dramatically more blacks and Hispanics” graduating from UC today than there were fifteen years ago. An important and related demographic factor is the doubling of the percentage of public high school graduates in California who are Latino over the past two decades (discussed earlier in Part II.C of this article).

But this is not the whole story. Unduplicated freshmen applications from California residents rose by 75% over the same span (from 45,714 to 80,029), which is even more than the 57% rise in enrollments.¹⁴⁶ Consequently, the UC system became more selective in admissions in the decade after Prop 209¹⁴⁷ for reasons that have nothing to do with the affirmative action ban. Other things being equal, a rising tide of selectivity in admissions will tend to close graduation rate gaps by race/ethnicity to at

143. Mark C. Long, *Changes in the Returns to Education and College Quality*, 29 ECON. ED. REV. 338, 338 (2010) (studies cohorts of students from the 1970s through the 1990s, finding: “Consistent with most of the prior literature, I find that educational attainment and college quality raise earnings, and the magnitudes of these effects have increased over time” and also finds “evidence of larger increases in the effects of education on earnings and labor force participation for men, Blacks, and Hispanics”).

144. Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 12–13, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2384 at *26–28. See also SANDER & TAYLOR, MISMATCH, *supra* note 51, at 146–47, 153–54.

145. *University of California: Application, Admission and Enrollment of California Resident Freshmen, 1989 to 2010*, UNIV. OF CAL. OFFICE OF THE PRESIDENT (Mar. 2011), http://www.ucop.edu/news/factsheets/flowfrc_10.pdf.

146. *Id.*

147. Tongshan Chang & Heather Rose, *A Portrait of Underrepresented Minorities at the University of California, 1994–2008*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION – THE PAST AND FUTURE OF CALIFORNIA’S PROPOSITION 209 83, 91 fig. 5.2 (Eric Grodsky & Michal Kurlaender eds., 2010) (reporting academic index scores for UC admits and enrollees for 1994 to 2008).

least some extent because of a ceiling effect at the high end (i.e., graduation rates can only go up to 100%) and at the low end selectivity disproportionately reduces entry for students less likely to graduate. In short, an increase in underrepresented minority graduation rates at UC would have been expected even if affirmative action had not been banned.¹⁴⁸

Casting further doubt on the triumphant account of Prop 209 by Sander et al. is a recent book chapter by Chang and Rose that analyzes UC retention and graduation rates.¹⁴⁹ Chart 11 shown below (reproduced with the author's permission) reports two-year persistence rates for the UC system (and the most selective campuses) for the 1994 to 2007 entering classes. Note the trends captured by the changing slopes of the lines in the graph. In the several years before Prop 209 took effect (1994-97), underrepresented minorities' retention rates were increasing at a fast clip. While I do not claim—and the graph does not prove—that there would have been even greater convergence in retention rates since 1998 in the absence of Prop 209, it does appear as if at both the most highly selective UC campuses and the UC system overall, Prop 209's implementation cut off (or at least decelerated) the positive trend rather than resulting in the dramatic improvement touted by advocates of the mismatch hypothesis.¹⁵⁰

The chart from Chang and Rose indicates that within the UC system overall, there was a slight increase over the 1997 persistence rate of 81% to 82% by 2000, but then a decline set in so that persistence rates in 2001 to 2007 hovered at ~80% without affirmative action. Since the persistence rate for whites, Asian Americans and others gradually climbed higher during this period, the gap in UC freshmen persistence rates was approximately three-fourths larger in 2007 compared to the last year before Prop 209 in 1997 (i.e., a 7 point gap instead of a 4 point gap). Retention rates at UC Berkeley and UCLA (labeled "elite" in the graph) show more bounce from year to year in underrepresented minorities' persistence rates, but compared to 1997, after Prop 209, the gap between underrepresented

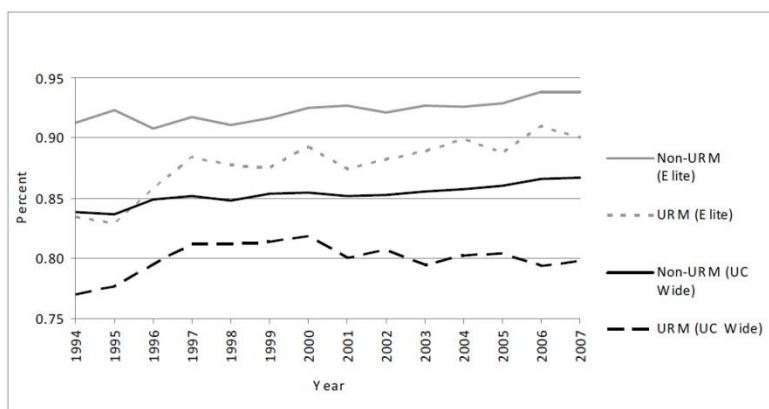
148. This is a corollary of the research findings in *Crossing the Finish Line* and other works cited earlier in this section about African American and Latino graduation rates at the most selective universities—but note that as applied to UC it is attenuated somewhat by the fact that growth noted herein disproportionately occurred at the less selective UC campuses.

149. Chang & Rose, *supra* note 147, at 97–101.

150. See also Christopher Edley Jr. et al., *Introduction—Proposition 209 and the National Debate on Affirmative Action*, in EQUAL OPPORTUNITY IN HIGHER EDUCATION—THE PAST AND FUTURE OF CALIFORNIA'S PROPOSITION 209 1, 7 (Eric Grodsky & Michal Kurlaender eds., 2010) (commenting on the Chang and Rose data, "[T]he impact of Proposition 209 on the characteristics of URM students appears to have been modest at best. Promising but fairly small improvements in URM persistence and graduation rates occurred after Proposition 209, but these were trending upward prior to 1998 and thus appeared to have little to do with purported increases in admissions standards.").

minorities only narrowed in two years out of ten (2004 and 2006) while it was the same for two years (1998 and 2000) was worse in six years (1999, 2001-03, 2005, 2007). These are not data one would expect to see if banning affirmative action had substantial positive effects on the performance of students admitted without regard to race.

Chart 11: Two-Year Persistence Rates by URM Status for the UC System and UC Berkeley/UCLA



Chang and Rose also examined the six-year graduation rates for the UC system for the 1994 to 2003 entering classes. The pattern they report, as shown in Chart 9, is similar. Underrepresented minority graduation rates went up more sharply in the 1994-97 period before Prop 209 took effect. They continued to rise, although less sharply, after Prop 209 took effect, but the rates leveled off or even dipped slightly for the 2000 to 2003 entering classes. Once again, because graduation rates for UC's white, Asian American and other students gradually rose over the same period, the net effect is that the gap in graduation rates is about one-fifth larger when comparing 1997 to the latest year available in the chart, which is 2003. The earlier persistence data reviewed above suggests that when the 2006 and 2007 six-year graduation rates become available, the gaps in graduation rates will be just as large if not larger than 2003.

As for graduation rates at UC Berkeley and UCLA, again note that there was a steep upward slope so that the gap in graduation rates was closing considerably in the four years before Prop 209 took effect (1994-97).¹⁵¹

151. As noted in the introduction, 1995 can be a preferred baseline depending on the context, but here it is working at cross-purposes with the point about selectivity increasing over time. Moreover, at UC Berkeley and UCLA any "pre-chilling effects" in 1996-97 appear to be less of an issue. It is difficult to dismiss 1997 as a pre-209 baseline in this context, especially given the huge drop-off in underrepresented minority enrollment that occurred between 1997 and 1998, which amounted to a decline by nearly half at UC Berkeley (23.0% to 12.0% of California resident

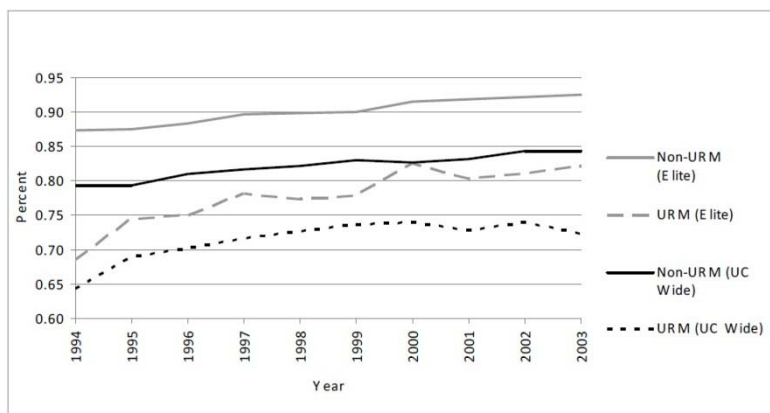
Relative to the pre-Prop 209 baseline of 1997, the gap in graduation rates compared to other groups since Prop 209 took effect worsened a little in 1998 and 1999, they were flat in 2001-02 and they were improved in 2000 and 2003. Again these underwhelming data are not what one would expect to see if Prop 209 was a “game changer” because of the elimination or dramatic reduction in academic “mismatch.” The slight change in graduation rates should be evaluated alongside the large post-Prop 209 declines in African American and Latino freshmen enrollment at Berkeley and UCLA,¹⁵² making the net tradeoff on a policy level (in light of the studies reviewed earlier in this section) even more decidedly unattractive.¹⁵³

Chart 12: Six-Year Graduation Rates by URM Status for the UC System and UC Berkeley/UCLA

freshmen) and one-third at UCLA (22.5% to 14.9%). See UNIV. OF CAL. OFFICE OF THE PRESIDENT, *supra* note 145, at 2, 5. Even for the UC system overall, where the impact was less than at Berkeley or UCLA, underrepresented minority freshmen dropped from 17.9% in 1997 to 15.5% in 1998. *Id.* at 1.

152. See *Id.*

153. The 2004 admission cycle to UC, in the midst California’s budget crisis, created a situation amenable to a limited “natural experiment” test of the mismatch hypothesis, which is analyzed in Michal Kurlaender & Eric Grodsky, Mismatch and the Paternalistic Justification for Selective College Admissions 21 (June 2012) (unpublished working paper) (“Perhaps most importantly, mismatched students attending an elite UC campus are no more likely to leave in their first four years prior to earning a degree than are regularly admitted students net of background characteristics.”).



Another high-profile dimension of the mismatch debate at the undergraduate level involves STEM (science, technology, engineering, and mathematics) fields, where several amici critical of affirmative action made claims in *Fisher* briefs.¹⁵⁴ But just as these anti-affirmative action groups and scholars (as corroborated throughout this article) tend to both falsely affix blame on affirmative action programs and raise false hopes about the supposed benefits of ending affirmative action, such attribution errors are also imbedded in claims about mismatch and STEM fields. Thus, in an important recent article Chang, Cerna, Han and Sàenz concluded:

There does seem to be a mismatch occurring in science education at the college level. The problem, however, is not only an issue of poorly prepared URM students failing among high achievers, as suggested by the mismatch hypothesis. The problem is that all students, irrespective of their race, academic preparation, or motivation, are at greater risk of failing among high achievers at highly selective institutions where the undergraduate student body is mostly White and Asian. In other words, even highly capable and talented White and Asian students—who would otherwise continue in a biomedical or behavioral science major at less selective institutions – are leaving the sciences at higher rates at more selective institutions.¹⁵⁵ (emphasis added)

In a 2011 monograph reviewing hundreds of studies addressing

154. Amicus Brief of Heriot et al., *supra* note 127, at 9–18; Brief Amici Curiae for Richard Sander and Stuart Taylor, *supra* note 144, at 5–7; Amicus Curiae Brief of The American Civil Rights Union in Support of Petitioner at 14, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2363 at *18. *Cf.* Brief for Abigail Thernstrom et al. as Amici Curiae in Support of Petitioners, 132 S. Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2369; (citing Cole & Barber).

155. Mitchell J. Chang et al., *The Contradictory Roles of Institutional Status in Retaining Underrepresented Minorities in Biomedical and Behavioral Science Majors*, 31 REV. HIGHER EDUC. 433, 454 (2008).

underrepresented minority students and STEM fields, Museus, Palmer Davis and Maramba found that the very same issues addressed in Part I of this article – campus racial climate and the negative implications of racial isolation—are important factors shaping the success of underrepresented minority students:

Researchers who have examined the role of climate in the experiences of racial and ethnic minority students in STEM have found that those students report chilly and hostile climates at both two- and four-year institutions and that such environments can be associated with feelings of discouragement. Several studies also demonstrate that less supportive educational environments are related to Black, Hispanic, and Native American college students' departure from the STEM circuit. Although chilly and unsupportive climates are a salient factor that hinders students' success, the cultures of campuses and STEM departments and programs may present equally significant barriers for minority college students.¹⁵⁶ (internal citations omitted)

Moreover, Museus et al. reviewed the various studies advancing and refuting the mismatch theory in STEM areas, and concluded that the roles of “MSIs [Minority Serving Institutions] and institutional selectivity on success among students of color in STEM are mixed and complex” and that the “predominantly White nature of highly selective institutions might be responsible for the negative impact of selectivity on success among students of color.”¹⁵⁷ In addition, a recent book-length committee report by the National Academies of Science focusing on STEM fields addressed

156. Samuel D. Museus et al., *Racial and Ethnic Minority Students' Success in STEM Education*, 36 ASHE HIGHER EDUC. REP., No. 6, at 1, 67 (2011). See also Mitchell J. Chang et al., *Considering the Impact of Racial Stigmas and Science Identity: Persistence Among Biomedical and Behavioral Science Aspirants*, 82 J. HIGHER EDUC. 564, 587 (2011) (“Although minimizing racial and other vulnerabilities in the social climate is certainly complex and involved, our study points to several key areas that can make a difference in retaining the most domain-identified URM students in BBS majors. They include significantly reducing the probability that students will (a) experience racial insults, threats, or hostile interactions, (b) be singled out because of race/ethnicity, and (c) have instructors who express stereotypes about racial/ethnic groups. Having higher frequencies of those experiences, we argue, heightens stigma consciousness and in turn, depresses achievement for students who would otherwise excel in their academic pursuits.”).

Also related to a chilly campus climate/culture are documented disparities between underrepresented minority women (versus men) in STEM field attainment. See e.g., Maria Ong et al., *Inside the Double Bind: A Synthesis of Empirical Research on Undergraduate and Graduate Women of Color in Science, Technology, Engineering, and Mathematics*, 81 HARV. EDUC. REV. 172 (2011); Lindsey E. Malcom & Shirley M. Malcom, *The Double Bind: The Next Generation* 81 HARV. EDUC. REV. 162 (2011). These disparities between male and female underrepresented minorities, which run the gamut from selective universities to community colleges, are difficult to chalk up to differences in academic preparation, again confounding the mismatch hypothesis.

157. Museus, *supra* note 156, at 64.

Sander's "mismatch hypothesis" and noted several studies rejecting mismatch¹⁵⁸ (citing Bowen et al.; Alon & Tienda; Espenshade & Radford, which are all discussed above). This National Academies report emphasized the converse problem of "undermatching" that is addressed in the Bowen, Chingos & McPherson book, and noted that in cases of "overmatching" that college administrators and faculty can play positive roles by ensuring that programs are in place to provide academic support and that there is a campus-wide culture of promoting the success of these (and all) students.¹⁵⁹

One such example of a successful intervention program is the Treisman workshop model that has shown to enhance African American college performance and abilities in mathematics at UT Austin, UC Berkeley and elsewhere.¹⁶⁰ Other institutional factors can have an important role in the success of underrepresented minority students in STEM fields at selective institutions. Recently Griffith analyzed persistence in STEM areas using NELS and NLSF data sets and found:

Students at selective institutions with a higher undergraduate to graduate student ratio are more likely to remain in a STEM field major. . . [T]hese results suggest that student attending colleges or universities with a focus on teaching and research for undergraduate students are more likely to remain in a STEM field major, while those attending institutions with more emphasis on graduate programs . . . are much less likely to remain in a STEM field major.¹⁶¹

This finding that the structure of learning environments matters was reinforced by Hurtado et al.'s recent qualitative study of underrepresented minority students in STEM fields at MIT, UT San Antonio, University of New Mexico and Xavier.¹⁶²

158. COMM. ON UNDERREP. GRP. AND THE EXPANSION OF THE SCI. AND ENG'G WORKFORCE PIPELINE ET AL., EXPANDING UNDERREPRESENTED MINORITY PARTICIPATION: AMERICA'S SCIENCE AND TECHNOLOGY TALENT AT THE CROSSROADS 95-97 (2010), available at http://www.nap.edu/openbook.php?record_id=12984&page=95.

159. *Id.* at 97.

160. See Hollis Duncan & Thomas Dick, *Collaborative Workshops and Student Academic Performance in Introductory College Mathematics Courses: A Study of a Treisman Model Math Excel Program*, 100 SOC. SCI. & MATHEMATICS 365 (2000); Uri Treisman, *Studying Students Studying Calculus: A Look at the Lives of Minority Mathematics Students in College*, 23 COLLEGE MATHEMATICS J. 362 (1992).

161. Amanda Griffith, *Persistence of Women and Minorities in STEM Field Majors: Is it the School that Matters?*, 29 ECON. EDUC. REV. 911, 921 (2010).

162. Sylvia Hurtado et al., *Diversifying Science: Underrepresented Student Experiences in Structured Research Programs*, 50 RES. HIGHER EDUC. 189, (2009) ("By creating science classroom environments that are more accepting of learning through trial and error, or that are grounded in more collaborative team work—as research experiences often are—colleges and universities can make progress in aligning undergraduate research, coursework, and their institutional culture of science in such a

Lastly, several of the briefs supporting *Fisher* that criticize affirmative action also emphasize what they see as the “mismatch” phenomenon in legal education, relying on Sander’s 2004 *Stanford Law Review* article.¹⁶³ This article relies on the data now twenty years old (the 1991 entering class of law students) from the LSAC’s Bar Passage Study (BPS), and it was published in a student-edited law journal without the benefit of substantive peer review. My colleague, Professor Richard Lempert testified before the U.S. Civil Rights Commission that if it were offered as evidence in a federal trial, Sander’s 2004 article “would be hard pressed to meet the test that the Supreme Court set in *Daubert v. Merrell Dow Pharmaceuticals* for the admission of scientific evidence.”¹⁶⁴ Lempert concluded that the Sander article fared poorly on all four of the *Daubert* factors: 1) the equivalent of a *Daubert* error rate; 2) scholarly peer review; 3) whether a theory is testable and whether it has been tested; and 4) general or widespread acceptance.¹⁶⁵ While studies of law school mismatch are complicated and can turn on subtle methodological choices and assumptions, the most important of the *Daubert* factors is peer review.

Indeed, it is fair to say that the eight years that have elapsed since publication of Sander’s seminal article have not been kind in terms of the

manner that comprehensively supports underrepresented and majority students alike. This perhaps may be the most important implication for policy and practice that arises from our study.”). *See also* Darnell Cole & Araceli Espinoza, *Examining the Academic Success of Latino Students in Science Technology Engineering and Mathematics (STEM) Majors*, 49 J. C. STUDENT DEVEL. 285, 295 (2008) (taking issue with the recommendations in the Elliott et al 1996 study now cited by some of the amici supporting Petitioner in *Fisher*; concluding rather than in addition to prior academic preparation there are “mediating environmental factors experiences within the college environment.”).

163. Brief for Richard Sander and Stuart Taylor, Jr. as Amici Curiae in Support of Neither Party at 4, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2011) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2384 at *13–14; Brief for Gail Heriot et al. as Amici Curiae in Support of Petitioners at 26, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2385 at *37; Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 20, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2360 at *34; Brief of Scholars of Economics and Statistics as Amici Curiae in Support of Petitioner at 30 n.16, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2372 at * 41. *Cf.* Amicus Curiae Brief of the Center for Individual Rights in Support of Petitioner at 13, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 24, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2383 at *18. All of the amicus briefs cite to Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

164. *Affirmative Action in American Law Schools: Testimony Before the U.S. Commission on Civil Rights* 51, 58 (April 2007) (statements of Richard Lempert with William Kidder), <http://www.usccr.gov/pubs/AALSreport.pdf> (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

165. *Id.* at 58–67.

post-hoc peer review that has occurred through publication of various re-analyses by other social scientists. A number of other researchers have sought to replicate Sander's results and claims using the same BPS data and often used more appropriate methods and found they could not do so. Empirical criticism includes a collection of critical essays in the May 2005 Stanford Law Review by Ayres & Brooks; Chambers, Clydesdale, Lempert and myself; Dauber; and Wilkins.¹⁶⁶ Other empirical critiques utilizing the BPS include Rothstein & Yoon,¹⁶⁷ Ho,¹⁶⁸ Barnes,¹⁶⁹ and most recently

166. Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers*, 57 STAN. L. REV. 1807 (2005); Chambers et al., *supra* note 66; Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005). Around the same time, I wrote a couple short spin-off essays. See generally William C. Kidder, *Does Affirmative Action Really Hurt Blacks and Latinos In U.S. Law Schools?*, UNIV. OF SOUTH. CAL. TOMAS RIVERA POL'Y INST. (Sept. 2005), http://www.trpi.org/PDFs/affirm_action.pdf; Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, J. BLACKS IN HIGHER ED. (2005), http://www.jbhe.com/features/46_black_student_mismatch.html. Sander's response to these criticisms, *A Reply to Critics*, *supra* note 103, attempts to salvage his original findings and conclusions with new reanalysis, but his *Reply* raises new serious problems and is similarly inconsistent with the findings of others. See Richard O. Lempert et al., *A Critical Response to Richard Sander's "A Reply to Critics"* (Univ. of Mich. Law School Olin Center, Working Paper, Feb. 2006), <http://www.law.umich.edu/centersandprograms/lawandeconomics/abstracts/2006/Documents/06-001lempert.pdf>.

167. Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649, 714 (2008) ("Our analysis suggests, however, that one cannot credibly invoke mismatch effects to argue that there are no benefits. Only a small fraction of students who are unsuccessful today would be successful under race blind admissions. Without affirmative action, the legal education system would produce many fewer black lawyers."). Rothstein & Yoon also have a companion working paper on this topic, Jesse Rothstein & Albert H. Yoon, *Mismatch in Law School* (Nat'l Bureau of Econ. Research, Working Paper No. 14275, Aug. 2008), <http://www.nber.org/papers/w14275>.

168. Daniel E. Ho, *Scholarship Comment: Why Affirmative Action Does Not Cause Black Students To Fail the Bar*, 114 YALE L.J. 1997 (2005); Richard H. Sander, *Mismeasuring the Mismatch: A Response to Ho*, 114 YALE L.J. 2005, 2008 (2005); Daniel E. Ho, *Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 YALE L.J. 2011 (2005).

169. Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?: A Correction, A Lesson, and an Update*, 105 NW. U. L. REV. 791 (2011). The amicus briefs by Sander & Taylor (9–10) make a to-do about the correction to Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students*, 101 NW. U. L. REV. 1759 (2007). However, this is a red herring that distracts attention away from the fact that Sander et al. still have not met their burden of proof regarding evidence of law school mismatch in peer-reviewed scholarship. See also Barnes, Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?: A Correction, A Lesson, and an Update*, 105 NW. U. L. REV. 791, 802 (2011) ("The reported results from the 2007 essay demonstrated an anti-mismatch effect. The corrected results do not. Nor do the results support the mismatch

Camilli and Jackson,¹⁷⁰ none of whom have documented reliable evidence of systemic mismatch effects. Even eight years after its original publication, the only supporting empirical scholarship cited by Sander & Taylor¹⁷¹ regarding law school mismatch are two unpublished papers by economist Doug Williams.¹⁷² For context, note that Williams has been publishing with Sander since the two were graduate students together in the 1980s,¹⁷³ including co-authoring other empirically controversial studies unrelated to affirmative action.¹⁷⁴

Educational measurement scholars Camilli and Welner critique the external validity of Williams' modeling choices,¹⁷⁵ and they provide a recent and helpful synthesis of the literature to date regarding law school mismatch, concluding:

[T]he existing research base fails to document a consistent and

hypothesis.”).

170. Gregory Camilli & Darrell D. Jackson, *The Mismatch Hypothesis in Law School Admissions*, 2 WIDENER J. LAW, ECON. & RACE 165 (2011), available at http://blogs.law.widener.edu/wjler/files/2011/05/LSAC_Final.pdf.

171. Brief for Richard Sander and Stuart Taylor, Jr. as Amici Curiae in Support of Neither Party at 9, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), cert. granted, 132 S.Ct. 1536 (May 29, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 2384 at *20.

172. See Doug Williams, *Does Affirmative Action Create Educational Mismatches in Law Schools?* (April 2009), <http://public.econ.duke.edu/~hf14/ERID/Williams.pdf> (claiming that alternative tests of the law school mismatch hypothesis consistently find strong support for mismatch effects on minority bar passage rates); Doug Williams, *Do Racial Preferences Reduce Minority Learning in Law Schools?* (Sept. 2011), <http://www.seaphe.org/pdf/williamsseptember.pdf>.

173. See, e.g., Richard H. Sander & E. Douglas Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431 (1989).

174. See *Dauber*, supra note 166, at 1910 n.58 (documenting the controversy over a 2002 study of the Santa Monica living wage proposal by Sander, Williams & Doherty, including Bernstein & Zabin's criticism that this study used a “made-up formula that has no basis in the literature”). My point is not to engage in *ad hominem* criticism of Williams, but to provide context that he did not arrive on the scene of the law school mismatch debate without a certain perspective (the same could be said of me).

175. Gregory Camilli & Kevin G. Welner, *Is There a Mismatch Effect in Law School, Why Might It Arise, and What Would It Mean?*, 37 J.C. & U.L. 491, 517–18 (2011) (concluding that Williams' “distance framework” that eliminates the middle two tiers from the BPS “places clear emphasis on a methodological choice that may affect external validity. Eliminating those “second-tier” categories removes from the analysis the most convincing counterfactual students, and thus decreases the quality of the ATT estimator. It also raises the question of whether this comparison has many real-world (as opposed to modeled) examples. Students attending UCLA tend to be substantially different from those attending Podunk State. The comparison only to lower-tier law schools also raises a related methodological question: whether the study is comparing applicants so substantially different that it is beyond the capacity of parametric regression models to control for those differences. Though the intent of Williams' analysts is clear, elimination of a substantial proportion of a sample in order to produce an effect is clearly open to further discussion.”). See *id.* at 518 n.138 (noting that “in the Williams study no mention is made of how missing data were treated.”).

substantial negative mismatch effect. . . Some studies suggest positive effects, some suggest negative effects, and some suggest no significant effects. If enough snark hunters return empty handed, there is not much reason to examine or explain the nature of snarks. Though there is a suggestion of negative effects for some Black students, these effects do not consistently rise to the level of statistical significance; indeed, the significance levels *within* Williams’ study vary according to methodological choices.¹⁷⁶

Camilli & Welner’s reference to “snark hunters” harkens back to a Lewis Carroll story and refers to the pursuit of a mythical creature that does not exist.¹⁷⁷ Most recently, a group of leading social science scholars (including two members of the National Academy of Science) filed an amicus brief in *Fisher* focusing on fatal design flaws in the law school mismatch studies by Sander (and Williams) that are the basis for the claims in Sander and Taylor’s *Fisher* brief.¹⁷⁸

LESSON #4: UC’S ATYPICALLY LARGE ENROLLMENT OF LOW-INCOME UNDERGRADUATES: A “NATURAL EXPERIMENT” VERIFYING THAT CLASS-BASED POLICIES ARE NOT EFFECTIVE SUBSTITUTES FOR RACE-CONSCIOUS POLICIES

Another high-profile issue emerging in the *Fisher* case is the question about whether other efforts such as class-based considerations can yield sufficient diversity that race-conscious measures can or should become unnecessary.¹⁷⁹ Other scholars (cited further below) have looked carefully

176. *Id.* at 521. *See also* Camilli & Jackson, *supra* note 170, at 185 (“Currently, minimal support exists in the literature for the negative match hypothesis in law school admission.”).

177. *See also* *Medellin v. Texas*, 552 U.S. 491, 549 (2008) (Breyer, J. dissenting) (finding the majority’s insistence on finding some indication of self-executing intent in a treaty’s text to be akin to “hunting the snark”).

178. Brief of Empirical Scholars as Amicus Curiae Supporting Respondents, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (August 13, 2012) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 3299. *See also* Brief of The American Educational Research Association et al. as Amici Curiae in Support of Respondents, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2011) (No. 11-345), 2012 U.S. S. Ct. Briefs LEXIS 3287. My coauthors and I summarized these and related issues in a piece for the U.S. Supreme Court blog. *See* Richard Lempert et al., *All Hat, No Cattle? Mismatch and Fisher v. University of Texas at Austin*, SCOTUSBLOG (Nov. 5 2012), *available at* <http://www.scotusblog.com/2012/11/all-hat-no-cattle-mismatch-and-fisher-v-university-of-texas-at-austin/>.

179. A forceful advocate of the class-based approach is Richard Kahlenberg of the Century Foundation. *See* RICHARD D. KAHLBERG WITH HALLEY POTTER, A BETTER AFFIRMATIVE ACTION (Oct. 2012), <http://tcf.org/publications/pdfs/ABAA.pdf>. I caution that this report heavily relies on the 2004 Century Foundation study by Carnevale & Rose, but Kahlenberg is obscuring one of Carnevale & Rose’s most

at this issue by utilizing a range of empirical simulations, but my modest goal in Part IV of this article is to highlight a “natural experiment” in California that provides real-world validity for the conclusion that even robust efforts focuses on socioeconomic status are not sufficient substitutes for race-conscious affirmative action at highly selective institutions.

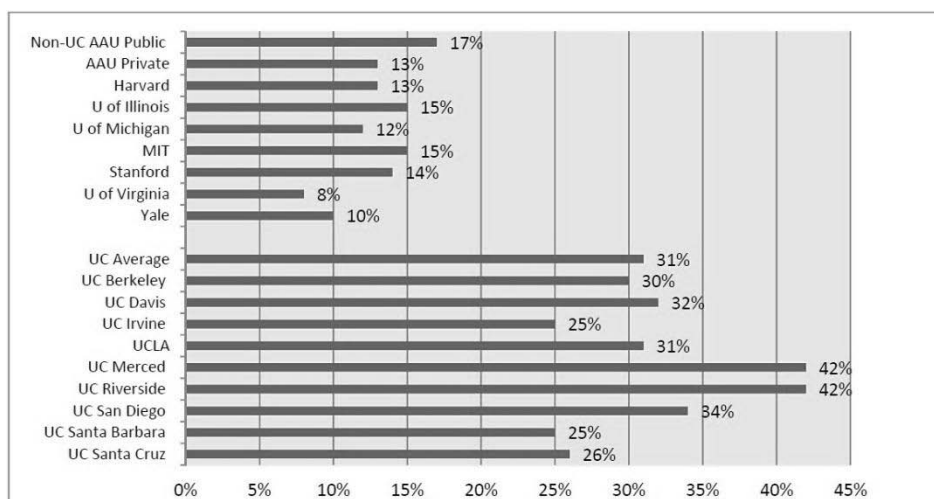
As the chart below indicates, at UC over 30% of the undergraduates are recipients of federal Pell Grants (i.e., they qualify as “low-income” students by the widely accepted federal definition), which is double the rate at UC’s peer institutions that are members of the prestigious Association of American Universities (17% at AAU publics and 13% at AAU privates). In fact, several of the UC campuses individually enroll more Pell Grant recipients than all Ivy League institutions combined, and all UC campuses have a somewhat higher percentage of Pell Grant students than UT Austin. Moreover, in recent years 50% of the underrepresented minorities admitted to UC come from low-income families, compared to only 20% of non-URM admits at UC.¹⁸⁰ From a social science perspective, this combination of factors in California comes close to an optimal “natural experiment” test of whether there are ceiling effects limiting the extent to which class-based admissions and financial aid policies can yield entering classes with meaningful proportions of African American, American Indian and Hispanic undergraduates at highly selective universities.¹⁸¹

important findings, which is that class-based affirmative action should be supported as a supplement to race-conscious measures; they recognize their data show that class-based measures are not a substitute for race-conscious diversity efforts. Likewise, Kahlenberg relies on the 2010 Century Foundation study by Carnevale & Strohl, but they too find that “socioeconomic status is no substitute for race or ethnicity.” See Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA’S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 153 (Richard D. Kahlenberg ed., 2004); Anthony P. Carnevale & Jeff Strohl, *How Increasing College Access Is Increasing Inequality, and What to Do about It*, in REWARDING STRIVERS 165 (Richard D. Kahlenberg ed., 2010), available at <http://tcf.org/publications/2010/9/how-increasing-college-access-is-increasing-inequality-and-what-to-do-about-it>. Several civil rights groups signed a statement criticizing the Kahlenberg report as presenting a false choice between class-based and race-conscious programs. NAACP Legal Defense Fund et al., *Response to the Century Foundation Report* (Oct. 2012), available at http://www.naacpldf.org/files/case_issue/Century-Response.pdf.

180. Chang & Rose, *supra* note 147, at 93–94.

181. *Cf.* United States v. Lopez, 514 U.S. 549, 581 (Kennedy, J. concurring) (“States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”).

Chart 13: Undergraduate Pell Grant Recipients, UC and Peer Institutions, 2008-09¹⁸²



As a complement to the Pell Grant data, comparative data for UC campuses and other AAU universities regarding grants and scholarships—collectively known as “gift aid”—indicates that at UC campuses the combination of per capita federal, state and institutional gift aid is so much larger than comparison institutions that even the lowest ranked campus (UC Irvine) barely overlaps with the highest comparison AAU institutions (Michigan and Florida).¹⁸³ Most of the grant assistance at UC comes from three major programs: federal Pell Grants, state Cal Grants, and UC Grants; over 90% of all gift aid received by UC undergraduates is awarded on the basis of need.¹⁸⁴ These data confirm that the high proportion of low-income students enrolling at UC is a reflection of several policies and programs that accentuate the federal Pell Grant program, including UC’s commitment to return one-third of tuition to need-based financial aid and the State of California’s contribution to need-based aid through Cal Grants rather than the “merit-based” scholarships that in many states tend to displace need-based support.¹⁸⁵

182. *Undergraduate Pell Grant Recipients, US and Comparison Institutions 2009–2010*, UNIV. OF CAL. 2012 ACCOUNTABILITY REPORT (2012), <http://www.universityofcalifornia.edu/accountability/index/3.5.1>

183. *Average Gift Aid, Cost of Attendance and Net Cost for Very Low-Income Students, UC Campuses and Public AAU Institutions 2009–2010*, UNIVERSITY OF CALIFORNIA 2012 ACCOUNTABILITY REPORT (2011), <http://accountability.universityofcalifornia.edu/2011/index/3.4>.

184. *2010–11 Annual Report on Student Financial Support* at 6, UNIV. OF CAL. OFFICE OF THE PRESIDENT (April 2012) http://www.ucop.edu/sas/sfs/docs/regents_1011.pdf.

185. *State Merit Scholarship Programs and Racial Inequality*, HARVARD UNIV.

In light of the Pell Grant and Gift Aid data described above, UC's comparatively optimal conditions for enrollment of low-income students are still not nearly enough to offset race-specific barriers associated with Prop 209, and for that reason the UC experience approximates an upper-bound limit on the extent to which an ensemble of class-based efforts can have as a byproduct a racially diverse undergraduate student body. The answer, unfortunately, is it cannot. Rather, as the plunge in underrepresented minority enrollments (especially at UC Berkeley and UCLA – see Part II.C of this article) tells us, UC's comparatively optimal conditions for enrolling low-income students are not nearly enough to offset the race-specific barriers associated with Prop 209. Hence, although improving access for low-income students at America's top universities is a worthy policy goal,¹⁸⁶ it is conceptually distinct. The conclusions drawn from the descriptive statistics summarized above are consistent with numerous empirical studies—conducted both before and after the *Gratz*,¹⁸⁷ and *Grutter* cases—and corroborate the basic finding that class-based affirmative action programs cannot substitute for race-conscious policies at highly selective American colleges and universities.¹⁸⁸

LESSON #5: COMPELLING CASE STUDIES REGARDING THE NEED FOR
RACE-CONSCIOUS AFFIRMATIVE ACTION: UC BUSINESS SCHOOLS AND UC
LAW SCHOOLS

In *Grutter*, the Court's holding that diversity is a compelling state interest was supported by the finding that “[t]hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”¹⁸⁹ In fact, sixty-five of America's top corporations supported

CIV. RTS. PROJ. (Donald E. Heller & Patricia Marin eds., 2004), <http://civilrightsproject.ucla.edu/research/college-access/financing/state-merit-scholarship-programs-and-racial-inequality>.

186. See, e.g., WILLIAM G. BOWEN ET AL., EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 161–93 (2005).

187. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (companion case to *Grutter* concerning undergraduate admission at the Univ. of Mich).

188. See Mark C. Long, *Affirmative Action and Its Alternatives in Public Universities: What Do We Know?*, 67 PUB. ADMIN. REV. 315 (2007); Alan Krueger et al., *Race, Income and College in 25 Years: The Continuing Legacy of Segregation and Discrimination* (Nat'l Bureau of Econ. Research, Working Paper 11445, Jun. 2005), <http://www.nber.org/papers/w11445.pdf> (“The correlation between race and family income, while strong, is not strong enough to permit the latter to function as a useful proxy for race in the pursuit of diversity. Moreover, the value of income as a proxy for race can only decline with increases in black incomes.”); Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 17, 28 (Gary Orfield & Edward Miller eds., 1998).

189. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

affirmative action in higher education with an amicus brief in the Michigan cases, and equally important, zero corporations filed briefs in opposition.¹⁹⁰ The research since *Grutter* confirming the importance of diversity in a business context is now even more robust.¹⁹¹ Thus, it should come as no surprise in *Fisher* that no American corporations or chambers of commerce are supporting the Petitioner.¹⁹²

As a relevant comparison to Texas,¹⁹³ in California, where 45% of the population is Latino/Hispanic, African American and American Indian (2010 Census), more than a decade after Prop 209 and SP-1 the six UC business schools continue to enroll discouragingly small numbers of African American, Latino and American Indian students in their MBA programs that play an influential role in shaping the face of tomorrow's business leaders. As indicated in the chart below, between 2000 and 2011 the entering classes of MBA students at UC Berkeley, UC Davis, UC Irvine, UCLA, UC Riverside, and UC San Diego had a combined average of only 1.5% African Americans, a three-fifths decline compared to the pre-Prop 209 period of 1995 and 1996 (3.6%). Moreover, many of these individual UC business schools have had zero African Americans and American Indians in their entering class. Likewise, as a combined average, Latino enrollment at the UC business schools between 2000 and 2011 has been only roughly half (3.2%) of what it was in 1995-1996 (6.1%). By comparison, at many of the leading U.S. business schools where affirmative action is utilized African Americans are 6% or more of incoming MBA students (and these students graduate at more or less the same rate as their white peers).¹⁹⁴

190. 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, 1552 (2004). See also Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondants at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (NO. 02-241), 2003 U.S. S. Ct. Briefs LEXIS 181 at *6-7.

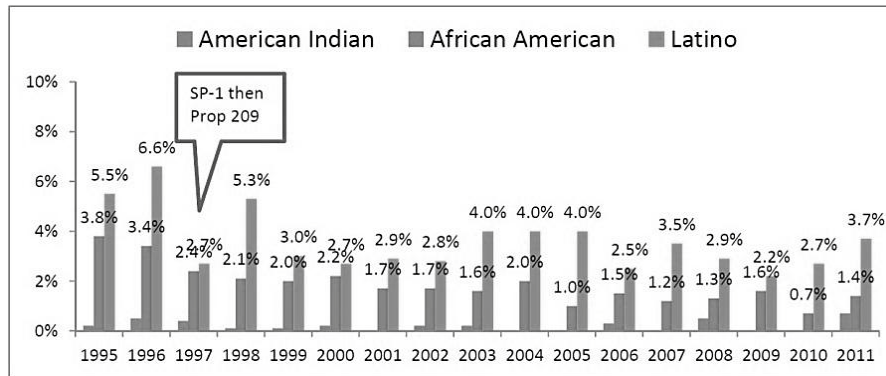
191. See, e.g., SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES* (2007); Orlando Richard et al., *Employing an Innovation Strategy in Racially Diverse Workforces: Effects On Firm Performance*, 28 GROUP & ORG. MGMT. 107, 120 fig. 1 (2003) (studying national sample of 177 banks and finding that racial diversity enhanced performance conditional on whether the banks were high in innovation).

192. Briefs were filed by 57 Fortune 100 and Other Leading American Businesses, a group of small businesses and small business associations, among others. See *Fisher v. Texas* Archive, UNIV. OF TEX. AT AUSTIN, <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html> (last updated Nov. 16, 2012).

193. Regarding recent analysis of Texas graduate and professional school patterns, see Liliana M. Garces, *Necessary But Not Sufficient: The Impact of Grutter v. Bollinger on Student of Color Enrollment in Graduate and Professional Schools in Texas*, 83 J. HIGHER ED. 497 (2012).

194. *Blacks at the Nation's Top-Ranked Business Schools: Enrollments Are Down But Graduation Rates Are Almost Perfect*, J. BLACKS IN HIGHER EDUC., (2005), http://www.jbhe.com/features/46_business_schools.html; *Black Admissions Are*

Chart 14: University of California Business Schools: Entering MBA Enrollments 1995 to 2011¹⁹⁵



In short, the overall picture at UC business schools indicates that post-Prop 209, the University of California continues to struggle to live up to the declaration in *Grutter* that “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”¹⁹⁶ Indeed, UC’s Regent-led Study Group on University Diversity concluded that since Prop 209 there has been “little or no progress at UC’s business schools. This clearly limits the University’s ability to contribute to a diverse leadership cadre for California.”¹⁹⁷

In *Grutter* the Court’s exhortation that the “path to leadership be visibly open to talented and qualified individuals of every race and ethnicity” was rooted in recognition of the fact that “law schools ‘cannot be effective in isolation from the individuals and institutions with which the law interacts.’ Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in

Lagging at the Nation’s Leading Business Schools, J. BLACKS IN HIGHER ED., (2006), http://www.jbhe.com/features/52_business-schools.html.

195. Data collected over the years from the UC Office of the President (on file with author) Percentages combine totals for Berkeley, Davis, Irvine, UCLA, Riverside and San Diego. UCSD’s first cohort of MBA students was in 2005; all other listed Business Schools are for the entire period in the graph. Combined, the UC Business Schools enrolled between 700 and 850 entering MBA students annually over this span.

196. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

197. *Overview Report to the Board of Regents*, UNIV. OF CAL. STUDY GROUP ON UNIV. DIVERSITY at 5 (Sept. 2007), <http://www.universityofcalifornia.edu/diversity/documents/diversityreport0907.pdf>. See also *Report on Diversity in Graduate and Professional School Admissions*, UNIV. OF CAL., ACADEMIC SENATE (Aug. 23, 2005), <http://www.universityofcalifornia.edu/senate/committees/ucaad/ucaad.gradtf.addendum.rpt.08.05.pdf>.

America.”¹⁹⁸ In fact, underrepresented minority graduates of elite U.S. law schools have higher pro bono contributions and have strongly disproportionate leadership contributions (relative to other law schools) in the ranks of corporate law firm partners, the professoriate and the federal judiciary.¹⁹⁹ Moreover, the Court’s nascent observations about the educational value of diversity in *Sweatt v. Painter*²⁰⁰ over sixty years ago mirrors contemporary social science indicating that across scores of law schools, exposure to greater racial diversity in legal education is associated with students having reduced prejudiced attitudes by the end of law school.²⁰¹ Amici supporting Petitioner in *Fisher* cite to one study by John Lott (controversial author of *More Guns, Less Crime*²⁰²) Mark Ramseyer and Jeffrey Standen in an attempt to call into question the benefits of “critical mass” and diversity in law school,²⁰³ but that study is not up to the task of testing what it purports to measure because of the low critical mass in the two schools studied,²⁰⁴ other serious problems in their

198. *Grutter*, 539 U.S. at 332–33 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

199. Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000); Chambers et al., *supra* note 66, at 1896 (2005). Likewise, in the field of medicine affirmative action has real health care consequences, as underrepresented minorities are consistently more likely to deliver health care to the underserved. *See e.g.*, Somnath Saha & Scott A. Shipman, *Race-Neutral Versus Race-Conscious Workforce Policy to Improve Access to Care*, 27 HEALTH AFFAIRS 234 (2008).

200. 339 U.S. 629 (1950).

201. Nisha C. Gottfredson et al., *The Effects of Educational Diversity in a National Sample of Law Students: Fitting Multilevel Latent Variable Models in Data With Categorical Indicators*, 44 MULTIVARIATE BEHAV. RES. 305, 318 (2009) (national sample of students at 64 law schools using structural equation modeling and finding that racial diversity is associated with reduction in prejudiced attitudes and increased perceived exposure to diverse ideas by the end of law school). For related benefits in legal education, *see also* Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63 (2011); Charles E. Daye et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, RUTGERS RACE & L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101253.

202. *But see* the National Academies of Science’s COMMITTEE TO IMPROVE RESEARCH INFORMATION AND DATA ON FIREARMS, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2004), available at http://www.nap.edu/openbook.php?record_id=10881&page=120. Chapter 6 examines and critiques much of Lott’s research conclusions and modeling specifications.

203. *Fisher* Brief of Scholars of Economics and Statistics as Amici Curiae in Support of Petitioner, *supra* note 163, at 6–7, 22–23, 26–29; Brief of Amicus Curiae California Association of Scholars et al. at 9 n.3, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (2011) (No. 11-345) (May 29, 2012).

204. John R. Lott et al., *Peer Effects in Affirmative Action: Evidence from Law Student Performance*, 31 INT’L REV. L. & ECON. 1 (2011). For a study that employs the term “critical mass” nearly twenty times, including in the abstract, I am skeptical whether Lott et al.’s population samples afford enough criterion space for addressing what the authors purport to measure. In their study, School A was only 3.2% African

methodology²⁰⁵ and the fact that the Lott et al. baseline data are impossibly odd.²⁰⁶

American and School B was only 1.9% African American and 2.3% Latino (Hispanics and Mexican Americans combined). These two unidentified schools—which would seem to be schools such as George Mason and Willamette—are almost certainly atypical compared to leading ABA schools. Apart from the low diversity numbers, this point is also driven home by the fact, *id.* at 6, that Lott et al. report that at School B Asian Americans have lower LSATs than African Americans *over a ten year span*, which is extremely unusual (and as discussed in a footnote further below, the LSAT data reported could also be indicative of deeper problems).

205. A separate basis of criticism is that because upper division courses have higher grades and simultaneously tend to be much smaller in average size than first year courses, for all law school classes in total, grades and the number of African Americans or Hispanics tend to pull in opposite directions for artifactual reasons that may not be satisfactorily handled by the “fixed effect” method the authors employ. *See e.g.*, Am. Assn. of Law Schools, REPORT TO DEANS ON LAW SCHOOL GRADING CURVES (2005), available at <http://www.aals.org/deansmemos/Attachment05-14.pdf> (confirming with many examples that most U.S. law schools have grading curves that allow for higher grades in upper division courses); Mitu Gulati et al., *Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 245 (2001) (“The average third year class is far smaller than the average first year class”). Thus, when Lott et al.’s analysis is restricted to first-year grades, only the coefficients for whites in the Lott et al. study remain statistically significant at the 1% level for both schools. Lott et al., *supra* note 204, at 9–10. Likewise, when Lott et al. reanalyzed their data with dummy variables attempting proxies for “course difficulty” the African American and Asian American findings are no longer statistically significant. *Id.* at 8. Add to this the problem that the absence of critical mass at the two schools in this study would seem to make the data used by Lott et al. even more vulnerable (than other more representative studies) to the latent measurement error problems associated with the well-known phenomenon whereby the third year of law school a large proportion of law students do not regularly attend their classes. *See e.g.*, Mitu Gulati et al., *Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 244 (2001) (“Even under optimal conditions, we estimate that third-year students at many schools attend only around 60 percent of their large classes.”). For the reasons stated in these three footnotes, it is fair to conclude that Lott et al.’s findings are rather anemic and should be regarded as irrelevant to the *Fisher* case.

206. Lott et al., *supra* note 204 at 6, claim the following: “LSAT scores were only obtained for School B, and even then they were only available for part of the sample period for students starting from 1990 to 2000. Nationally from 1993 to 1999 the average LSAT score was 142 for African-Americans and 152 for whites. For students starting at School B, the difference was about 43% as large. The LSATs were 132.6 for African-Americans and 138.9 for whites. The average was only 125 for Hispanics and Mexican-Americans, 131.4 for Asian-Americans, and 126 for Native Americans.” However, annual data from the Law School Admission Council indicates that for ABA Law Schools combined in the 1991–92 through 2000–01 admission cycles (I have these old LSAC data for every year but 1992–93), among those with LSAT scores in the 125–129 band there was only 1 Mexican American, 1 American Indian and 3 Hispanics in the entire U.S. who enrolled in a ABA-accredited law school over that span of nearly a decade. Rather, the score averages reported by Lott et al. for School B are roughly 24 points below—on the 120–180 scale—the average Mexican American, American Indian, and Hispanic applicant to American law schools in 1991–2000, much less the average of those who enrolled in law schools.

It seems plausible that the data reported by Lott et al. could result from averaging

A final important lesson from Prop 209 is that—notwithstanding the florid claim in one *Grutter* dissent that at Berkeley Law “the sky has not fallen,”²⁰⁷—it is unequivocal that the long-term impact of banning affirmative action has been to substantially diminish opportunities for African Americans at California’s most selective public law schools, Berkeley and UCLA. As indicated in the chart below, for the quarter-century between 1970 and 1996, the UC Berkeley Law School enrolled an average of 25.7 entering African American law students annually. The effect of SP-1 and Prop 209 has been to cut this figure in half (an average of 12.5 African Americans per year in 1997-2011). This post-Prop 209 decline at Berkeley Law occurred despite a large increase in the number and quality of African Americans applying to U.S. law schools over the course of the past four decades.²⁰⁸

At the UCLA Law School, between 1970 and 1996, an average of thirty African American entering law students enrolled annually, and the effect of SP-1 and Prop 209 has been to cut this figure by more than three-fifths (an average of eleven African Americans per year in 1997-2011). Despite the substantially improved credentials of African American law school candidates, and despite significant efforts to improve diversity, it remains the case that African American enrollments at Berkeley Law and UCLA Law are lower today than they were in any year during the affirmative action era from 1970 to 1996.

Chart 15: Entering African Americans at the UC Berkeley and UCLA Law Schools, 1965-2011²⁰⁹

CONCLUSION

In *Grutter* the Court held that the educational benefits of diversity provide a compelling governmental interest in race-conscious admissions, and diversity as a compelling interest remains a core issue in *Fisher* though it is disputed more intensely by Petitioner’s amici than by the Petitioner herself.²¹⁰ In *Fisher* the University of Texas argues that its efforts to seek

LSATs from the pre-1991 scale (10–48) with the post-June 1991 scale (120 – 180)—a method that does not conform to professional practice, and that renders the LSAT scores they report meaningless – but their lack of recognition when reporting figures that venture so far into the realm of the impossible (especially when comparing their data to national norms) raises questions about whether other problems exist below the surface that would not be apparent without actually analyzing their data independently.

207. *Grutter v. Bollinger*, 539 U.S. 306, 367 (2003) (Thomas, J., dissenting).

208. See William C. Kidder, *Bakke at Thirty: A History of Affirmative Action in U.S. Law Schools*, in *REALIZING BAKKE’S LEGACY* 170, 175–81 (Patricia Marin & Catherine Horn eds., 2008); Chambers et al., *supra* note 66, at 1891 n.122.

209. With occasional exceptions (e.g., 1991), the size of the total entering class at Berkeley and UCLA Law Schools is quite stable. Similar published data that are a few years older is found in Kidder, *supra* note 208, at 175–81.

210. The question presented in the petition for the U.S. Supreme Court to review

“critical mass” come alongside the dual recognition that “[n]o particular percentage of the incoming class will ensure that those benefits are realized in all educational settings” but that this “does not mean that the critical-mass determination is just an abstraction.”²¹¹ The facts on the ground were that the entering freshmen class at UT Austin in 2003 – when *Grutter* was handed down – included the “startling number” that African Americans were three percent (and Latinos were fourteen percent).²¹² Moreover, the University found “jarring evidence of racial isolation” and their study of classroom diversity revealed “that African-American and Hispanic students were nearly non-existent in *thousands* of classes was a red flag that UT had not yet fully realized its constitutional interest in diversity.”²¹³

The findings in Part I of this article support the educational judgments above with very recent data comparing undergraduates at UT Austin and ten other peer research universities. African Americans at UT Austin were considerably less likely to feel respected on campus than white students (72.3% versus 96.4%). At the same time, the African Americans on the Austin campus fared better than those at the University of California, which is subject to an affirmative action ban and where diversity levels are lower (a combined student body that is three percent African American on seven of the UC campuses).

“Critical mass” does not neutralize all other factors influencing the student educational experience, but the survey data in Part I from nearly ten thousand African American and Latino undergraduates confirm that with higher diversity/critical mass and the presence of affirmative action (UT Austin, AAU University #1) is generally associated with a more positive racial climate for African Americans and Latinos than is found at peer campuses laboring under an affirmative action ban and lower diversity levels (Berkeley, Davis, Irvine, UCLA, San Diego, Santa Barbara, Santa Cruz). The campuses with even greater African American critical mass than UT Austin have African American students who report even higher levels of feeling respected on campus (UC Riverside, AAU University #2).

The racial climate survey data reviewed in this article also provide an educational basis for viewing with skepticism assertions about affirmative

Fisher was “Whether this Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas at Austin’s use of race in undergraduate admissions decisions.” Brief for Petitioner at i, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 21, 2012) (No. 11-345). The social science supporting the educational benefits of diversity is noted in numerous amici, and is best synthesized in the Brief of the American Educational Research Association et al., *supra* note 86.

211. Brief for Respondents at 41, *Fisher v. Univ. of Tex.*, 644 F.3d 301 (5th Cir. 2011), *cert. granted*, 132 S.Ct. 1536 (May 21, 2012) (No. 11-345, *available at* <http://www.utexas.edu/vp/irla/Documents/Brief%20for%20Respondents.pdf>).

212. *Id.* at 43.

213. *Id.*

action causing significant harm by supposedly stigmatizing beneficiaries. Evidence about what students “do” are consistent with what students say in surveys, as the data in Part II of this article covering UC’s freshman admit pools since the 1990s are also inconsistent with the “stigmatic harm” hypothesis of many affirmative action critics. In fact, underrepresented minorities with stronger credentials, and especially African Americans, are relatively more likely to walk away from admission offers to the University of California than they were before Prop 209, and with more of them instead accepting offers from competitor private selective universities that practice affirmative action. Other “chilling effects” in Part II were documented in UC’s law school applications and undergraduate enrollment.

Part III rebuts two myths that are passionately promoted by critics of higher education affirmative action. First, racial/ethnic differences in average/median SAT scores are falsely portrayed as being overwhelmingly caused by affirmative action. Relatedly, the critics over-dramatize claims about harmful “mismatch” effects on underrepresented minority students’ performance when the social science literature overall corroborates that there are net benefits to attending highly selective universities, including with respect to graduation rates and labor market outcomes. STEM field and law school mismatch claims were also reviewed.

Part IV draws upon the University of California’s experience with an affirmative action ban and analyzes California as a “natural experiment” showing that class-based diversification efforts – while important for distinct policy reasons – do not effectively substitute for race-conscious policies at America’s most selective universities. Finally, Part V showed that after Prop 209 there were substantial declines in access for underrepresented minorities at the UC Business Schools and the UC Law Schools, fields where it is especially the case that the “path to leadership be visibly open.” While several studies confirm the benefits of diversity and critical mass in law school, the critics supporting the Petitioner in *Fisher* who dismiss these benefits rely on one problematic study by John Lott et al. – a study that is not up to the task of assessing “critical mass” and that is constrained by other data problems.

In different ways, Parts I through V of this article all provide analysis and data on issues swirling around the “compelling interest” and “narrow tailoring” legal questions in *Fisher* and beyond – including racial isolation and respect, enrollment choice and stigma, the test score gap, success in long-term outcomes (versus “mismatch”), class-based admissions/financial aid efforts and the distinct consequences of ending affirmative action at professional schools. These issues will remain important in the higher education landscape for years to come irrespective of the precise contours of the Court’s ruling in *Fisher*, which reinforces (in a roundabout way) why it is valid and legitimate in the first place for courts to defer to the educational and academic judgments that colleges and universities make in

carrying out their educational missions.

PERCENT PLANS: A “WORKABLE, RACE-NEUTRAL ALTERNATIVE” TO AFFIRMATIVE ACTION?

MARVIN LIM*

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INTRODUCTION

Since 1978, when *Regents of the Univ. of California v. Bakke* avowed its constitutionality,¹ affirmative action in higher education has continued to face legal and political challenges.² In 2003, *Grutter v. Bollinger* affirmed *Bakke*’s holding that the compelling state interest of diversity justifies affirmative action, but by a threadbare 5-4 margin.³ Justice O’Connor’s majority opinion also declared a societal time limit for affirmative action,⁴

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1. See 438 U.S. 265 (1978).

2. See, e.g., *Johnson v. Board of Regents of the Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001) (holding that automatically adding points to an admission score for non-white applicants violated the Equal Protection Clause).

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

4. See *id.* at 343 (“[w]e expect that 25 years from now, the use of racial

recognizing the societal burdens it creates. As various nationwide political movements demonstrate, this time limit seems on the horizon. Since 1996, six states have passed ballot measures banning affirmative action policies in public universities, including California and Michigan, where *Bakke* and *Grutter*, respectively, originated.⁵ In addition, lawmakers in other states have recently proposed initiatives to enact their own bans.⁶

With the Sword of Damocles hanging over affirmative action, many have proposed race-neutral mechanisms to replace it.⁷ In fact, in order for any given affirmative action program to be constitutional, *Grutter* first requires “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”⁸ These mechanisms have sparked much debate, centering mainly on the feasibility of class-based “affirmative action” to achieve diversity.⁹ However, another race-neutral alternative has received comparatively less attention, particularly in legal scholarship: percent plans.

Percent plans guarantee students who place in the top “x” percent of their high school class admission into a state’s university system. They are facially race-neutral, as they consider only a student’s class rank, and never a student’s race, for admissions purposes. Thus, these plans need only pass rational basis scrutiny under traditional equal protection analysis.¹⁰ However, they are implicitly designed to achieve racial diversity in at least two ways. First, they eschew standardized exam scores and numerical grade point average comparisons. Consequently, they circumvent any need to weigh academic measures differently for individuals of different racial groups.¹¹ In the process, they avoid the tension between maintaining

preferences will no longer be necessary to further the [diversity] interest”).

5. Affirmative Action: State Action, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=12857> (last visited Sept. 20, 2012).

6. See Robert Gehrke, *Affirmative Action: Push for a Color-Blind Utah*, THE SALT LAKE TRIB. (Dec. 2, 2010) archive.sltrib.com/printfriendly.php?id=50788330&itype=cmsid; Randy Krehbiel, *State House Sends Affirmative Action Ban to Voters*, TULSA WORLD (Apr. 27, 2011) www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20110427_11_0_theokl298226.

7. See, e.g., KENNETH L. MARCUS, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION*, (2004), available at <http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>.

8. *Grutter*, 539 U.S. at 339 (citation omitted).

9. See, e.g., RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1997).

10. See, e.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979) (holding that a facially neutral law, absent adoption precisely because of the adverse effects it would have on a protected class, does not undergo strict scrutiny).

11. Blacks and Hispanic minority groups tend to score lower on these exams, such as the SATs. See, e.g., U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUCATION, *STATISTICS, DIGEST OF EDUCATION STATISTICS* tbl. 143 (2009).

diversity and maintaining academic selectivity.¹² Second, by granting admission solely based on class rank, they rely on the fact that every school will have a top “x” percent—including majority-minority schools. Under their logic, many minorities will achieve the class rank to qualify for admission through the plan, consequently engendering diversity.¹³

These plans were first introduced in 1997: The Texas state legislature passed the Texas Top Ten Percent Plan¹⁴ in response to a Fifth Circuit Court ruling in 1996 declaring that diversity was not a compelling state interest and striking down affirmative action in Texas.¹⁵ Though Texas reinstated affirmative action soon after *Grutter*, which abrogated this holding on diversity, Texas’s percent plan exists today. This plan grants applicants who place in the top ten percent of their high school class admission into the state university of their choice.¹⁶ Two other states, California and Florida, have also implemented percent plans, both in 1999 shortly after each banned affirmative action.¹⁷ In California and Florida, students in the top four and twenty percent, respectively, of their high school classes are guaranteed admission into one state university, though without guaranteed admission into any particular university.¹⁸

Despite the fact that three states have implemented percent plans in reaction to the abolition of—and, implicitly, as an alternative to—affirmative action, these percent plans continue to receive little attention in the legal world. By automatically admitting some students from majority-minority schools and resource-poor schools simultaneously, percent plans could render the race versus class-based affirmative action debate moot.¹⁹

12. This refusal to compromise was problematic for Justice Thomas in *Grutter*. See 539 U.S. at 355–56 (“the Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status”).

13. See, e.g., Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 AM. L. & ECON. REV. 312 (2006).

14. See H.B. 588, 75th Leg., Reg. Sess. (Tx. 1997).

15. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

16. See THE UNIV. OF TEX. AT AUSTIN, OFFICE OF ADMISSIONS, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN: REPORT 13 (2010), available at http://www.utexas.edu/student/admissions/research/topten_reports.html.HB588-Report13.pdf.

17. California’s percent plan is called “Eligibility in the Local Context.” See *Eligibility in the Local Context*, UNIV. OF CAL., <http://www.ucop.edu/sas/elc/>. Florida’s percent plan is called “Talented Twenty.” See *What is the Talented Twenty Program?*, FLA. DEP’T OF EDUC., <http://www.fldoe.org/Talented20>. California and Florida banned affirmative action in 1996 and 1999, respectively. See *Affirmative Action: State Action*, *supra* note 5.

18. See *Eligibility in the Local Context*, *supra* note 17; *What is the Talented Twenty Program?*, *supra* note 17.

19. There is evidence, for example, that in Texas the percent plan passed the state legislature only because the plight of rural and poor whites were connected to those of minorities, underscoring the potential of the percent plan to help the socioeconomically

If not, the study of percent plans could still illuminate interactions between race, class, and other demographic factors to provide support for other race-neutral mechanisms (e.g., individually targeted class-based affirmative action). Such findings would rebuff the idea that it is necessary to consider race to achieve race-related interests. Nevertheless, none have comprehensively ascertained the merits of these plans, particularly not under the standards for “workable” alternatives that *Grutter* sets.²⁰ Until *Fisher v. University of Texas-Austin* in 2011,²¹ the only court to discuss these plans was the Supreme Court in *Grutter*—and then only hypothetically. The *Grutter* majority briefly commented that percent plans “may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”²²

Beyond the courts, academic research has also not yet explored the question of whether individualized assessments considering race are necessary to assemble a sufficiently diverse student body in practice. Largely analyzing one percent plan in isolation (mostly Texas’s plan) in its fledgling years (i.e., pre-*Grutter*), sociological studies have concluded that percent plans have achieved less diversity than affirmative action as measured by minority enrollment proportions.²³ However, such findings are insufficient to establish that percent plans are not a “workable” alternative under *Grutter*; it is still possible that percent plans achieve sufficient diversity from a constitutional perspective (e.g., they still enroll a “critical mass” of minorities).²⁴ It is also possible that these affirmative action programs achieved their gains by placing impermissible weight on race.

The issue of percent plans’ workability as an alternative to affirmative action gained attention in January 2011, with the decision in *Fisher v. University of Texas-Austin*.²⁵ In *Fisher*, the Fifth Circuit upheld UT-

disadvantaged. See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 71–73 (2002).

20. The one piece of legal scholarship that analyzes diversity under percent plans beyond Texas’s was written pre-*Grutter*. Therefore, these results were not analyzed under constitutional standards of sufficient race-neutral alternatives in higher education. See Jennifer L. Shea, Note, Percentage Plans: An Inadequate Substitute for Affirmative Action in Higher Education Admissions, 78 *IND. L. REV.* 587 at 618 (2003) (finding that percent plans “do not generate the same results as admissions policies that individually evaluate a student’s contribution to campus diversity based on a range of factors including race”).

21. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011); see also *infra* notes 25–29 and accompanying text.

22. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

23. See, e.g., HORN & FLORES, *infra* note 87; MARIN & LEE, *infra* note 114; TIENDA ET AL., *infra* note 133. Such research also tends to focus mainly on the impact of percent plans on flagship universities.

24. See *Grutter*, 539 U.S. at 316.

25. See *Fisher*, 631 F.3d 213.

Austin's use of affirmative action to supplement the Texas percent plan.²⁶ In the process, the Court declared that this percent plan "does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it" to meet the university's interest in diversity."²⁷ However, the case far from settled the issue of percent plans' workability. One judge specially concurred, signing on to the Court's opinion *except*, curiously, for its entire analysis of whether the Texas percent plan is a workable alternative.²⁸ Another judge also specially concurred but implied that the percent plan *should* be considered a sufficient alternative because UT's use of affirmative action generated only a marginally more diverse student body.²⁹ The case gained further traction when the Supreme Court granted the petition for certiorari in February 2012.³⁰ With several Justices already critical of diversity as a compelling interest³¹ and leaning towards colorblindness,³² the Supreme Court could reverse the Fifth Circuit and hold that affirmative action is unconstitutional at UT. The Court could justify such a decision by declaring that race-neutral alternatives have been proven to realize the benefits of diversity sufficiently, regardless of whether they achieve the same levels of diversity as affirmative action. Even if the Court upholds UT's program, or strikes it down on much narrower grounds, it could use evidence from percent plan states to declare at its next opportunity that other affirmative action programs are unconstitutional because the states did not seriously consider this mechanism. Such results could not only compel *more* states to implement affirmative action bans, but also bring the Supreme Court significantly closer to holding that affirmative action in higher education is wholly unconstitutional.

These issues give rise to several questions that this article considers in proffering the first "serious, good faith consideration" of percent plans in legal scholarship. First, what framework should be used to evaluate the sufficiency of race-neutral alternatives like percent plans? Second, how well do percent plans, not merely in Texas but everywhere, achieve diversity? Are the levels of diversity they achieve sufficient by constitutional standards, supporting the proposition that affirmative action

26. *See id.*

27. *Id.* at 240.

28. *See id.* at 247 (King, J., specially concurring).

29. *See id.* at 259–60 (Garza, J., specially concurring).

30. *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 2012 WL 538328 (U.S. Feb. 21, 2012) (No. 11–345).

31. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 354 (2003) (Thomas, J., concurring in part and dissenting in part) ("there are other ways to 'better' the education of law students aside from ensuring that the student body contains a 'critical mass' of underrepresented minority students").

32. These leanings are encapsulated by Chief Justice Roberts' statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

is generally unnecessary? Third, even if percent plans fall short, can states simply make adjustments to their percent plans, or are they fundamentally insufficient? And, even if percent plans are fundamentally insufficient, can individualized assessments actually achieve greater diversity without placing impermissible weight on race? Or are percent plans as equally effective as the most diversity-engendering, but constitutionally constrained affirmative action program possible?

Part I analyzes how well percent plans achieve the interest of diversity. First, it proposes a standard for evaluating what constitutes a “workable” race-neutral alternative, connecting *Grutter* and doctrine on disparate employment practices to argue that “critical mass” can and indeed must be evaluated quantitatively, especially in the context of race-neutral programs where a qualitative analysis is wholly inapplicable. Then, it empirically analyzes diversity outcomes in the three states that have implemented percent plans, ultimately finding that these plans have not sufficiently achieved critical mass. Part II analyzes why percent plans are limited in achieving diversity, particularly focusing on whether these plans erroneously assume that majority-minority schools will yield sufficient numbers of minority percent plan admits. It finds that, despite eschewing standardized exams, percent plans cannot circumvent racial disparities that are present in class rankings even in more homogenous schools. Thus, individualized assessments are likely necessary to achieve the diversity interest. In the process, this part examines whether individualized assessments can actually engender diversity gains above percent plans without placing impermissible weight on race. This article concludes that percent plans are an unworkable alternative, reaffirming the continuing constitutionality of affirmative action policies to achieve diversity—and, more broadly, the significant difficulties in achieving race-related goals without directly considering race.

I. EMPIRICS: ARE PERCENT PLANS SUFFICIENT TO ACHIEVE DIVERSITY?

As per *Grutter* precedent, a university must give “serious, good faith consideration” to “workable race-neutral alternatives” before implementing affirmative action to achieve diversity in higher education.³³ An innovative mechanism among such alternatives is the percent plan. Depending on how successful these plans have been in engendering diversity, they could raise serious doubts about the need for, and the constitutionality of, affirmative action at colleges and universities. On the other hand, given that several states have banned affirmative action, it is also important for other states and the Supreme Court alike to consider whether, in practice, there actually exist workable race-neutral alternatives. As such, how well percent plans

33. *Grutter*, 539 U.S. at 339. Good faith consideration does not require “exhaustion of every conceivable race-neutral alternative.” *Id.*

achieve diversity merits analysis.

A. At What Point Do Universities Achieve Sufficient Diversity?

How does one evaluate whether percent plans achieve sufficient diversity, particularly racial diversity? *Grutter* did not explicitly expound what constitutes a “workable” race-neutral alternative for achieving diversity, except to cite *Wygant v. Jackson Board of Education*, which states that race-neutral alternatives must serve to achieve diversity “about as well.”³⁴ However, serving the diversity interest “about as well” does not require achieving about the same levels of racial diversity as affirmative action. *Grutter* described the diversity interest as the pursuit of a “critical mass of underrepresented minority students.”³⁵ Because of its indefiniteness, this concept means that percent plans could still fulfill the diversity interest below, and perhaps even substantially below, the levels of racial diversity that affirmative action achieves. To evaluate whether percent plans serve diversity “about as well,” it is necessary to ask: what levels of diversity constitute critical mass?

This question is not without controversy. The majority in *Grutter* allowed critical mass to be “defined by reference to the educational benefits that diversity is designed to produce.”³⁶ However, the dissenters claimed that the majority in effect gave colleges and universities the deference to continue pursuing racial diversity indefinitely.³⁷ This debate about critical mass is one to which there is no bright-line answer. To disallow the diversity justification at all might deprive colleges and universities of benefits that allow them to fulfill their mission of higher education. These benefits, as *Grutter* articulates them, are what make diversity a compelling state interest in the first place: enriched classroom discussions and campus atmosphere, improved cross-racial understanding, and an increased sense that colleges and universities are open to individuals of all races.³⁸ However, to set a defined threshold of racial diversity would be akin to an impermissible quota itself.³⁹

The *Grutter* Court resolves this tension by appearing to place emphasis not on *overall* applicant and enrollment numbers, but on how schools evaluate each applicant *individually*. In order for an affirmative action program not to be a quota, it must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of

34. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280, n.6 (1986) (citation omitted).

35. *Grutter*, 539 U.S. at 316. These underrepresented minorities include African-Americans, Hispanics, and Native Americans. *See id.*

36. *Id.* at 330.

37. *See id.* at 348–49 (Scalia, J., concurring in part and dissenting in part).

38. *See id.* at 330–33.

39. *See Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 315 (1978).

each applicant."⁴⁰ Race may serve only as a "plus" for any particular applicant; it cannot serve as the predominant factor. By limiting colleges and universities' ability to consider race at the individual level, this approach allows colleges and universities to pursue critical mass to some extent, while simultaneously avoiding the problem of numerically defining what constitutes critical mass and thus risk instituting a quota.

Nevertheless, this approach is insufficient in two important respects. First, it is susceptible to the criticism that colleges and universities can theoretically continue to pursue diversity even if they have, for example, a majority-minority student body, so long as the college or university never considers race as a predominant factor for any *individual* applicant.⁴¹ This criticism of *Grutter* leaves the diversity interest particularly vulnerable, as it applies even if one recognizes that diversity does have empirical benefits. Second, it is not a useful framework for evaluating whether race-neutral admissions programs achieve critical mass. Because achieving diversity "about as well" as an affirmative action program does not necessarily mean achieving very similar levels, it becomes necessary to define critical mass as a concept apart from co-existence with a race-conscious program. Therefore, avoiding a quantitative conception of critical mass, as the *Grutter* Court appeared to do, leaves no framework for evaluating race-neutral programs as alternatives to affirmative action—including percent plans.

However, *Grutter's* own language may give more guidance to the doctrinal concept of critical mass than initially appears. In particular, it may allow for a quantitative component that evaluates race-conscious *and* race-neutral programs more rigorously, while not effectively reinstating quotas. If, as the *Grutter* majority allows, critical mass is defined by the educational benefits that diversity produces, then implicitly colleges and universities are required to consider the following questions: given the level of racial diversity in any year of enrollment, what exactly would be the benefit of achieving incrementally greater levels? Would a greater minority presence benefit the school substantially, given that current minority enrollment is particularly low? Would it produce only small benefits? Or worse, would it be counterproductive, creating racial homogenization in another direction while sacrificing non-racial elements of diversity?⁴² Such questions, like any calculation of non-economic

40. *Grutter*, 539 U.S. at 334 (emphasis added) (citing *Regents*, 438 U.S. at 315, 317).

41. See, e.g., *id.* at 348–49 (Scalia, J., concurring in part and dissenting in part).

42. Other language in *Grutter* supports the idea that critical mass should be measured in this manner. See *Grutter*, 539 U.S. at 334 ("[a race-conscious admissions program] must be flexible enough to consider all pertinent elements of diversity"). Such a framework also dovetails with the benefits analysis proposed by Ian Ayres and Sydney Foster, as part of their larger cost-benefit analysis of affirmative action. See Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and*

benefits, are indefinite to some degree. However, rather than a wholly indefinite framework, such a scale begins to allow for more concrete arguments as to whether, at any given level of minority enrollment, a university may have amply garnered the benefits of racial diversity and reached the point of critical mass, or whether it might pursue greater diversity through other methods in subsequent years. Thus, this framework sets the stage for evaluating when colleges and universities achieve critical mass. It reconciles *Grutter*'s very proposition that critical mass entails "[s]ome attention to numbers,"⁴³ but cannot require achieving a specific number or percentage of minorities.⁴⁴

Strongly supporting this manner of evaluating critical mass is the Supreme Court's employment law doctrine. Since *Grutter*, several scholars have analyzed the implications of the critical mass concept for voluntary affirmative action in the workplace.⁴⁵ This race-conscious mechanism is another that the Supreme Court has also held to be constitutional.⁴⁶ However, no scholars have identified a significant feature of broader employment law doctrine inclusive of, but not limited to, workplace affirmative action precedent that guides how to evaluate critical mass itself: the Supreme Court also sees the magnitude of racial underrepresentation in employment along a scale.⁴⁷ At one extremity, under Title VII, employers may be held liable for practices that have disparately adverse outcomes for minority groups.⁴⁸ The bar to establishing such liability is high.⁴⁹ To

Gratz, 85 TEX. L. REV. 517, 565 (2007). Ayres and Foster state that, instead of looking at the weight of race on the individual level, affirmative action programs should justify overall and marginal benefits of increased diversity against overall and marginal costs to non-minorities.

43. *Grutter*, 539 U.S. at 336.

44. *See id.* at 318.

45. *See, e.g.*, Jessica Bulman-Pozen, Note, *Grutter at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1443 (2006) (arguing that *Grutter* affirms workplace affirmative action precedent, which stresses remediation, but through integration rather than compensation); Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005) (arguing that *Grutter* may justify non-remedial, diversity-centric affirmative action in the workplace).

46. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979) (holding that Title VII "does not condemn all private, voluntary, race-conscious affirmative action plans").

47. Bulman-Pozen comes the closest, briefly suggesting that the workplace affirmative action concept of "manifest imbalance" supports a "quantitative conception of critical mass." *See supra* note 45 at 1436, 1433. However, the "manifest imbalance" standard is restricted to workplace affirmative action. *See infra* note 52.

48. Such liability may exist regardless of whether there is intent to discriminate. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups").

49. *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (holding that, before an employer takes race-conscious action to remedy potential Title VII disparate impact

establish a *prima facie* case requires robust statistical evidence, or what the Court has termed a “gross disparity.”⁵⁰ Such a disparity entails a statistically significant difference of “greater than two or three standard deviations” between the expected number of minority hires, given their proportion in the particular occupational field and the actual number of minority hires.⁵¹ Moving further along the scale, however, even when employers are in full compliance with Title VII and there is no evidence that they have ever engaged in discriminatory employment practices, they are neither statutorily nor constitutionally barred from voluntarily addressing disparities that are less than two or three standard deviations, as long as there is still a “conspicuous” or “manifest imbalance.”⁵² That employment law doctrine inclusive of workplace affirmative action recognizes degrees of demographic underrepresentation—ones that affect how employers are permitted or even required to act to address disparities—further supports the contention that one must evaluate critical mass along an incremental scale, rather than a vaguely binary one.

Even establishing that *Grutter*’s “some attention to numbers” concept entails this incremental understanding of critical mass, evaluating diversity by simply “eyeballing” enrollment figures (or comparing whether a given means achieved more or less diversity than a prior one) may still give limited concrete guidance. Thus, although neither the Court nor scholars have specifically done so, applying a similar statistical framework as in employment law directly to higher education creates brighter-line standards that are fully consistent with *Grutter*’s some-numbers-but-no-quota principle. Such analysis would illuminate whether a percentage gap between minority and non-minority enrollment translates to a statistically significant result given broader demographics, specifically the actual pool

liability, it must have a strong basis in evidence to believe it will be subject to such liability).

50. *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 307 (1977).

51. *Id.* at 308, n.14 (citing *Castaneda v. Partida*, 430 U.S. 482, 496–97, n.17 (1977)). *Castaneda*, a juror selection case, provides a more detailed calculation of standard deviation, a calculation that *Hazelwood* then applies in the employment context. A result of greater than two or three standard deviations is statistically significant, corresponding with a 95% confidence level. Specifically, the result entails a 95% certainty that the “observed disparity in the applicant pool reflects a real disparity in the relevant labor market with respect to the challenged [employment] practice,” and a 5% possibility that the disparity is a result of mere chance due to sampling. Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 786 (2009).

52. See *Johnson v. Transportation Agency*, 480 U.S. 616, 632 (1987) (“a manifest imbalance need not be such that it would support a *prima facie* case against the employer”). The Supreme Court has not ruled on voluntary affirmative action in the workplace since *Johnson*, but lower courts have upheld affirmative action programs where the standard deviation was less than two. See, e.g., *Chance v. Bd. of Examiners*, 458 F.2d 1167, 1171 (2d Cir. 1972) (finding an adverse impact where the deviation between whites and minorities was 1.5).

of potential students. Considering especially that one of the doctrinally recognized benefits of diversity is to create an increased sense of open access,⁵³ statistically “gross” disparities in minority enrollment should safely indicate that a university has not achieved critical mass (e.g., four or more standard deviations from the composition of the applicant pool, that is, higher than the threshold for permitting voluntary affirmative action in the workplace). Lesser disparities may still indicate the same but are much more debatable. For example, less than three standard deviations (i.e., directly below the requirement for Title VII liability) would not necessarily bar a college or university from continued pursuit of critical mass. However, it would certainly require further justification for this pursuit, just as workplace affirmative action necessitates a showing of “manifest” disparities below this threshold.

Of course, the mechanism for evaluating racial disparities in employment law need not be the best framework for education for several potential reasons. First, the two areas of the law have some differing substantive goals. The goal of addressing racial disparities in employment is designed to redress discrimination that hurts minorities in the workplace. However, the goal of fostering educational diversity is patently not to address discrimination. Second, while a quantitative framework might be appropriate for evaluating whether an employer has redressed discrimination, importing this framework for evaluating educational diversity might transform critical mass into an impermissible quota.

Nevertheless, the two areas of law share important commonalities that, in concert with the language of *Grutter* itself, strongly support a quantitative framework for evaluating critical mass. First, while the goals of employment antidiscrimination and educational diversity may seem substantively different, a key concept unites the two: broader racial integration in society.⁵⁴ Underscoring this concept in employment is precisely that workplace affirmative action is permissible even when an employer has no legal obligation to correct any of its practices. In justifying this type of affirmative action, the Supreme Court explicitly highlighted the benefits of enabling work and integrating minorities into “the mainstream of American society,” benefits that arise from opening up access to employment opportunities even absent legally cognizable, discrete discrimination among similarly qualified applicants.⁵⁵ Further highlighting the integrative goal of employment law is that, while Title VII certainly prohibits employment practices that intentionally discriminate on the basis of race, it also prohibits practices that cause a racially disparate *impact* even absent invidious intent.⁵⁶ In this sense, Title VII’s concept of racial

53. *See supra* note 38 and accompanying text.

54. *See* Bulman-Pozen, *supra* note 455, at 1411.

55. *United Steelworkers of America v. Weber*, 443 U.S. 193, 202–03 (1979).

56. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

antidiscrimination is much more broadly and societally integrative than narrowly and individually remedial. For its part, *Grutter* does not see the benefits of diversity as limited by any means to producing classroom exchanges of diverse viewpoints. Instead, *Grutter* explicitly recognizes that the benefits of educational diversity encompass preparing people for work, citizenship, and “participation by members of all racial and ethnic groups in the civic life of our Nation,” which are benefits that arise by “[e]nsuring that public institutions are open and available to all segments of American society,” even absent legal discrimination.⁵⁷ The Court also stresses the importance of colleges and universities as a “training ground for a large number of our Nation’s leaders,” justifying attention paid to “the openness and integrity of the educational institutions that provide this training.”⁵⁸ In identifying these two interests, the *Grutter* Court emphasizes the broader integrative goal that links the goals of education and employment law.

Employment law’s integrative component has key implications for the portability of its quantitative framework for measuring racial disparities. If this framework were used solely for inferring employer discrimination between similarly qualified individuals, it may be difficult to justify importing into critical mass analysis. However, the same framework is also used to justify permitting employers to address workplace disparities affirmatively *even absent* any disparate treatment or even any disparate impact sufficiently large to violate Title VII. Consequently, even in employment law, quantitative analysis is used to justify integrative efforts in the absence of legal discrimination—precisely what characterizes the pursuit of educational diversity. Therefore, quantitative analysis should also be compatible in the latter context. One remaining distinction would be that the latter does not take into account the qualifications of the pool. Nonetheless, this distinction is warranted because it is the purpose of critical mass analysis neither to ascertain whether there is discrimination among similarly qualified applicants that must be corrected (like in Title VII disparate treatment)⁵⁹ nor to permit affirmative action without any further scrutiny. Instead, it is to determine whether there is *such* a large statistical discrepancy between the composition of enrolled and potential students that it creates a plausible inference: a college or university can continue to increase minority enrollment and would very likely garner substantial, diversity-specific benefits from doing so.⁶⁰ Whether and how it

57. *Grutter v. Bollinger*, 539 U.S. 306, 331–332 (2003).

58. *Id.* at 332.

59. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977). Again, such discrimination need not be intentional, but may be structural. *See also supra* note 45 and accompanying text.

60. Under a distributional curve in which the mean enrollment represents exactly proportional representation vis-à-vis the applicant pool, 95% of actual enrollment figures should fall within two standard deviations. More than two standard deviations consequently indicate a statistically large variance from proportional representation, as

intentionally chooses to *pursue* critical mass will depend, in part, on how a college or university chooses to weigh the relative importance of other applicant factors, such as traditional academic qualifications. In turn, how the university weighs these factors will remain constitutionally constrained.⁶¹ However, for the sole purpose of determining whether or not a university has achieved critical mass, such statistical analysis is probative *without* making differentiations in academic qualifications.

Second, just as Title VII's quantitative framework may be used to justify workplace affirmative action without effectively creating quotas, the same framework in education law also avoids this constitutionally problematic extreme, which the *Grutter* Court defines as a "certain fixed number or proportion of opportunities" that are "reserved exclusively" for individuals belonging to specific groups.⁶² In the workplace affirmative action context, an employer may implement a program when there is a certain manifest imbalance, tied to around two standard deviations or greater. However, even taking note of this quantitative imbalance—which the Court *requires* before implementing a program—an employer does not necessarily, and constitutionally cannot, pursue a specific number or proportion of minorities. An employer must still implement a process that does not "trammel the interests" of non-minorities, entailing that the employer must not manipulate the evaluation of applicants to reach a specific number or range (and that it is possible, depending on the applicant pool, for a large standard deviation to remain ultimately).⁶³ Similarly, in the college and university context, *Grutter* itself explicitly affirms that it is possible for colleges and universities to have minimum numerical *aspirations* in mind; it merely cannot engineer the process to *ensure* a specific number or range. For example, as the Court recognizes, "10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of

well as a 95% or greater probability that a result did not happen by chance (i.e., that the enrollment in a given year reflects a real gap between actual and proportional enrollment). Large negative variances from proportional representation should reasonably indicate that a university has not reaped the full benefits of diversity. *See Hazelwood Sch. Dist.*, 433 U.S. at 308, n. 14. Even in states where minority representation appears significant on its face, particularly sizeable variances are more likely to indicate that a university has not yet attracted certain distinctive perspectives from *within* minority groups.

61. This argument addresses another potential objection to such statistical analysis: that comparing applicant and enrollment figures does not account for admission rates. Since the applicant-admitted student ratio is often worse for minorities, it is also difficult to argue that a university admits (but does not enroll) a critical mass of minorities. *See infra* note 83 and accompanying text.

62. *Grutter*, 539 U.S. 306, 335 (2003).

63. *See Johnson v. Transp. Agency Santa Clara Cnty. Cal.*, 480 U.S. 616, 630 (1987). The *Johnson* Court stresses that workplace affirmative action programs must not turn into quotas, excluding some individuals from consideration for particular slots, but can authorize "that consideration be given to affirmative action concerns when evaluating qualified applicants." *Id.* at 638.

view.”⁶⁴ Therefore, considering any given level of statistical disparity, colleges and universities may decide that, at that particular point, they have not yet achieved their goals, while still not manipulating the process to ensure that it arrives at a specific point.

Parents Involved v. Seattle School District No. 1, a post-*Grutter* case, is additionally instructive. Here the Court struck down a facially race-conscious plan designed to achieve diversity in public high schools by assigning students to schools on the basis of their race when any given school deviated from a specific percentage target (as determined by a school district’s demographics), effectively allowing race to supersede all other factors automatically except for sibling attendance.⁶⁵ In striking down this plan, Chief Justice Roberts’ plurality opinion agreed that a “defined range set solely by reference to the demographics of the respective school districts” was impermissible.⁶⁶ However, Justice Kennedy, who was the decisive fifth vote in striking down the plan, did not sign on to this particular opinion.⁶⁷ While Justice Kennedy agreed that the plan was unconstitutional because, unlike the program in *Grutter*, it gave predominant and automatic weight to race individually, he explicitly stated that a more “general recognition of the demographics,” as well as “tracking enrollments, performance, and other statistics by race,” would still be permissible in pursuing diversity—an idea similar to this Article’s proposed framework.⁶⁸ *Parents Involved* further ties *Grutter* to employment law, affirming diversity not only for what it contributes to varied student exchange, but also for the societal importance of equal opportunity access for minorities, regardless of legally cognizable discrimination.⁶⁹ In these ways, *Parents Involved* affirms the possibility of conceiving *Grutter*’s critical mass quantitatively, still barring rigid number or percentage requirements but nevertheless entailing that some attention be paid to such figures to provide concrete guidance to critical mass.⁷⁰ Providing an even more concrete framework of evaluation, the case further rebuffs the criticism that critical mass affords excessive deference and allows colleges and universities to pursue diversity indefinitely.

64. *Grutter*, 539 U.S. at 335. The Court also quotes Justice Powell’s controlling opinion in *Bakke*: “there is of course ‘some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.’” *Id.* at 336.

65. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711–12 (2007).

66. *Id.* at 729.

67. See *id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment).

68. *Id.* at 789.

69. See *id.* at 787–88 (“The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race”).

70. See *supra* text accompanying notes 47–48.

In summary, a quantitative analysis of critical mass is not only allowed by and fully consistent with *Grutter* itself, but also supported by direct comparison to employment law. After all, there is some merit to the criticism that a qualitative framework alone for evaluating race-conscious programs is insufficient to govern the pursuit of diversity. Not only does this framework theoretically allow colleges and universities to pursue diversity indefinitely, but it is also inapplicable to evaluating race-neutral programs' achievement of diversity, since evaluating the predominance of race for one applicant cannot equate to evaluating the overall benefits of diversity when race is not considered in admissions. A quantitative component of critical mass resolves both of these problems. It makes the analysis of diversity much more *rigorous*, but not *rigid* in the sense that it becomes a quota. A clearer conception of critical mass not only "saves" *Grutter* by placing more measurable constraints on the pursuit of diversity, but also opens the door to evaluating the achievement of this interest under regimes where race-conscious programs may not exist at all—most notably, percent plans.

B. Evaluating Diversity Under Percent Plans

With this framework in mind, one must now ask: do percent plans sufficiently engender critical mass? Or can one infer from the statistics that percent plans are limited in achieving the diversity interest? Ultimately, in the percent plan states of Texas, Florida, and California, the numbers show that there remain sizeable racial disparities in student body composition, both within and across colleges and universities. These gaps evidence the inability of percent plans to foster the benefits of diversity (and thus critical mass) sufficiently.

There are several levels at which to apply this framework to evaluate whether colleges and universities have sufficiently achieved diversity. One is to evaluate the degree of diversity within each institution. A particular method of doing so would be to analyze campus-wide enrollment; a college or university with few minorities would be hard pressed to claim that it is reaping the benefits of diversity.⁷¹ Another method would be to evaluate the student composition within segments of a university, for example, specific programs within a university. On the one hand, one might argue that a broadly diverse campus is sufficient to reap the benefits of diversity. *Grutter* itself and its companion case *Gratz v. Bollinger* did not look at

71. Empirical research shows that diversity benefits these goals. See, e.g., Steve Chatman, *Does Diversity Matter in the Education Process? An Exploration of Student Interactions By Wealth, Religion, Politics, Race, Ethnicity and Immigrant Status at the University of California*, CTR. FOR STUDIES IN HIGHER EDUC. 1, 12-13, 2008. This University of California-wide study found that, despite being a very small percentage of the student population, African Americans surveyed reported a 73% rate of interactions resulting in increased understanding of another's point of view. Hispanics reported a 68% rate of such interactions. See *id.*

diversity within specific segments of a school.⁷² On the other hand, *Grutter* also stresses the importance of diversity specifically in “classroom discussion,” as well as the “robust exchange of ideas.”⁷³ Thus, classroom-level diversity is important because it perpetuates not merely cross-racial understanding, but also the ideational exchange itself that is paramount to any university’s goal.⁷⁴ Without such diversity, the benefits of diversity will not flow in an important sense, particularly not to academic areas that have been traditionally dominated by certain groups and where such diversity would likely be able most to contribute to ideational exchange.⁷⁵ Finally, the broadest level at which to evaluate diversity is *across* colleges and universities. Such analysis is useful because it raises inferences about critical masses throughout an entire college or university system.

Percent plans are ultimately limited in achieving diversity within many colleges and universities. These limitations manifest themselves, first, in the persistent campus-wide disparities, particularly at flagship colleges and universities where most students seek admission. In Texas, the University of Texas-Austin exemplifies this phenomenon. In 2009, enrollment at UT-Austin was 4.6% black and 20% Hispanic.⁷⁶ Apart from any facial conclusions one could draw from this data, particularly from the former statistic, applying the statistical methods from employment law places these figures in the best context. With blacks and Hispanics comprising 7.8 and 21.5%, respectively, of the total applicant pool,⁷⁷ there are greater than six standard deviations between actual enrollment of these minorities and enrollment proportional to the applicant pool.⁷⁸ This statistic is large enough to create a robust inference that, despite the percent plan in Texas, this university in all likelihood has not yet reached the point of critical mass, particularly for blacks. It is also interesting to note, in comparing

72. *Grutter* concerned only the University of Michigan Law School. See *Grutter v. Bollinger*, 539 U.S. 306, 317–18 (2003). *Gratz* concerned the University’s undergraduate component as a whole. See *Gratz v. Bollinger* 539 U.S. 244 (2003).

73. *Grutter*, 539 U.S. at 329–30.

74. *Id.* at 324, 330. That the constitution recognizes “expansive freedoms of speech and thought” in the university setting was affirmed in *Parents Involved* in the plurality opinion, which distinguishes primary education from higher education. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723–25 (2007).

75. Deborah Malamud discusses the disproportionately large representation of certain groups in certain fields. See Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 965 (1997).

76. See OFFICE OF INFORMATION MANAGEMENT AND ANALYSIS, UNIVERSITY OF TEXAS AT AUSTIN, STATISTICAL HANDBOOK 2009–10, tbl. S 21 (2010).

77. See *id.*

78. Blacks and Hispanics comprised 29% of the applicant pool, and there were 7,148 total enrollees (minus those of unknown race). See *id.* Consequently, one standard deviation consists of 38 students. If the number of minority enrollees were proportional to the applicant pool, they would comprise 2,056 enrollees. In actuality, they comprised 1,814 enrollees. See *id.*

enrollment before UT-Austin reinstated affirmative action to enrollment in the years prior to Texas's affirmative action ban, racial diversity stagnated or declined in *absolute* numbers,⁷⁹ despite slight increases in the proportion of minority applicants.⁸⁰ Perhaps unsurprisingly, statistics also indicate that racial diversity is not the only type of diversity hampered in Texas flagships like UT-Austin.⁸¹ The full benefits of having many students from lower socioeconomic backgrounds, regardless of race, similarly do not appear to accrue.⁸²

California and Florida also fall short in achieving diversity, particularly within flagship institutions. Even among those eligible for admission under the California and Florida percent plans, blacks and Hispanics have lower rates of admission to these states' flagship colleges and universities, noting again that these plans do not guarantee admission into any particular college or university.⁸³ Perhaps unsurprisingly, these states' flagship institutions have maintained lower admissions and enrollment rates for these minority groups overall (and again for those of lower socioeconomic

79. At UT-Austin, total black enrollment decreased between 1989 and 2004, and Hispanic enrollment only increased by 100 despite large increases in the Hispanic population. *See* Fisher v. University of Texas at Austin, 631 F.3d 213, 244 (5th Cir. 2011).

80. From 1990 to 2001, the black and Hispanic combined proportion of applicants to UT-Austin increased from 19.9 to 20%. *See* OFFICE OF INSTITUTIONAL STUDIES, UNIVERSITY OF TEXAS AT AUSTIN, STATISTICAL HANDBOOK 2001–02, 34 (2002); OFFICE OF INSTITUTIONAL STUDIES, UNIVERSITY OF TEXAS AT AUSTIN, STATISTICAL HANDBOOK 1990–91, tbl. E 19 (1991).

81. In analyzing the period from 1993 to 2003, Koffman and Tienda find that Texas's percent plan did not change application rates from poorer high schools and that at Texas's two flagships, UT-Austin and Texas A&M, top ten percent applicants consisted mainly of students from wealthier high schools. *See* Dawn Koffman & Marta Tienda, Missing in Application: The Texas Top 10% Law and Campus Socioeconomic Diversity (March 2008) (unpublished thesis, Princeton University) (on file with Office of Population Research, Princeton University).

82. Recent empirical research underscores the value of increasing socioeconomic diversity. *See* CHATMAN, *supra* note 71, at 9 (“Across the UC system, 41% of all undergraduates reported that they often increased in understanding of other viewpoints through interactions with students who were from a different social class”).

83. In California, while the average admission rate into Berkeley for an ELCer was 56.7% in 2009, the admission rate for blacks and Hispanics, respectively, was 54.8 and 45.6. The average admission rate into UCLA for an ELCer in the same year was 59.9%, while it was 54.8 and 45.7 for blacks and Hispanics, respectively. *See* *University of California: StatFinder*, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, available at <http://statfinder.ucop.edu/statfinder/drawtable.aspx?track=1>. In Florida, the acceptance rate for Talented Twenty students to Florida State University in 2007 was 76%; for blacks and Hispanics, it was 46.7 and 69.9%, respectively. At the University of Florida, while the general Talented Twenty acceptance rate in the same year was 64.1, admissions for blacks and Hispanics, respectively, were 75.6 and 60.1. *See* *Talented 20 (Prior Year) Admission and Registration Headcounts and Percentages: By Race and University, Summer and Fall 2007*, FLORIDA BOARD OF GOVERNORS (available at <http://www.flbog.edu/resources/factbooks/factooks.php>).

status).⁸⁴ These rates translate to statistically significant disparities when one compares them to minority applicant numbers. For example, in 2009, the University of California-Berkeley's black enrollment was 2.9%, and Hispanic enrollment was 10.9%.⁸⁵ Beyond the facially small size of minority enrollment (e.g., less than 15% black and Hispanic enrollment), these figures seen in the context of the composition of applicants makes an even stronger case for the lack of diversity as there are greater than eleven standard deviations between actual enrollment of blacks and Hispanics and enrollment proportional to the applicant pool.⁸⁶ Such statistical disparities are gross enough to create the inference that, at whatever point these flagships achieve critical mass, they have very likely not reached that point even with percent plans. Therefore, this creates a strong inference that these institutions would gain substantial benefits from pursuing still greater diversity.⁸⁷ Lastly, considering increases in the proportion of black and

84. In California, Berkeley and UCLA are the most selective colleges in the UC system, with a general admissions rate of 21.6 and 21.9, respectively, in 2009. However, the admissions rates for blacks were 14.4 and 15.1 into the two institutions, respectively; for Hispanics, the rates were 16.7 and 15.6. For students with parental income of less than \$40,000, the rates were 17.1 and 17.4, respectively. See *University of California: StatFinder*, *supra* note 83. In addition, socioeconomic diversity, as measured by Pell Grant recipients in each campus, is lower at the flagship universities in California. See OFFICE OF THE PRESIDENT, UNIVERSITY OF CALIFORNIA, UNDERGRADUATE ACCESS AND EXCELLENCE AT UC: OUTLOOK FOR 2010–11, 2 (2010). Research has also shown that affirmative action bans tend to have a stronger impact on the more selective universities, including in California. See Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, REV. OF ECON. & STATISTICS (forthcoming 2011), available at http://www9.georgetown.edu/faculty/plh24/hinrichs_aff_action.pdf. Florida's flagship universities, including Florida State University and the University of Florida, display similar demographics in total enrollment. At Florida State University, black enrollment decreased from 12.34% of the student body in 1999 to 10.16% in 2010, though Hispanic enrollment increased from 7.11% to 12.34% in the same time frame. See *Enrollment Headcount*, OFFICE OF INSTITUTIONAL RESEARCH, FLORIDA STATE UNIVERSITY, available at <http://ir.fsu.edu/student/headcount.htm>. On the other hand, at the University of Florida, both black and Hispanic enrollment increased from 1998 to 2009. See *Enrollment by Level, Gender, and Ethnicity: 1997–2009*, UF OFFICE OF INSTITUTIONAL PLANNING AND RESEARCH, UNIVERSITY OF FLORIDA (2010), available at <http://www.ir.ufl.edu/factbook/facti.xls>. However, interestingly, enrollment from those with lower socioeconomic status is comparatively lower than underrepresented minority enrollment, at 23 versus 30%. Furthermore, underrepresented minority enrollment still lags behind the top private institution, the University of Miami, which still permits affirmative action. See THE EDUCATION TRUST, OPPORTUNITY ADRIFT: OUR FLAGSHIP UNIVERSITIES ARE STRAYING FROM THEIR PUBLIC MISSION, 3 (2010).

85. See *University of California: StatFinder*, *supra* note 83.

86. Blacks and Hispanics comprised about 22% of the applicant pool, and there were 4,146 total enrollees. See *supra* note 83. Consequently, one standard deviation consists of 27 students. If the number of minority enrollees were proportional to the applicant pool, they would comprise 899 enrollees. In actuality, they comprised 606 enrollees. See *id.* These statistics exclude applicants and enrollees of unknown race.

87. Such results also confirm earlier research on percent plans, research that

Hispanic applicants over time,⁸⁸ statistics show the marked contrast between recent minority enrollment and that from before the affirmative action ban. For example, black and Hispanic enrollment at Berkeley each were numerous percentage points higher at 6.0% and 14.9%, respectively, in 1996 shortly before California enacted its ban.⁸⁹

Finally, though there is a relative paucity of data on this subject, there is some evidence that racial disparities within colleges and universities manifest themselves at the classroom level as well. UT-Austin again best exemplifies this phenomenon. A UT-Austin study reported more classes with zero to one black or Hispanic students in the fall of 2002 in the absence of affirmative action, than in the fall of 1996 shortly before the affirmative action ban came into effect; in fact, 79% of classrooms in 2002 had zero to one black students, and 30% had zero to one Hispanic students.⁹⁰ Furthermore, as *Fisher* itself points out, “nearly a quarter of the undergraduate students in UT’s College of Social Work are Hispanic, and more than 10% are African-American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African-American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African-American.”⁹¹

Based on such evidence, Texas’s percent plan has not been sufficient in at least some settings to foster the type of diversity—that is, classroom diversity—that would most directly lead to the desired exchange of viewpoints. While applicant data is not accessible at this level, given the starkness of these facial disparities, even incremental increases in classroom diversity at UT-Austin would arguably yield substantial benefit. In addition to augmenting the variety of viewpoints within in-class discussion, such increases would help to break down academic and occupational stereotypes of minorities, which the percent plan overlooks and potentially perpetuates by maintaining barriers of access into certain intra-university colleges.⁹²

reached similar conclusions regarding the limited impact of percent plans on flagships. See CATHERINE L. HORN & STELLA M. FLORES, *THE CIVIL RIGHTS PROJECT: HARVARD UNIVERSITY, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES* (2003) (finding that percent plans are not effective in increasing or maintain minority enrollment in flagship institutions).

88. For example, at Berkeley from 1994 to 2009, the black and Hispanic combined proportion of applicants increased from 16.73 to 20.78%. See *University of California: StatFinder*, *supra* note 83.

89. Similarly, UCLA’s minority enrollment decreased in the same time period, with Hispanic enrollment falling from 18.0 to 17.1%, and black enrollment falling from 6.8 to 4.3%. See *id.*

90. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 225 (5th Cir. 2011). Assuming a class size of 30, these figures leave, for example, 79% of classrooms to be comprised of 0 to 3.33% black students.

91. *Id.* at 240.

92. See, e.g., Charles R. Lawrence III, *The Id, the Ego and Equal Protection*:

Evaluation *across* colleges and universities within the same state system provides additional evidence that percent plans have not achieved diversity adequately. In California and Florida, the proportion of minorities in these public university systems is low, particularly blacks. This fact is most evident when again applying the statistical methods that courts use to analyze disparate employment practices. Blacks comprised 3.8% of total enrollment in California in 2009 (23.8% blacks and Hispanics combined),⁹³ equating to greater than ten standard deviations between actual enrollment of blacks and Hispanics and enrollment proportional to the applicant pool.⁹⁴ Florida's figures are facially higher, with blacks comprising 13.6% of total enrollment in 2007 (31% combined).⁹⁵ However, this figure equates to sixteen standard deviations with respect to enrollment proportional to the applicant pool—a result that seems ironic given the greater proportion of minority enrollees as compared to California, but which the much greater proportion of minority *applicants* in Florida explains.⁹⁶ Even Florida's minority enrollment proportions fall below each minority group's proportions in the statewide applicant pool⁹⁷ and the general state population.⁹⁸ Thus, these statistically large disparities strongly suggest that many campuses and classrooms within these college or

Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 372 (1987) (stating that the exclusion of blacks from certain “jobs has been rationalized by a belief in their unsuitability for these roles.”); see also Marta Tienda, *College Admission Policies and the Educational Pipeline: Implications for Medical and Health Professions* (March 11, 2001) (unpublished thesis, Princeton University) (on file with Office of Population Research, Princeton University) (discussing the negative impact of affirmative action bans on underrepresented minorities in the medical field).

93. In California, blacks and Hispanics comprised 5.2 and 21.3%, respectively, of applicants in 2009. See *University of California: StatFinder*, *supra* note 83.

94. Blacks and Hispanics comprised about 26.5% of the applicant pool, and there were 33,061 total enrollees (minus those of unknown race). Thus, one standard deviation consists of 80 students. If the number of minority enrollees were proportional to the applicant pool, they would comprise 8,768 enrollees. In actuality, they comprised 7,899 enrollees. See *id.*

95. In Florida, blacks and Hispanics comprised 18.5 and 16.2%, respectively, in 2005. See *Admission and Registration Headcounts and Percentages by Type of Student and University, Summer and Fall 2005*, FLORIDA BOARD OF GOVERNORS (available at <http://www.flbog.edu/resources/factbooks/factbooks.php>).

96. Blacks and Hispanics comprised about 34.7% of the applicant pool, and there were 27,233 total enrollees. See *First-Time-in-College (FTIC) Admission and Registration Headcounts and Percentages*, *supra* note 95. Consequently, one standard deviation consists of 79 students. If the number of minority enrollees were proportional to the applicant pool, they would comprise 9,450 enrollees. In actuality, they comprised 8,232 enrollees. See *id.*

97. See *id.*

98. Each of California and Florida's black and Hispanic enrollment figures falls below its counterpart number in the general state population. Blacks and Hispanics make up 6.6 and 38.1%, respectively, of the California population, and 16.5 and 22.9%, respectively, of the Florida population. See U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS (2010), available at <http://quickfacts.census.gov/qfd/states/48000.html>.

university systems have not yet attained critical mass under percent plan regimes.

Further underscoring these disparities are comparisons to diversity in these states prior to their respective affirmative action bans. When compared only to diversity immediately prior to affirmative action bans, it may appear that percent plans have achieved diversity adequately. For example, in the California and Florida state college and university systems, comparisons of recent enrollment to enrollment immediately before the states' respective bans show increases in racial (and socioeconomic) diversity.⁹⁹ However, when comparing more recent enrollment to enrollment in the years prior to these bans,¹⁰⁰ there are stagnancies or even decreases in black enrollment,¹⁰¹ despite increases in the proportion of black applicants over time.¹⁰² Even increases in the proportion of Hispanic enrollment¹⁰³ have been outpaced by the increasing proportion of minority students in California and Florida high schools.¹⁰⁴

99. See, e.g., *Fundable Student Headcount by Part-Time/Full-Time, Gender, Race, and Level: Fall 2007*, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, available at <http://statfinder.ucop.edu/statfinder/drawtable.aspx?track=1>; *Fundable Student Headcount by Part-Time/Full-Time, Gender, Race, and Level: Fall 1997*, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, available at <http://statfinder.ucop.edu/statfinder/drawtable.aspx?track=1>.

100. This accounts for the possibility that the affirmative action bans adversely impacted enrollment of minority applicants admitted before the ban, as happened in Texas in 1996. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011).

101. In the University of California system, black enrollment was 3.67% of the total enrollment in 2009, a decrease from 4.235 in 1994. See *University of California: StatFinder*, *supra* note 83. In Florida, black enrollment was 13.6% of total enrollment in 2007, while it was 12% in 1994. See *State University System of Florida Facts and Figures: Enrollment*, BOARD OF GOVERNORS, STATE UNIVERSITY SYSTEM OF FLORIDA, available at <http://www.flbog.org/resources/factbooks/factbooks.php>.

102. In California, for example, from 1994 to 2009, the black and Hispanic combined proportion of applicants increased from 19.17 to 25.57%. See *University of California: StatFinder*, *supra* note 83 (Florida provides applicant data by race for only a limited number of years).

103. In the University of California system, Hispanic enrollment was 19.4% of total enrollment in 2009 and 15.2 in 1994. See *University of California: StatFinder*, *supra* note 83. In Florida, Hispanic enrollment increased from 12.4% in 1994 to 17.5% 2007. See *State University System of Florida Facts and Figures: Enrollment*, *supra* note 101.

104. According to the *Tampa Bay Times*, increased Hispanic enrollment in pre-college education has been largely responsible for increasing diversity in Florida's public universities. See Shannon Colavecchio, *A Decade of Gov. Jeb Bush's One Florida Has Seen Minority College Enrollment Rise*, TAMPA BAY TIMES (Dec. 14, 2009), available at <http://www.tampabay.com/news/politics/legislature/a-decade-of-gov-jeb-bushs-one-florida-has-seen-minority-college-enrollment/1058573>. However, these figures may largely reflect, not increasingly opportunity for minorities, but the changing demographics of the state. In fact, while Hispanic enrollment has increased over time, the *Orlando Sentinel* states that the increase in Hispanic high school graduates has outpaced college enrollment. See Scott Powers and Luis Zaragoza, *10 Years In, "One Florida" Posts Mixed Results for Minorities at Universities*, ORLANDO SENTINEL (Apr. 10, 2010), available at <http://articles.orlandosentinel.com/2010-04->

Although diversity on the statewide level in Texas fares somewhat better, it still shows significant disparities under the state's percent plan. While total Hispanic enrollment was 46% statewide in 2009,¹⁰⁵ black enrollment was only 6.3% in the same year.¹⁰⁶ Apart from a facially low enrollment figure, the statistical disparity between black applicants (9% of the applicant pool)¹⁰⁷ and enrollment is large enough, representing fifteen standard deviations, to serve as significant evidence that Texas would likely gain substantial benefits from pursuing increased diversity.¹⁰⁸ In addition, although this 2009 enrollment figure is marginally better than the 4.5% black enrollment statistic from 1995 pre-affirmative action ban,¹⁰⁹ the black proportion of the applicant pool has also increased in the intervening years.¹¹⁰ Enrollment likewise still remains substantially below the state's black population, which has remained at 12% over two decades.¹¹¹

In summary, despite the existence of percent plans in Texas, California, and Florida, statistical evidence shows that these public college and university systems have likely not reached critical mass. Beyond "eyeballing" manifest disparities, statistical analysis—and specifically the frequent large, even double-digit standard deviations between applicants and enrolled students—creates a strong inference that percent plan states would continue to garner substantial, diversity-centric benefits from engendering greater minority enrollment.

10/news/os-one-florida-10-years-later-20100410_1_affirmative-action-florida-s-public-universities-graduates.

105. See THE UNIVERSITY OF TEXAS SYSTEM, OFFICE OF STRATEGIC INITIATIVES, ACCOUNTABILITY AND PERFORMANCE REPORT 2009–10 (2010).

106. See *id.*

107. See *First-time Undergraduate Applicant, Acceptance, and Enrollment Information for Summer/Fall 2009*, TEXAS HIGHER EDUCATION COORDINATING BOARD (2010).

108. There were 24,378 total enrollees in 2009. See *supra* note 96. Given the 9.0% black applicant pool, a standard deviation consists of 45 students. If the number of black enrollees were proportional to the applicant pool, they would comprise 2,204 enrollees. In actuality, they comprised 1,526 enrollees. See *id.*

109. See *Student Demographics: Undergraduate and Graduate Enrollment Fall 1992–1996*, THE UNIVERSITY OF TEXAS SYSTEM (last visited Sept. 10, 2012), available at <http://www.utsystem.edu/bus/ksr/FEB1997/Students97/UGEnrAll.html>.

110. Compare 2009's 9.0% figure with 1998's 5.25%. See *supra* note 107 and accompanying text; *First-time Undergraduate Applicant, Acceptance, and Enrollment Information for Summer/Fall 1998*, Texas Higher Education Coordinating Board (2010).

111. See U.S. CENSUS BUREAU, CENSUS OF POPULATION AND HOUSING (2010); U.S. CENSUS BUREAU, CENSUS OF POPULATION AND HOUSING (1990), available at http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&q_r_name=DEC_1990_STF1_DP1&ds_name=DEC_1.

II. MECHANICS: ARE INDIVIDUALIZED ASSESSMENTS NECESSARY TO ACHIEVE DIVERSITY?

Percent plan states have failed to achieve a sufficient level of diversity. Before declaring them as not workable, however, it is first important to determine *why* they have failed. The answer to this question will establish whether states, including those that might consider using percent plans in the future, need only properly calibrate these plans, or whether these plans are fundamentally inadequate to achieve the diversity interest. The former would demonstrate that percent plans can still be a workable, race-neutral alternative. The latter would support, on a more universal level, the *Grutter* Court's conjecture that individualized assessments may be necessary to assemble diverse student bodies.¹¹²

A. Percent Plan Thresholds and Restrictions

The most basic hypothesis for why percent plans have failed to achieve sufficient diversity is that their percentage thresholds and restrictions are too stringent. Unpacking this hypothesis, percent plans are not inherently inadequate, but need proper calibration to work.

Percent plan states themselves are aware of the limitations that the percentage threshold can place on diversity. Precisely to address this issue, California changed its plan in 2009, altering the threshold from the top 4% to the top 9%, effective in 2012.¹¹³ Since the governments of all three states have continued to evaluate the effectiveness of their respective plans,¹¹⁴ it may be that over time all will continue to increase the threshold of these plans as needed to produce greater diversity. Given that California's change has not come into effect (as of the time this article was authored), it is not yet possible to rule out that, at least in California, proper percent plan calibration could produce critical mass. It is worth noting that, despite even less stringent thresholds in Texas and Florida (10% and 20%, respectively),

112. See *supra* note 23 and accompanying text.

113. In February 2009, California changed the eligibility requirements from the top 4% in each school, to the top 9% in one school or statewide, the latter of which factors in standardized test scores in addition to school rank. See OFFICE OF STRATEGIC COMMUNICATIONS, UNIVERSITY OF CALIFORNIA, UC REGENTS ADOPT CHANGES TO FRESHMAN ELIGIBILITY (2009), available at http://www.universityofcalifornia.edu/news/eligibilitychanges/documents/eligibility_factsheet.pdf.

114. Texas commissions annual studies on its plan's effectiveness. See, e.g., Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 225–26 (5th Cir. 2011). California and Florida also have mechanisms to reevaluate their respective plans. In Florida, the One Florida Initiative under the Board of Governors is charged with, among other tasks, consistently overseeing its percent plan. See PATRICIA MARIN & EDGAR K. LEE, THE CIVIL RIGHTS PROJECT: HARVARD UNIVERSITY, APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN FLORIDA(2003). In California, the Board of Regents oversees its percent plan. See *Eligibility in the Local Context*, *supra* note 17.

these states have not yet sufficiently achieved diversity either. Nevertheless, it may be that all three states need only adjust their thresholds further.

On the other hand, a state's ability to alter their percent plan thresholds likely has limits. Perhaps the most significant limiting factor is the resource capacity of colleges and universities to enroll all students that percent plans automatically admit. The crowding at UT-Austin that automatic admission has caused exemplifies this risk; this crowding has actually led some to suggest that Texas's percentage threshold be *more* stringent, moving for example to a 4% threshold as in California¹¹⁵—though California itself will be moving to a 9% threshold precisely to address the limitations of its initial plan.¹¹⁶ High school student population increases may further limit this strategy to achieve greater diversity. If the number of high schools grow and states are forced to admit more students automatically, universities will need greater resource capacity to enroll all percent plan admits even at current percentage thresholds.¹¹⁷

This resource capacity problem limits another adjustment that states could make to their percent plans to increase diversity: loosening restrictions to flagship institutions and programs. As earlier stated, in Florida and California,¹¹⁸ percent plan admittees are not guaranteed admission into their first choice of college or university, ultimately stymieing percent plans' impact on certain flagship institutions. Meanwhile, Texas percent plan admittees *are* guaranteed admission into their first choice of college or university, but, as at UT-Austin, they are still not guaranteed admission into the various competitive intra-university colleges on campus.¹¹⁹ Thus, to gain entrance into certain intra-university colleges, students under any of these percent plans must still succeed under the traditional evaluation methods that percent plans were meant to circumvent, limiting these plans' ability to engender diversity within particular institutions.¹²⁰

Despite low minority enrollment within flagship institutions and certain competitive admissions programs, states face significant limitations in loosening their restrictions on access, largely because some colleges and universities are already dealing with crowding from percent plan admissions. To address this resource capacity issue, for example, the Texas legislature in 2009 limited the state's percent plan to fill only 75% of the

115. See, e.g., Steven Thomas Poston II, *The Texas Top Ten Percent Plan: The Problem It Causes for the University of Texas and a Potential Solution*, 50 S. TEX. L. REV. 257 (2008).

116. See *supra* note 113 and accompanying text.

117. See Poston, *supra* note 115.

118. See *supra* note 17 and accompanying text.

119. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 240 (5th Cir. 2011).

120. See *id.*

slots at UT-Austin.¹²¹ Though preserving current statewide diversity by not scaling back the 10% threshold, this solution does not help the representation of minorities at this particular flagship. Meanwhile, at the University of Florida, percent plan admittees already compose 98% of each class, even though with the design of Florida's percent plan, the university already does not admit every percent plan-eligible applicant.¹²² Therefore, school resource capacities also limit the loosening of access restrictions to produce critical mass within specific colleges and universities.

Nevertheless, one could argue that these limitations are too speculative, and that further adjustments of percentage thresholds and restrictions could still result in improved outcomes. Still, one may wonder: why have percent plans not *already* achieved a greater level of diversity? With the existence of majority-minority schools, should not more minorities be automatically admitted into at least one state college or university even at the current percentage thresholds and restrictions? The next section explores percent plans' assumption with respect to majority-minority schools, the one on which these plans most greatly depend.

B. High School Heterogeneity and Minorities in the Top "X" Percent

In circumventing *Grutter*'s requirement for race-conscious admissions—that it “be flexible enough to consider all pertinent elements of diversity”¹²³—a percent plan surrenders the flexibility to control racial diversity. Percent plans have direct control over only one type of diversity – that is, geographical diversity, as every school across the state will have percent plan admittees.

Given this feature of their design, another potential reason that percent plans have been inadequate is that, in the first place, they may incorrectly anticipate the number of minorities who will ultimately qualify for admission through the plan. This possibility would thwart the key expectation of percent plans that many minorities will be able to qualify for admission because they will inevitably place on top at majority-minority schools, even if they might be less competitive compared to the overall applicant pool.¹²⁴ If percent plans correctly estimate the number of minorities who will qualify at current thresholds, they may not be inherently ineffective. To reach critical mass, their thresholds and restrictions would simply need adjustment, albeit not so substantially that it

121. See Scott Jaschik, *Texas Limits 10% Admissions*, INSIDE HIGHER ED (Jun. 1, 2009, 3:00 AM), <http://www.insidehighered.com/news/2009/06/01/texas>.

122. See *Talented 20 (Prior Year) Admission and Registration Headcounts and Percentages*, *supra* note 83; *Admission and Registration Headcounts and Percentages by Type of Student and University, Fall 2007*, FLORIDA BOARD OF GOVERNORS (2008).

123. *Grutter*, 539 U.S. at 334 (citation omitted).

124. See *supra* note 13 and accompanying text.

triggers the possible resource capacity problem.¹²⁵ If, however, these estimates are already wrong, it becomes doubtful that even adjusting these thresholds and restrictions would increase diversity. Percent plans do accurately foresee the existence of many majority-minority schools. In fact, between 33% and 44% of public high schools in the three percent plan states are majority-minority.¹²⁶ However, these plans may be incorrect to assume that those who ultimately rank at the top of these schools are minorities, given that there are few schools that are perfectly homogeneous.¹²⁷

It thus bears noting a potentially important and ironic caveat to percent plans. Given their dependence on majority-minority schools, it follows logically that, if there is great diversity in student background within high schools, these plans could be less effective in achieving diversity in colleges and universities. This possibility arises in several ways. On the one hand, research suggests that because of discrimination, not merely structural, but even by educational actors themselves, minorities regularly may not have access to the same educational opportunities that help students not just to perform well on standardized exams, but also to compete with their own classmates for top class rankings.¹²⁸ These impediments also frequently elude capture by traditional socioeconomic

125. See *supra* Part II–A.

126. In Texas, 44.36% of the schools are composed of at least 60% non-white students. See Marta Tienda & Sunny Xinchun Niu, *The Impact of the Texas Top 10 Percent Law on College Enrollment: A Regression Discontinuity Approach*, 29 J. POL'Y ANALYSIS & MGMT. 84, 100 (2010). In California and Florida, 41.2% and 32.96% of the schools, respectively, are composed of at least 60% black or Hispanic students. See *Common Core of Data*, U.S. DEPARTMENT OF EDUCATION (last visited Nov. 1, 2011), available at <http://nces.ed.gov/ccd/>.

127. For example, in the percent plan states, only between 12.5% and 14.5% of schools are at least 90% black and Hispanic. See *Common Core of Data*, *supra* note 126.

128. For example, there is strong evidence that discrimination by school officials against minorities is prevalent and even systematic, even if unconscious. See, e.g., Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1317–21 (1995). In poor, predominantly minority urban school systems, administrators are more wary of approaching students who appear to be “unmanageable” in the large classrooms. See Lisa Delpit, *The Silenced Dialogue: Power and Pedagogy in Educating Other People's Children*, 58 HARV. EDUC. REV. 280, 283 (1988). In addition, the negative stereotypes of African-Americans as less capable and more disruptive provide teachers a heuristic for interpreting the everyday behavior of black children. See Lawrence, *supra* note 92 at 339. A number of studies have also shown teacher bias toward minority students. See SONIA NIETO, AFFIRMING DIVERSITY: THE SOCIOPOLITICAL CONTEXT OF MULTICULTURAL EDUCATION 20–33 (1991). These biases affect teacher perceptions concerning every interaction, and may lead teachers to overreact to small disruptions by African-American students. See DARLENE POWELL HOPSON & DEREK S. HOPSON, DIFFERENT AND WONDERFUL: RAISING BLACK CHILDREN IN A RACE CONSCIOUS SOCIETY 150–52 (1970). Cf. JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE (1995).

variables, such as parental income.¹²⁹ On the other hand, one might argue that racial minority status does not ubiquitously disadvantage an applicant, as, for example, socioeconomic status does. Even in this case, however, percent plans are *still* statistically less likely to ensure a diverse student body in any year if most high schools are racially heterogeneous. In contrast, if the vast majority of at least some schools are comprised of mostly minority students, it is more certain that a percent plan will admit minority students.

Were majority-minority high schools perfectly or near perfectly homogeneous, this caveat of percent plans would not matter, and colleges and universities would achieve diversity while circumventing the need to acknowledge any racial disparities within high schools or their possible causes. There is evidence, however, that because even the most racially homogeneous schools display some heterogeneity, percent plans cannot circumvent the need to consider race on an individual level.

To begin, evidence shows that percent plans have actually encouraged students to choose less competitive high schools, regardless of the racial composition of the school, precisely to take advantage of the percent plan.¹³⁰ On the one hand, percent plans may be an impetus for some integration rather than persistent *de facto* segregation. Some anticipated that percent plans would incentivize the latter, with the expectation that more minorities would choose to stay in majority-minority school districts to increase their chances at college and university acceptance.¹³¹ On the other hand, ironically, such integration increases the pure statistical likelihood that minority students will not be in the top percent cohort. Second, there is evidence that in practice high school heterogeneity disrupts the key assumption of percent plans. For example, survey data from Texas shows that white and Asian students in majority-minority high schools are likelier than their black and Hispanic classmates to graduate in the top 10%.¹³² Across the percent plan states, the uniformity of academic profiles within any given statewide cohort of percent plan admittees also calls into question whether these plans work as intended in accounting for local context.¹³³

129. See Malamud, *supra* note 75.

130. See Julie Berry Cullen et al., *Jockeying for Position: Strategic High School Choice Under Texas' Top Ten Percent Plan* (Nat'l Bureau of Econ. Research, Working Paper No. 16663, 2011).

131. See, e.g., Benjamin Forest, *A Policy That Depends on Segregation*, THE NEW YORK TIMES, Mar. 23, 2003, at A11.

132. See Tienda & Niu, *supra* note 13 (finding that it is not segregation, but concentrated disadvantage that inhibits minorities in gaining admission through the Texas percent plan). This data is unavailable for California and Florida.

133. Analyzing these academic profiles, for example, Tienda et al. find that most candidates admitted to selective universities in Texas such as UT-Austin would likely have been admitted without the plan. See MARTA TIENDA ET AL., CLOSING THE GAP? ADMISSIONS AND ENROLLMENTS AT THE TEXAS PUBLIC FLAGSHIPS BEFORE AND AFTER

Additional statistics cast further doubt on who qualifies for percent plan admission from majority-minority schools. Tellingly, in every percent plan state, the proportion of percent plan admittees who are black or Hispanic falls sizably below the proportion of majority-minority schools.¹³⁴ Perhaps best underscoring the flawed assumption of percent plans, however, is the application of the statistical method for comparing expected and actual demographic outcomes in employment—appropriate because percent plans hinge precisely on expected demographic outcomes, specifically in majority-minority schools.¹³⁵ In Texas, for example, approximately 48% of students graduate from high schools with over 60% black and Hispanic students, and on average black and Hispanic students comprise 86% of student population in these schools.¹³⁶ These figures are substantial, and based on their product, one should expect around roughly 40% of top ten graduates to be minorities from these schools alone. In actuality, minorities from any Texas school *regardless* of racial composition comprise only 35% of top ten graduates.¹³⁷ This figure represents a double-digit standard deviation,¹³⁸ evidencing the limited capacity of the percent plan's key assumption towards engendering critical mass. The same statistical analysis of California produces similar results, finding another double-digit standard deviation between expected minority outcomes from majority-minority schools and actual minority outcomes from all schools.¹³⁹ Such

AFFIRMATIVE ACTION 30–31 (2003). Marin and Lee also find that, in Florida, most students do not need the assistance of the percent plan to gain admission into at least one state college or university. *See* MARIN & LEE, *supra* note 114.

134. In Texas, 39.79% of percent plan admits are black or Hispanic (2008), compared to 44.36% of public high schools being majority-minority. In Florida, the ratio is 30% black or Hispanic percent plan admits (2007) to 38% majority-minority schools; in California, the same ratio is 27.49% (2009) to 41%. For statistics on the proportion of percent plan admits who are black or Hispanic, *see* THE UNIVERSITY OF TEXAS SYSTEM, *supra* note 105; *Talented 20 (Prior Year) Admission and Registration Headcounts and Percentages*, *supra* note 83; *University of California: StatFinder*, *supra* note 83. For majority-minority school statistics, *see Common Core of Data*, *supra* note 126.

135. *See supra* note 13 and accompanying text.

136. *See Common Core of Data*, *supra* note 126.

137. *See First-time Undergraduate Applicant, Acceptance, and Enrollment Information*, *supra* note 107.

138. There were 23,232 top ten graduates in 2009, entailing a 41% estimate of 9,484 minorities from majority-minority schools, and a per-standard deviation value of 36 students. In actuality, there were 8,268 minorities from any Texas school. *See supra* note 107.

139. In California, 42% of students are from schools with over 60% minorities, and these schools, on average, are comprised of 82% minorities. *See Common Core of Data*, *supra* note 126. Given the total number of top four graduates, 13,197, one might expect about 4,570 minorities from these schools. In actuality, there are 4,103 top four minorities from any California school, representing 16 standard deviations. *See University of California: StatFinder*, *supra* note 83. In Florida, the total number of top twenty minority students exceeds the expected number of top twenty minorities from majority-minority schools. *See Talented 20 (Prior Year) Admission and Registration*

evidence further supports the proposition that, even in majority-minority schools, minorities are frequently not those whom percent plans admit (statistics also indicate that among non-minorities, those who are socioeconomically disadvantaged are also not those whom percent plans generally help).¹⁴⁰

One perhaps unintended consequence of percent plans is also worth noting, as they only exacerbate the displacement of minorities (and socioeconomically disadvantaged non-minorities) from the top ranks. Because percent plan admissions substantially limit the number of remaining slots, admission at the most popular flagship institutions has become increasingly difficult for even students who are right below the percentage threshold.¹⁴¹ Consequently, while percent plans implicitly recognize that minorities are less competitive on standardized metrics, for many of these minorities—that is, those not at the very top of class rankings—not only does the traditional system of evaluation still apply, but the competition also becomes much more intense.¹⁴²

Thus, the issue with percent plans is not that majority-minority schools do not exist. In the last decade, the proportion of majority-minority schools actually has increased in all three percent plan states, but the proportion of percent plan admittees who are underrepresented minorities has not risen accordingly.¹⁴³ The issue, instead, is that percent plans cannot account for

Headcounts and Percentages, *supra* note 83. Data on the actual number of top twenty minorities from these majority-minority schools is unavailable.

140. In Florida, for example, there is evidence that few white percent plan eligible students are those who actually needed the plan's guarantee to gain admission. In 2000, of the percent plan eligible applicants with GPAs falling below 3.0—applicants that, it can be inferred, faced resource deficiencies—only 18% were white. *See* MARIN & LEE, *supra* note 114. In California, where socioeconomic data for percent plan admits is available for certain schools, statistics point to the same phenomenon: in 2009, only 20.85% of percent plan admits to Berkeley with annual family incomes of less than \$40,000 were not black or Hispanic. This figure was 26.2% for UCLA. *See University of California: StatFinder*, *supra* note 83.

141. Regarding the University of Texas, *Fisher* states that “[n]either the record nor any public information released by the University disclose what portion of that total applicant pool were Texas residents, but if we assume that proportion of applicants from Texas matches the 90% of admissions slots reserved for Texas applicants, one can estimate that there were 24,940 Texas applicants. Subtracting the 8,984 students admitted under the Top Ten Percent Law yields an estimate of 15,956 applicants for 1,216 seats, or an acceptance rate of approximately 7.6%.” *Fisher v. University of Texas at Austin*, 631 F.3d 213, 241, n.5 (2011). As mentioned earlier, the University of Florida's percent plan admits compose a vast majority, 98%, of the class. *See supra* note 122 and accompanying text.

142. *See* RITA BARR, HOUSE RESEARCH ORG., TEX. HOUSE OF REPRESENTATIVES, FOCUS REPORT: SHOULD TEXAS CHANGE THE TOP 10 PERCENT LAW? 4 (2005).

143. *Compare supra* note 139 *with* statistics from earlier years: in California, 19.42% of percent plan admits were black or Hispanic (2001), while the proportion of majority-minority schools was 23.27. In Florida, the ratio was 29.32% (2003) to 17.65; in Texas, 30.1% (2002) to 25.44. For percent plan admit statistics, *see* THE UNIVERSITY OF TEXAS SYSTEM, *supra* note 105; *Talented 20 (Prior Year) Admission and*

heterogeneity in individual backgrounds that typifies even racially homogeneous schools. Percent plans would work only if there is even greater *de facto* segregation than there already is. Consequently, even as they contextualize applicants as narrowly as possible without considering them individually, percent plans cannot circumvent the issue of racial disparities in achievement, whatever their cause.

Finally, it is necessary to note that, regardless of their restrictions or percentage thresholds, percent plans will face the issue discussed above. In other words, increasing these thresholds would likely not yield as great an increase in minority admittees as would be expected, at least not until the threshold rises to admit more than relatively small fractions of students in each school. In that case, however, colleges and universities would then face the over-enrollment and resource capacity problem. A probative example underlying the impracticality of adjusting percent plans to achieve critical mass: in 2009, to bring UT-Austin's minority enrollment from six standard deviations of fully proportional enrollment to within two¹⁴⁴ would have required Texas to increase its percent plan threshold to roughly 11%, given several factors (i.e., the minority proportion of percent plan-qualifying students, the proportion of all percent plan-qualifying students who ultimately enroll in a college or university, and the proportion of percent plan enrollees who choose UT-Austin).¹⁴⁵ While this one percentage point difference seems small, given the popularity of UT-Austin among percent plan admittees,¹⁴⁶ this figure would have yielded an

Registration Headcounts and Percentages, *supra* note 83; *University of California: StatFinder*, *supra* note 83. For majority-minority school statistics, see *Common Core of Data*, *supra* note 126.

144. Each standard deviation is 38 students, entailing 152 minority students to move from six to two standard deviations. See *supra* note 78. Two standard deviations raise a strong inference that a college or university is at or near critical mass. See Tienda and Niu, *supra* note 13.

145. This calculation for this percent plan threshold is as follows: (total number of high school graduates * percent plan threshold * minority proportion of percent plan admits) = (current number of minority percent plan-eligible students + (four standard deviations / [proportion of percent plan eligible students that ultimately enroll * proportion of percent plan enrollees that enroll at UT-Austin])). The total number of high school students is approximately 232,230. See *supra* note 138. The minority proportion of percent plan admits is 35%. See *supra* note 137 and accompanying text. The current number of minority percent plan-eligible students is 8,268. See *supra* note 138. Four standard deviations are 152 students. See *supra* note 140. The proportion of percent plan eligible students that ultimately enroll in any university is 33%. See THE UNIVERSITY OF TEXAS SYSTEM, *supra* note 105. The proportion of percent plan enrollees that enroll at UT-Austin is 80.4%. See *infra* note 153. For the sake of argument, this calculation assumes that, if a percent plan threshold increased, particularly by one percentage point, both the minority proportion of percent plan admits and the proportion of percent plan eligible students that enroll would stay roughly the same.

146. See *infra* note 153.

additional 1,577 students at UT-Austin,¹⁴⁷ representing a significant 21% increase in *total* enrollment.¹⁴⁸ Given such findings, percent plans in practice support the proposition that individualized assessments are necessary to achieve sufficient diversity.

C. The Feasibility of Individualized Assessments

However much percent plans have contributed to diversity, they are fundamentally insufficient to achieve critical mass. Nevertheless, before concluding that percent plans are an unworkable alternative to the individualized assessments that affirmative action undertakes—and, consequently, that affirmative action should remain generally permissible—it is necessary to address a final counterargument. That is, individualized assessments may be able to achieve greater diversity only by placing impermissible weight on race, since percent plans would arguably capture most, if not all, academically qualified minorities. Put differently, percent plans may work well enough to admit a similar number of minorities that would have been admitted under the optimum race-conscious program that does *not* subjugate non-racial factors such as academics. Thus, even though percent plans are fundamentally insufficient to achieve critical mass—and even though percent plan/affirmative action comparisons in Part I show that affirmative action can achieve substantially greater diversity¹⁴⁹—it is unwise to conclude that percent plans are a constitutionally insufficient alternative to individualized assessments, and/or that such assessments are feasible notwithstanding the prospect of these plans.

Workability analysis must address the following question: is it actually possible to create individualized assessment regimes that engender greater diversity but do not weigh race to an impermissible degree? UT-Austin provides a timely opportunity to answer this question. Acknowledging that percent plans are not a diversity panacea, UT-Austin, has chosen a unique approach of combining the percent plan with affirmative action. In contrast, California and Florida have continued their bans on affirmative action despite the resulting lower minority numbers,¹⁵⁰ instead relying solely on

147. This calculation is as follows: (total number of high school graduates * percent plan threshold * proportion of percent plan-eligible students that ultimately enroll * proportion of percent plan enrollees that enroll at UT-Austin) – (current number of percent plan enrollees at UT-Austin). For the first three numbers, *see supra* note 145. Multiplied together and with the percent plan threshold, they equate to 6,780 percent plan enrollees. The current number of percent plan enrollees at UT-Austin is 5,203, representing a difference of 1,577 additional students. *See THE UNIVERSITY OF TEXAS SYSTEM, supra* note 105.

148. Current enrollment at UT-Austin is at 7,242. *See THE UNIVERSITY OF TEXAS SYSTEM, supra* note 105.

149. *See* Part I–B.

150. *See supra* notes 99–104 and accompanying text.

percent plans and race-neutral measures to improve pre-collegiate education.¹⁵¹ Yet, since even before it became the subject of the *Fisher* case, UT-Austin has been accused precisely of excessively weighing race in individual assessments to make diversity gains beyond the Texas percent plan.¹⁵² Particularly considering the new limits on the proportion of UT-Austin students admitted through percent plans,¹⁵³ UT-Austin's affirmative action program compels analysis of percent plan workability, in light of the actual feasibility of adopting individualized assessments to engender greater diversity.

Before analyzing this program, it is first necessary to clarify what it means for an affirmative action program to place impermissible weight on race. Because such individualized assessments are facially race-conscious, they trigger strict scrutiny,¹⁵⁴ under which they must meet a compelling state interest, be narrowly tailored, and be the least restrictive means to achieve the state interest.¹⁵⁵ As per *Grutter*, for any affirmative action program to be the least restrictive means, a university must have first considered race-neutral alternatives—a criterion that UT-Austin meets by virtue of the implementation, and empirical inadequacy, of the Texas percent plan operating before UT-Austin reinstated affirmative action.¹⁵⁶ Additionally, to meet both the narrow tailoring and least restrictive means requirements,¹⁵⁷ an affirmative action program cannot effectively be a

151. Florida's strategies target increased enrollment, including minority enrollment, in college preparatory, professional development, and other activities. See FLORIDA BOARD OF GOVERNORS, THE ONE FLORIDA ACCOUNTABILITY COMMISSION: AN INDEPENDENT REVIEW OF EQUITY IN EDUCATION AND EQUITY IN CONTRACTS COMPONENTS OF ONE FLORIDA, JUNE 2002 (2002). California is changing its Eligibility in the Local Context percent plan, and besides the change in the percentage threshold, another is dropping SAT II Subject Tests as part of the requirements for eligibility. The drop was designed to eliminate barriers to high-performing students. However, besides this change, the plan in California will remain the same, and education reform remains focused on pre-higher education initiatives. See OFFICE OF STRATEGIC COMMUNICATIONS, *supra* note 113.

152. See *infra* note 163 and accompanying text.

153. See *supra* note 121 and accompanying text. With the Texas percent plan allowing a student to attend one's school of choice, UT-Austin is the most popular of nine undergraduate institutions. For example, in 2009, it enrolled 80.4% of all percent plan enrollees, and 71.8% of entering UT-Austin freshmen were percent plan admits. See THE UNIVERSITY OF TEXAS SYSTEM, *supra* note 105.

154. In affirmative action cases specifically (including those outside of the education context), the Supreme Court's purpose for strict scrutiny has extended beyond smoking out irrational, invidiously intended discrimination to conducting a cost-benefit justification for the facial use of race. See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 437–38 (1997).

155. See, e.g., *Sable Commun's of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989); see also Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

156. See *supra* notes 71–75, 85–87 and accompanying text.

157. See, e.g., *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n.6 (narrow tailoring requires consideration of "lawful alternative and less restrictive means"); see

quota: it must “be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.”¹⁵⁸ If the admissions process places too much weight on an individual’s race at the expense of other types of diversity, as well as academic qualifications, it is not narrowly tailored.¹⁵⁹

Applying these criteria, does UT-Austin’s plan achieve greater diversity, but only by placing impermissible weight on race? It is first important to reiterate that, indicating the underperformance of the Texas percent plan as a whole, UT-Austin has continued to show significant racial disparities, both campus-wide as well as in specific intra-university colleges.¹⁶⁰ Consequently, affirmative action could be indispensable as a means to reduce these disparities, both now and in the future—and, indeed, UT-Austin has shown diversity gains since adopting its affirmative action program.¹⁶¹ On the other hand, some have raised concerns that the university attained these diversity gains unconstitutionally, pointing especially to the magnitude of these gains, which appear small. Some scholars have noted, for example, that Texas’s reinstatement of race-based affirmative action in the year following *Grutter* led to only a one percent increase in minority enrollment at UT-Austin.¹⁶² Using this statistic, these scholars have argued that, since percent plans should capture a vast majority of the best academically qualified minorities, UT-Austin’s affirmative action may be placing impermissible weight on race at the expense of other factors, in order to gain any additional diversity.¹⁶³

However, there are two counterarguments to this claim, both of which underscore crucial points in evaluating whether individualized assessment regimes can garner a diversity advantage permissibly, or whether percent plans are effectively equal to the best constitutionally feasible means. First, as Part I argued, given the composition of the overall applicant pool and the degree of the school’s lack of diversity, it is imprudent to assume in the first place that facially small percentage point gains of minority students are marginal, because such gains could actually contribute significantly to the university’s goals.¹⁶⁴ Applying critical mass analysis again underscores

also Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1788 (1996) (“When applied to racial classifications, [the least restrictive means principle] seems to require the government to achieve its compelling remedial interest in the way that least restricts or burdens the fundamental rights of the program’s non-beneficiaries”).

158. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (citing *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 315, 317 (1978)).

159. *See id.*

160. *See supra* notes 76–80, 90–92 and accompanying text.

161. *See supra* notes 79–80 and accompanying text.

162. *See* George La Noue & Kenneth L. Marcus, “*Serious Consideration*” of *Race-Neutral Alternatives in Higher Education*, 57 CATH. U.L. REV. 991, 1034 (2008).

163. *See id.* The petitioners in *Fisher* also make this argument. *See Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 242–44 (5th Cir. 2011).

164. *See* Tienda and Niu, *supra* note 13.

this notion: a one percent increase in minority enrollment in 2009 would have represented nearly two full standard deviations with respect to enrollment proportional to the applicant pool.¹⁶⁵ This result would have brought the university within four standard deviations of fully proportional enrollment, a range where legitimate doubt arises regarding any argument that the university has not achieved critical mass.¹⁶⁶ Therefore, at contemporary levels of diversity, numerical gains such as those that UT-Austin has achieved likely produces large benefits, validating the advantage of affirmative action compared to what percent plans have accomplished, and justifying the university's continued pursuit of diversity within *Grutter's* critical mass framework.¹⁶⁷ This counters the inference that UT-Austin's affirmative action may be placing impermissible emphasis on race because seemingly small percentage gains could in actuality be significant.

Second, that minority enrollment has not dramatically increased under affirmative action can instead be circumstantial evidence that a process does *not* place impermissible weight on race. Probative in this instance is that, since UT-Austin reinstated affirmative action, the proportion of black and Hispanic *non*-percent plan enrollees (i.e., possible affirmative action beneficiaries) compared to total enrollment at UT-Austin has not increased significantly.¹⁶⁸ Most importantly, focusing directly on the applicant evaluation process itself, race is only one of many factors of one component of one applicant indicator in the UT-Austin system.¹⁶⁹ The

165. A one percent increase in minority enrollment represents 72 students, while one standard deviation is 38 students. *See supra* note 78.

166. *See* Tienda and Niu, *supra* note 13.

167. The post-*Grutter* case of *Parents Involved* also implies that pursuing race-related goals in education is permissible even if the gains are small in absolute number: "[t]he small number of assignments affected suggests that the schools could have achieved their stated ends through different means." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 791 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (holding that it was unconstitutional for a particular school district to assign students to schools based on race, and to do so in a manner that viewed race in binary "white" and "other" categories).

168. For example, from 2001 (pre-reinstitution of affirmative action) to 2005 (post-reinstitution), the proportion increased from 1.42% to 1.43% for blacks, and even decreased from 6.14% to 4.36% for Hispanics. *See* THE UNIVERSITY OF TEXAS SYSTEM, OFFICE OF STRATEGIC INITIATIVES, ACCOUNTABILITY AND PERFORMANCE REPORT 2006–2007 (2007).

169. UT-Austin performs a holistic review of applicants who fall outside of the top ten percent of their respective schools. Admissions decisions for these applicants are made on the basis of an Academic Index, which factors in grades and test scores, and a Personal Academic Index, which evaluates essays and "personal achievement." The Academic Index is considered first; without a sufficiently high score, the Personal Academic Index will not be considered, although there is some room for discretion in this area. The Personal Academic Index is then calculated as: $PAI = [(personal\ achievement\ score * 4) + (average\ essay\ score\ of\ 2\ essays * 3)]/7$. "Personal achievement" is measured by factors that fall under two general categories: personal

university does not give race its own individual weight;¹⁷⁰ instead, for minority and non-minority applicants alike, a litany of non-racial diversity and personal achievement factors receives concurrent consideration.¹⁷¹ Additionally, race receives consideration only after an applicant has already met a minimum threshold on an academic index, where race is not considered at all.¹⁷² Within such a system it is unlikely that race subjugates other considerations in evaluating an applicant. In fact, given the discretion to consider race individually, affirmative action may allow for greater flexibility in diversity than even percent plans. The latter may admit similar numbers of minorities annually, because they draw from the same schools with likely the same composition.¹⁷³ Overall, the mechanics of the system work to ensure that it is narrowly tailored and the least restrictive means to achieve diversity.

UT-Austin's affirmative action establishes that improvement over percent plans need not necessitate a constitutional violation in impermissibly weighing race in individualized assessments. This strongly supports the notion that percent plans are broadly not a workable alternative, and consequently, that individualized assessments considering race should remain generally permissible. As a caveat, this analysis cannot exclude the possibility that in other states' universities, percent plans perform as well as the most diversity-engendering, constitutional affirmative action program possible in those settings. Nevertheless, analysis of the UT-Austin example underscores the general potential for individualized assessments, even despite facial appearances, to make substantial critical mass gains over percent plans *and* to meet constitutional requirements.

circumstances and accomplishments. The former category is comprised of race, socioeconomic status of the applicant and of the applicant's high school, and the familial status and responsibilities of the applicant. The latter is comprised of leadership qualities, awards and honors, work experience, involvement in extracurricular activities and community service, and the applicant's standardized test score compared to the average of his or her high school. *See* Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 226–31 (2011).

170. In *Gratz*, the Supreme Court found unconstitutional that an applicant was awarded 20 points of the 100 necessary for admission based on membership in an underrepresented racial or ethnic minority group. *See* Gratz v. Bollinger, 539 U.S. 244, 255 (2003); *see also* *Parents Involved*, *supra* note 167.

171. *See supra* note 169.

172. *See id.*

173. Such variation would address the concern raised by Kennedy in *Grutter v. Bollinger*, 539 U.S. 306, 389–91 (2003) (Kennedy, J., dissenting) (stating that Michigan Law School's lack of yearly variation was essentially a quota). This flexibility also helps to address the concern that dissimilarities in critical mass numbers between various underrepresented minority groups evidence a quota and/or discrimination between these minorities. *See* Gratz, 539 U.S. at 281 (Thomas, J., concurring); *Grutter*, 539 U.S. at 380–81 (Rehnquist, J., dissenting).

CONCLUSION

Justice O'Connor's time limit on affirmative action underscores the trend seen in the six states that have banned affirmative action: limiting race-consciousness in state action. However, despite Justice O'Connor's opinion that affirmative action will soon no longer be necessary—and as this analysis of California, Florida, and Texas has shown—past disparities are present ones in America's public colleges and universities. Lack of diversity continues to persist on several levels, limiting potentially substantial benefits for higher education.

Percent plans have attempted to address this issue while being sensitive to constitutional and political trends. However, the experiences of all three percent plan states since 1996 provide evidence that states cannot achieve sufficient diversity solely with percent plans, and that these plans are neither “workable” in current percent plan states, nor likely workable in prospective percent plan states. Ultimately, these plans provide strong evidence that individualized assessments are necessary to approach sufficient realization of diversity.

These realities of percent plans also lend support to the argument that other race neutral means, of which class-based affirmative action is perhaps the most discussed,¹⁷⁴ may fare no better. Just as percent plans, no matter how well-calibrated, cannot circumvent the imperfect correlations between locale and race, class-based affirmative action may be unable to address the imperfect correlations between race and class status.¹⁷⁵ Even if liberally-applied, a class-based affirmative action program may still fail to achieve a critical mass of minorities, unless a vast majority of minority applicants are socioeconomically disadvantaged enough to qualify. Looking at various mechanisms in concert, it may become even clearer that heterogeneity in race, class, and other factors can instead impede diversity, if a university itself chooses a homogeneous approach. Thus, without directly addressing race, racial disparities in public higher education will likely continue.

Do individualized assessments have the potential to address these disparities without subjugating academic and other non-racial factors? Or are percent plans sufficient, despite their inadequacy, to substitute for the best possible constitutional affirmative action program? An analysis of UT-Austin shows that the former is possible in at least some universities. Should individualized assessments fully *replace* for all percent plans? It is

174. See *supra* note 9 and accompanying text.

175. See *supra* note 130 and accompanying text. The California and Florida university systems also demonstrate this imperfect congruence. To the extent that percent plans account for local concentrations of minorities, so it would account for concentrations of the socioeconomically disadvantaged. Interestingly, however, California tends to do significantly better with enrolling students from socioeconomically disadvantaged backgrounds than minorities; Florida tends to manifest the opposite. See *supra* note 84.

more difficult to answer this question. States should not lightly discard the promise of university admission for anyone who places at the top of his or her class. In any case, a system like UT-Austin's could serve as a model for affirmative action, either as a substitute or replacement, as it achieves substantial gains without placing impermissible weight on race.

For the constitutional doctrine itself, a plausible implication of these results is that race-conscious means should receive greater deference even when race-neutral means have not received the utmost consideration. In other words, race-conscious means might receive strict scrutiny without exacting analysis as to whether various race-neutral means are "workable" alternatives. The reason is that, at least in the context of higher education, race-neutral means as implemented provide support for the notion that to achieve certain compelling race-related interests, it is necessary to consider race directly. The argument in Justice Ginsburg's *Gratz* dissent, used in that context to support automatic admissions points for minorities, thus finds greater traction in the race-neutral versus race-conscious debate: "[the] fully disclosed College affirmative action program is preferable to achieving similar numbers through . . . disguises."¹⁷⁶

Ultimately, any admissions system must work in concert with various measures that help minorities succeed, instead of merely serving as a mechanism for facial diversity.¹⁷⁷ Just as the lack of diversity has a root cause, so is diversity itself only a root, the branch being the exchange it is supposed to engender in the classroom and on campus. Even the "best" admissions system does not eliminate the factors that hindered a student's ability to enter university in the first place. First garnering access to higher education is paramount, but without addressing these disadvantages in the long-term, both individuals and society would not attain the benefits of such education. Nevertheless, the empirical results of race-neutral percent plans support the notion that race-conscious means should still be permissible to help achieve the greater purposes of higher education in America.

176. *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting).

177. See, e.g., *Grutter*, 539 U.S. at 371–72, n.11 (2003) (Thomas, J., concurring in part, dissenting in part) (noting the problem of facial diversity substituting for mechanisms that actually help underrepresented minorities).

BLUE FIELD OF DREAMS: A BCS ANTITRUST ANALYSIS

TREVOR JACK*

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I. INTRODUCTION

Give me your tired, your poor,
 Your huddled masses yearning to breathe free,
 The wretched refuse of your teeming shore.
 Send these, the homeless, tempest-tost to me,
 I lift my lamp beside the golden door!

The New Colossus, Emma Lazarus

The morning sun is just peaking over the Boise Mountains and spreading across the world famous blue field of dreams that is home to the winningest football team in America during the past decade.¹ As the scenic Boise River glistens and ripples along the campus, a lone floppy-haired skateboarder with books under his arm makes his way across a footbridge toward the blue field. Growing up in a small town in Prosser, Washington, Heisman Finalist Kellen Moore was overlooked by nearly every college in America. Like so many before him, Boise State spotted something special everyone else discounted. In 2010, Kellen Moore was selected by Sporting News as the 2011 best player in college football.² With a career ending record of 50-3, Moore is the winningest quarterback in NCAA history.³ Like every non-BCS program in Division I-A college football, student-athletes ask for just one thing: the chance to compete.

From generation to generation, amateur sports have become one of this nation's favorite entertainment events. During the college football season, millions of enthusiasts gather in parking lots before the game and are

1. Tim Hyland, *Winningest College Football Programs of the 2000s*, ABOUT.COM, <http://collegefootball.about.com/od/schools/a/Winningest-College-Football-Programs-Of-The-2000s.htm> (last visited May 31, 2011).

2. Chadd Cripe, *Sporting News Declares Boise State QB Kellen Moore the Best Player in College Football*, THE IDAHO STATESMAN, http://voices.idahostatesman.com/2011/03/28/ccripe/sporting_news_declares_boise_state_qb_kellen_moore_best_player_c#ixzz1M0EJ6b6W (last visited Mar. 28, 2011).

3. Jim Corbett and Tom Pedulla, *Prospect Perceptions: Height Still Crucial For QBs in Draft*, USA TODAY (April 21, 2012), <http://www.usatoday.com/sports/football/nfl/story/2012-04-12/kellen-moore-ryan-tannehill-nfl-draft/54419820/1>.

treated during the game to halftime marching bands and inspired play on the field. Millions more tune in to watch their favorite teams on national television. And millions of dollars are spent by advertisers to gain their attention. Despite this commercial component, the persistent myth of amateurism in college football enabled it to run relatively unregulated and immune to antitrust scrutiny up until a few decades ago.

The purpose of this note is to examine antitrust issues with regard to the Bowl Championship Series [“BCS”]. It begins by examining the current state of antitrust law guided by four important cases in the context of this note. It then examines the origins of the National Collegiate Athletic Association [“NCAA”] and the BCS and discusses how antitrust law applies to these institutions. Because it is in the best interests of both sides to avoid antitrust litigation, this note will conclude with alternative remedies to the BCS system, with particular attention given to the recently adopted four-team playoff format. These alternatives are not intended to destroy the BCS, but to remove barriers to competition inherent in its current design.⁴

II. ANTITRUST LEGISLATION

A. 1890 Sherman Antitrust Act

In an effort to defend the American entrepreneurial spirit in the marketplace, the federal government enacted in 1890 the Sherman Antitrust Act,⁵ which stood in opposition to any combination of entities that might oppress and harm competition. Section 1 states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”⁶ Section 2 states that: “[e]very person who shall

4. Terminology note: the BCS is comprised of “automatic qualifying (AQ)” and “non-automatic qualifying (non-AQ)” teams. However, the media and general public rely mostly on other terms, such as “BCS” and “privileged conferences” for AQ teams; and “non-BCS” or “non-privileged conferences” for non-AQ teams. Except where otherwise appropriate, this note will rely upon the terms “BCS” and “non-BCS.”

5. Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1–7 (2004)). The courts have stated that “[w]hether or not a particular practice violates the antitrust laws is determined by its effect on competition, not its effect on a competitor.” *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 825 (6th Cir. 1982). For more on legislative intent, *see Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531 (1983) (noting that the legislation upholds basic common law principles); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972) (interpreting purpose of legislation to be the preservation of fair competition).

6. 15 U.S.C. § 1 (2006). To prevail on a §1 challenge, the plaintiff must demonstrate that the defendant “(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.” *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998). *See also National Society of Professional Engineers v. United States*, 435 U.S. 679, 687–688 (1978) (noting that §1 cannot be applied literally since “restraint is the

monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”⁷

The courts appeal to one of three standards in applying this language. *Per se* analysis applies to agreements which “because of their pernicious effect on competition, and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”⁸ *Rule of reason* analysis emanated from landmark antitrust cases against giant companies like Standard Oil⁹ and American Tobacco.¹⁰ The Supreme Court articulated the rule of reason standard of analysis in *Board of Trade v. United States*¹¹ and based it upon the concept that not every restraint of trade is illegal, but that it becomes illegal if it unreasonably restricts competition in disregard to consumer welfare. Rule of reason analysis places the initial burden on the plaintiff to prove how the alleged antitrust violation creates anticompetitive effects.¹² If this burden is met, the defendant then bears the burden of demonstrating the pro-competitive benefits of the alleged violation.¹³ The final burden rests on the plaintiff to prove how the alleged violation produces unreasonably excessive anti-competitive effects or that a less restrictive alternative is available.¹⁴

Quick-look analysis is less strict than *per se* analysis, but more

very essence of every contract”); K. Todd Wallace, Note, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 SPORTS LAW. J. 57, 66 (1999) (stating that antitrust provisions only apply to restraints that trigger the initial purpose of the legislation).

7. 15 U.S.C. § 2 (2006). To prevail on a §2 challenge, the plaintiff must demonstrate that the defendant (1) possesses monopolistic power in a relevant market and (2) willfully acquires or maintains that power by means “distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

8. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). *Per se* analysis only applies when it “relate[s] to conduct that is manifestly anticompetitive.” *DeLong Equip. Co. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499, 1506 (11th Cir. 1989). Two examples of conduct falling under *per se* analysis are horizontal price-fixing and output limitation. *NCAA v. Bd. of Regents*, 468 U.S. 85, 100 (1984) (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.* 441 U.S. 1, 19–20 (1979)).

9. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

10. *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

11. 246 U.S. 231 (1918). “The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. . . . The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.” *Id.* at 238.

12. *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

13. *Id.* at 669.

14. Mark Hales, Note, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS LAW. J. 97, 113–14 (2003).

scrutinizing than rule of reason analysis. The theory is that certain business practices which do not fall within categories that are per se antitrust violations can still be considered clear violations without more than a cursory rule of reason analysis. As Phillip Areeda quipped, “the rule of reason can sometimes be applied in the twinkling of an eye.”¹⁵

B. Case History

1. Standard Oil Co. v. United States¹⁶

During the 1880's, large-scale businesses entered trusts with the intent of dominating their markets and eliminating competition by controlling product pricing, distribution, and production. One such company was John Rockefeller's Standard Oil, which devised a plan that enabled stockholders and the company to move from corporate status to the more flexible vehicle of a trust. This legal conveyance allowed the company to consolidate the powers of its corporations into a dominating force, not only in the oil industry, but in railroads and steel as well. Standard Oil became known for its anti-competitive and systemic strategies. For instance, price-fixing was used to starve competitors out of the market or buy them out.¹⁷ By the time Congress passed the Sherman Antitrust Act in 1890, Standard Oil controlled eighty-eight percent of the refined oil flow in the United States.¹⁸

The Department of Justice charged Standard Oil with violating antitrust provisions and the Supreme Court employed rule of reason analysis to evaluate the charge.¹⁹ The Court determined that Congress did not intend all restraints of trade to be illegal, but just those that failed a rule of reason test.²⁰ The Court identified three primary “evils which led to the public outcry against monopolies”: (1) price fixing, (2) limited production, and (3) reduced production quality.²¹ The Court concluded that Standard Oil's monopolistic control over its industry was a violation of antitrust law.²²

15. *Bd. of Regents*, 468 U.S. at 110 n.39 (quoting P. Areeda, The “Rule of Reason” in Antitrust Analysis: GENERAL ISSUES 37–38 (Federal Judicial Center, June 1981) available at [http://www.fjc.gov/public/pdf.nsf/lookup/antitrust.pdf/\\$file/antitrust.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/antitrust.pdf/$file/antitrust.pdf)). See also *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (applying quick-look analysis when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets”).

16. 221 U.S. 1 (1911).

17. See generally *Standard Oil Trust*, NETHelper.COM, http://www.nethelper.com/article/Standard_Oil_Trust (last visited Aug. 28, 2011) (citing DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER* (1969)).

18. *Id.*

19. *Standard Oil Co.*, 221 U.S. at 62.

20. *Id.* at 102 (Harlan, J., dissenting).

21. *Id.* at 52.

22. *Id.* at 81–82.

2. Hennessey v. NCAA²³

In 1977, an assistant coach challenged an NCAA bylaw limiting schools to a certain number of full-time assistant coaches.²⁴ The court disagreed with several defenses raised by the NCAA. First, the court ruled that an antitrust suit may be brought against only the NCAA (as opposed to both parties to a contract) because “the NCAA Bylaw can be seen as the agreement and concert of action of the various members of the association, as well as that of the association itself, and it is permissible to sue but one of several alleged co-conspirators.”²⁵ Next, the court cited language in *Goldfarb v. Virginia State Bar*²⁶, which argues that no exemption can be so broad as to violate the purpose of the Sherman Act.²⁷ Finally, the court ruled that the NCAA’s bylaw affected interstate commerce and that the bylaw deserved a complete rule of reason analysis.²⁸ In judging whether the pro-competitive effects of the bylaw outweighed its anti-competitive effects, the court adopted a “wait and see” philosophy and held that the bylaw was valid.²⁹

The plaintiff in this case argued that the bylaw constituted a “group boycott,” which the court described as a “concerted refusal to deal with persons or companies because of some characteristic of those persons and companies.”³⁰ The court disagreed with the argument since the bylaw did not prevent teams from hiring particular assistant coaches, but merely restricted the number of coaches that the team could employ.³¹ The court stated that this is more analogous to a market division restriction, which would also constitute a per se violation.³² Still, the court was not convinced by its own analogy and dismissed the plaintiff’s argument.³³

3. NCAA v. Board of Regents³⁴

The University of Oklahoma and the University of Georgia challenged a NCAA bylaw designed to protect college football gate attendance by controlling the amount of games a team may broadcast, what networks they could use, and the extent to which they would be allowed to televise their

23. 564 F.2d 1136 (5th Cir. 1977).

24. *Id.* at 1141.

25. *Id.* at 1147.

26. 421 U.S. 773 (1975).

27. *Hennessey*, 564 F.2d at 1149.

28. *Id.* at 1154.

29. *Id.*

30. *Id.* at 1151.

31. *Id.*

32. *Id.*

33. *Id.*

34. 468 U.S. 85 (1984).

product.³⁵ The Court held that the plan limited price and output in clear violation of antitrust law.³⁶ Though the Court recognized the important role the NCAA plays in college athletics and the need for ample latitude to fulfill its goal of amateurism, it ruled that the bylaw constituted “a restraint upon the operation of a free market, and the district court’s findings established that the plan has operated to raise price and reduce output, both of which are unresponsive to consumer preference.”³⁷

The district court characterized the NCAA control over college football as a “classic cartel” with an “almost absolute control over the supply of college football . . . to the viewing public.”³⁸ The district court reasoned that the NCAA’s threat against its own members “constituted a threatened boycott of potential competitors.”³⁹ If upheld by the Supreme Court, this would seem to guarantee that the bylaw would be reviewed under per se analysis.⁴⁰ The Court instead applied rule of reason analysis, citing (1) the NCAA’s historic role in preserving and encouraging intercollegiate amateur athletics and (2) the necessity of horizontal restraints to enable the NCAA to provide its product to the public.⁴¹

The Court first ruled that the bylaw “on its face constitutes a restraint upon the operation of a free market . . . [which places] a heavy burden [on the defendant] of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market.”⁴² Next, the Court found that the bylaw is not a necessary means to market the NCAA’s product.⁴³ The NCAA also could not justify the bylaw through its desire to shield stadium revenue from the pressure of fair competition.⁴⁴ “[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.”⁴⁵ The Court concluded that the bylaw restricted output and violated the purpose of the Sherman Act.⁴⁶

4. Law v. NCAA⁴⁷

In 1998, college basketball coaches challenged NCAA efforts to limit

35. *Id.* at 89.

36. *Id.* at 113.

37. *Id.* at 86.

38. *Bd. of Regents of Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1300 (W.D. Okla. 1982).

39. *NCAA v. Bd. of Regents.*, 468 U.S. at 96.

40. *See supra* note 8.

41. *NCAA v. Bd. of Regents*, 468 U.S. at 101.

42. *Id.* at 113.

43. *Id.* at 115.

44. *Id.* at 116.

45. *Id.* at 117 (citing *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978)).

46. *Id.* at 120.

47. 134 F.3d 1010 (10th Cir. 1998).

compensation for coaches. As in the *Board of Regents* case, the courts disregarded the usual per se analysis for horizontal restraints, opting instead for a quick look analysis, which immediately assigned to the NCAA the burden of refuting the anti-competitive nature of the NCAA's actions.⁴⁸ The court distinguished this case from *Hennessey* stating that the pay restriction was a "naked restriction on price" and that the anticompetitive nature of the pay restriction was clear.⁴⁹

To meet their burden, the NCAA asserted a pro-competitive position founded upon (1) retaining entry-level coaching positions, (2) reducing costs, and (3) maintaining competitive equity between rich and poor schools.⁵⁰ The court dismissed the first as factually inaccurate and irrelevant for having no impact on competition for coaching positions.⁵¹ It dismissed the second as insufficient to justify anticompetitive agreements since this would justify any price-fixing schemes.⁵² The court dismissed the third as not clearly achieved through the bylaw. This argument, the court claimed, was essentially a cover-story for the real purpose of the bylaw as a cost-cutting mechanism.⁵³ The court notably rejected the "wait and see" approach taken in *Hennessey*, stating that the burden of proving pro-competitive effects lies squarely on the defendant's shoulders. Their failure to do so resulted in the court ruling in the plaintiff's favor.⁵⁴

III. ANTITRUST ANALYSIS FOR THE BCS

A. History of the NCAA and the BCS

1. National Collegiate Athletic Association (NCAA)

The NCAA was formed in 1906 with the purpose of safeguarding student athletes "from dangerous and exploitive athletics practices."⁵⁵ A rule-making body and discussion group was formed to govern national championships and to ensure sportsmanship, player safety, and integrity.⁵⁶ The first NCAA national championship was conducted in 1921; the National Collegiate Track and Field Championships.⁵⁷ After World War II, controversy regarding recruitment and financial aid, unregulated

48. *Id.* at 1020.

49. *Id.* at 1021.

50. *Id.*

51. *Id.* at 1021–22.

52. *Id.* at 1022.

53. *Id.* at 1023–24.

54. *Id.* at 1024.

55. *History* – NCAA.org, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history> (last visited March 25, 2011).

56. *Id.*

57. *Id.*

postseason football games, and the impact of television on attendance demonstrated the need for granting the NCAA increased governing authority.⁵⁸ As college athletics grew, the scope of athletics programs forced the NCAA to recognize varying levels of emphasis. In 1973, the NCAA formed three legislative and competitive divisions; I, II and III.⁵⁹ Five years later, Division I also created football subdivisions I-A and I-AA (renamed the Football Bowl Subdivision [“FBS”] and the Football Championship Subdivision [“FCS”] in 2007).⁶⁰

According to its constitution, the NCAA has the “responsibility of promoting the opportunity for competitive equity among its member institutions.”⁶¹ The NCAA’s website outlines its core commitment to:

The collegiate model of athleticism in which students participate as an avocation, balancing their academic, social and athletics experiences; the highest levels of integrity and sportsmanship; the pursuit of excellence in both academics and athletics; the supporting role that intercollegiate athletics plays in the higher education mission and in enhancing the sense of community and strengthening the identity of member institutions; an inclusive culture that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds; respect for institutional autonomy and philosophical differences; and presidential leadership of intercollegiate athletics at the campus, conference and national levels.⁶²

Though the NCAA currently oversees eighty-nine championships in twenty-three sports for its collegiate association,⁶³ it is not responsible for selecting Division I-A championship teams or negotiating television contracts. The Division I-A national football championship is the only Division I-A NCAA-sponsored sport that is not managed by the NCAA.⁶⁴ Before the BCS was formed, the title of national football champion was

58. *Id.*

59. *Id.*

60. *Id.*

61. *NCAA v. Miller*, 10 F.3d 633, 635–36 (9th Cir. 1993) (citing NCAA Const. § 2.7).

62. *Core Values – NCAA.org*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/core+values+landing+page> (last visited March 25, 2011) (emphasis in original).

63. *NCAA Sports and Championships*, NCAA.ORG, <http://ncaa.org/wps/wcm/connect/public/ncaa/championships> (last visited November 14, 2012).

64. *College Football National Championships in NCAA Division I FBS*, WIKIPEDIA, http://en.wikipedia.org/wiki/Collegefootballnationalchampionships_inNCAADivisionIFBS (last visited March 25, 2011). See also *NCAA Division I-A National Football Championship at AllExperts*, ALLEXPERTS.COM, <http://www.associatepublisher.com/e/n/nc/ncaadivisioni-anationalfootballchampionship.htm> (last visited March 25, 2011).

considered by many as “mythical”⁶⁵ since it was assigned, not by tournament, but by the votes of sportswriters and coaches.⁶⁶

2. Bowl Championship Series (“BCS”)

The first intercollegiate football contest was played on November 6, 1869, in New Brunswick, New Jersey.⁶⁷ The first bowl game occurred on New Year’s Day 1894, when the University of Chicago played at the University of Notre Dame.⁶⁸ Just eight years later, Stanford and Michigan met in Pasadena for the first Rose Bowl.⁶⁹ Before there were AP polls and Coaches’ polls, the team that won the Rose Bowl was usually crowned the national champion.⁷⁰ Soon after, other regions decided to host their own bowls⁷¹ and, as of 2010, there were a total of thirty-five bowl games played.⁷² Though each bowl operates as an independent entity apart from the NCAA, the NCAA does assume responsibility for ensuring that the rules of regular-season play are followed, teams meet a minimum winning threshold, and that the NCAA’s member institutions are not exploited.⁷³

In 1976, sixty-three college and university football programs departed from the NCAA format to create their own organization, the College Football Association [“CFA”].⁷⁴ In 1984, the NCAA lost control of regular

65. See Jeff Petersen, *Unicorns Win Football Title*, THE OBSERVER (January 7, 2010), <http://www.lagrandeobserver.com/Columnists/Jeff-Petersen-s-columns/Unicorns-win-football-title> (“I’m declaring Boise State University the national college football champs. It doesn’t matter what happens tonight in the ‘mythical’ national championship game matching Texas and Alabama.”). See also John Margolis, *Bowls Are Good For Football, America*, CHICAGO TRIBUNE, Dec. 28, 1989, at Sports (“Without a playoff system, we have something called ‘the mythical national champion. . .’”).

66. Blake Snow, *Game of Numbers: How the BCS Rules College Football*, WIRED.COM (Dec. 3, 2010, 7:00 AM), <http://www.wired.com/playbook/2010/12/inside-the-bcs/4/>.

67. *College Football Encyclopedia – Introduction*, COLLEGE FOOTBALL ENCYCLOPEDIA, <http://www.footballencyclopedia.com/cfeintro.htm> (last visited March 25, 2011).

68. *Id.*

69. *Tournament of Roses History*, TOURNAMENT OF ROSES ASSOCIATION, <http://www.tournamentofroses.com/pasadena-tournament-of-roses/history/tournament-of-roses-association/gamehistory.asp> (last visited March 25, 2011).

70. KEITH DUNNAVANT, THE FIFTY YEAR SEDUCTION 93 (2004).

71. *Id.* at 94.

72. *College Football Bowls – CBSsports.com*, CBSSPORTS.COM, <http://www.cbssports.com/collegefootball/bowls/predictions> (last visited Aug. 21, 2011).

73. *Antitrust Implications of the College Bowl Alliance: Hearings on J-105-21 Before the Subcomm. on Antitrust, Business Rights, and Competition of the Committee on the Judiciary*, 105th Cong., 1st Sess. 43 (1997), (statement of Cedric W. Dempsey, Executive Director of NCAA) [hereinafter Dempsey Testimony] available at <http://www.eric.ed.gov/PDFS/ED461320.pdf>.

74. Jude D. Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl*

season football television rights when the United States Supreme Court ruled in *NCAA v. Board of Regents* that the NCAA was in violation of antitrust law.⁷⁵

In 1992, the commissioners of the SEC, Big 8, Southwest, ACC, and Big East conferences met with the bowl committees of the Orange, Sugar, Cotton, Fiesta, Gator and Hancock bowls to form the Bowl Coalition agreement.⁷⁶ The Coalition provided a structure which enabled the champions of the Big East Conference and Atlantic Coast Conference and Notre Dame to meet either the champion of the Big Eight (in the Orange Bowl), Southeastern (Sugar Bowl) or Southwest (Cotton Bowl) conferences.⁷⁷ Five at-large teams would be selected from coalition conference champions. Additionally, five at-large teams would be selected from the five member conferences' runners-up, the runner-up of the Pac-10, the SEC's third-place team, or Notre Dame.⁷⁸ A flaw in the Bowl Coalition, and the subsequent Bowl Alliance, was its inability to include the Big Ten and Pac-10 champions, as both were obligated to play in the Rose Bowl.⁷⁹ With many conference tie-ins with bowls, it was difficult to decide who had won the national title. Rarely did these vertical contracts produce a National Championship game between the two highest ranked teams.⁸⁰

Further complicating matters was the terribly unpredictable nature of the bowl selection process. In 1990, the Sugar Bowl offered a slot to undefeated and top-ranked University of Virginia four games before the end of the regular season.⁸¹ The gamble did not pay off, however, as the University of Virginia lost three of its final four games and dropped out of the rankings.⁸² ACC Commissioner Gene Corrigan recounted:

We were in a situation where the bowl system was under assault on several fronts The selection process was out of control, which was contributing to the larger problem, which is that we couldn't seem to find a way to have a national championship game. The fans were griping, and the playoff talk was getting louder. Everybody knew we had to do something.⁸³

By 1995, these challenges motivated the conferences and Notre Dame to

Championship Series Still Draw a Flag Under the Sherman Act, 14 SPORTS LAW. J. 219 (2007).

75. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

76. *BCS Chronology*, BCSFOOTBALL.ORG <http://www.bcsfootball.org/news/story?id=4819366> (last updated January 21, 2010, 3:28 PM).

77. *Id.*

78. *Id.*

79. *Id.*

80. Hales, *supra* note 14, at 102.

81. Dunnivant, *supra* note 70, at 247.

82. *Id.*

83. *Id.* at 249.

form the Bowl Alliance, controlled by the most powerful college football institutions.⁸⁴ The new arrangement included two at-large spots which were open to all Division I-A teams (including those from the previously excluded smaller conferences) that won at least eight regular season games or were ranked in the top twelve or no lower than the lowest-ranked conference champion participating in the Alliance.⁸⁵ Conference tie-ins were eliminated to allow flexibility for arranging the best bowl matchups.⁸⁶

On June 26, 2012, a committee of college and university presidents approved a proposal by BCS commissioners to establish a four-team playoff to determine the national champion.⁸⁷ The new format will rotate two semifinal games between six bowl sites and a championship game among neutral sites.⁸⁸ Participants in the playoff will be determined by a selection committee,⁸⁹ which will also rank the top fifteen or twenty teams to guide selections for non-playoff, major bowls.⁹⁰

While this format may be an improvement, Roy Kramer, former commissioner of the SEC, acknowledged that this model simply replaces the controversy regarding which teams should be in the championship game with the controversy regarding which teams should be in the playoffs.⁹¹ This solution will not resolve many of the controversies discussed in this note and will likely fail to assuage the public's demand for a true playoff format. Some critics argue this new format might even be more prejudicial to non-elite football programs.⁹²

84. *Id.*

85. *BCS Chronology*, *supra* note 76.

86. *Id.*

87. Adam Himmelsbach, *College Football Playoff Approved for 2014 Season*, N.Y. TIMES (June 26, 2012), available at <http://www.nytimes.com/2012/06/27/sports/ncaafotball/four-team-college-football-playoff-approved.html>.

88. *BCS Presidential Oversight Committee Establishes New Postseason Format*, BCSFOOTBALL.ORG (June 26, 2012, 7:43 PM), <http://www.bcsfootball.org/news/story?id=8099512>.

89. *Id.*

90. Stewart Mandel, *Six-Bowl Premium Package Will Turn New Year's Into Nirvana*, SPORTSILLUSTRATED.COM (June 28, 2012), http://sportsillustrated.cnn.com/2012/writers/stewart_mandel/06/28/bcs-bowl-selection/index.html.

91. *Id.*

92. See Patrick Rishe, *College Football Playoff System a Blessing, But 4-Team Structure Appears Flawed*, FORBES.COM (June 22, 2012), <http://www.forbes.com/sites/prishe/2012/06/22/college-football-playoff-system-a-blessing-but-the-proposed-execution-details-appear-flawed/> (arguing that teams ranked outside the top four will suffer financially and that the proposed method of selecting the teams creates more room for bias); Dennis Dodd, *Playoff System? Get Ready for Your Boise State-Types to Have Less Access*, CBSSPORTS.COM (June 11, 2012, 2:54 PM), <http://www.cbssports.com/collegefootball/story/19332347/playoff-system-get-ready-for-your-boise-statetypes-to-have-less-access> ("The growing realization is that access to the sport's new postseason will be worse for the have-nots.").

It should be no surprise when the new four-team playoff format proves inadequate, since it appears motivated by the same profit-protecting mentality that gave rise to the BCS.⁹³ It can be said that the fundamental differences between the NCAA and the BCS missions are directly traceable to their roots. Whereas the NCAA evolved with expressed priority to protect the safe, fair, and sportsmanlike competitions in college athletics, the BCS evolved in 1998 with the intent of the six major college athletic conferences—the Big Ten, ACC, SEC, Big East, Pac-10, and Big 12—to guarantee their place in the BCS National Championship game and four lucrative BCS Bowl games: Tostitos Fiesta Bowl, Discover Orange Bowl, Rose Bowl Game, and Allstate Sugar Bowl.⁹⁴ As Corrigan stated, “[t]he desire to maximize revenue is central” to the purpose of the BCS.⁹⁵

The BCS is managed by conference commissioners, an athletic director’s advisory group, and a presidential oversight committee.⁹⁶ Within BCS and NCAA guidance, BCS games are operated by privately owned organizations in each of the host cities.⁹⁷ In addition, there are thirty other postseason bowls, which are managed independently by entities in twenty-eight cities around the nation and in Canada.⁹⁸

3. Legal Intervention

BCS college and university football reflects the best and worst in American culture. At best, it represents hard work, hopes, and dreams in celebrated pageantry. At worst, it replicates aberrant monopolistic behavior in the free market, where powerful economic interests have conspired to guarantee themselves a dominant share of competitive opportunity, prestige, and revenue. As in the past, it is unlikely that smaller competition has the resources to stand up to or survive against overpowering anti-competitive forces in the market without the protection of antitrust law and those sworn to uphold it, such as the Justice Department and Congress.

Though members of Congress do not always share the same political identities, they do share the same responsibility to protect the non-BCS

93. See Stewart Mandel, *Selection Committee Helped Bridge Divide, Will Lead To Fan Satisfaction*, SPORTSILLUSTRATED.COM (June 21, 2012), http://sportsillustrated.cnn.com/2012/writers/stewart_mandel/06/21/college-football-playoff-selection-committee/index.html (“According to participants in the room at Wednesday’s decisive meeting, the key compromise that finally brought any remaining holdouts on board was the concept of a selection committee charged with emphasizing specific criteria.”) (discussing the BCS’s long history of biased ranking, which will likely be exacerbated when entrusted to a smaller group of interested parties).

94. *BCS Background*, BCS FOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809699> (last updated Jan. 16, 2012, 5:06 PM).

95. DUNNAVANT, *supra* note 70, at 251.

96. *BCS Governance*, BCS FOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809846> (last updated Sep. 26, 2012, 1:51 PM).

97. *BCS Background*, *supra* note 94.

98. See *supra* note 72.

schools in each of their states. Congressional objections to the BCS date back to 1997, when the Senate Judiciary Committee held hearings regarding potential antitrust issues.⁹⁹ In 2003, Tulane President Scott Cowen argued before the U.S. House Judiciary Committee that the BCS creates an ever-increasing financial gap between BCS and non-BCS schools.¹⁰⁰ Grassroots groups such as BCSReform.org¹⁰¹ and Playoff PAC¹⁰² encourage Congress to examine disparities in Division 1-A football. In response, the BCS spent \$670,000 between 2003 and 2009 on lobbying.¹⁰³

In 2005, the House Subcommittee on Commerce, Trade and Consumer Protection also weighed in on the BCS issue.¹⁰⁴ In 2009, several groups expressed disdain for the BCS, including Congressman Gary Miller, who introduced H.R. Res. 599,¹⁰⁵ which, had it passed, would have prohibited federal funds to NCAA Division I FBS schools unless the national championship was determined by a playoff system.¹⁰⁶

In 2009, after undefeated University of Utah was denied a shot at the national championship for the second time in four years, the Utah State Senate adopted a resolution urging the NCAA to abandon the BCS in favor of a playoff system.¹⁰⁷ Also in 2009, a House Energy and Commerce Subcommittee approved a bill that sought “[t]o prohibit, as an unfair and deceptive act or practice, the promotion, marketing, and advertising of any post-season NCAA Division I football game as a national championship game unless such game is the culmination of a fair and equitable playoff system.”¹⁰⁸ In July of that same year, Senator Orrin Hatch, ranking member of the Senate Antitrust Subcommittee, characterized the BCS as:

[A]n agreement between the preferred conferences and the major

99. Andrew Zimbalist, *The BCS, Antitrust and Public Policy 2*, (unpublished manuscript) available at <http://www.smith.edu/econ/workingpaper/pdfs/Zimbalist1.pdf> (last visited Mar 26, 2011).

100. *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm on the Judiciary*, 108th Cong. 50 (2003) (statement of Scott Cowen, President, Tulane University).

101. *BCS Reform - Time For A Real NCAA Football National Championship Playoff*, BCSREFORM.ORG, <http://www.bcsreform.org> (last visited Mar 26, 2011).

102. Playoff PAC, PLAYOFFPAC.COM, <http://www.playoffpac.com> (last visited Mar 26, 2011) (describing itself as a “federal political committee dedicated to establishing a competitive post-season championship for college football.”).

103. Dave Levinthal, *BCS Becomes Political Football as Lobbyists Blitz Congress*, OPENSECRETS.ORG (Dec. 17, 2009, 11:51 AM), <http://www.opensecrets.org/news/2009/12/bcs-becomes-political-football.html>.

104. Zimbalist, *supra* note 99, at 2.

105. 111th Cong. (1st Sess. 2009).

106. *Id.*

107. *Utah Lawmakers Call For Football Playoff System*, ESPN.COM, <http://sports.espn.go.com/espn/wire?section=ncf&id=3894958> (last updated Jan. 9, 2009, 4:49 PM).

108. H.R. 390, 111th Cong. (1st Sess. 2009) 1.

bowl games as to how they will compete with one another and, more apparently, how they will compete against the non-preferred conferences. Worse still, under the current BCS regime, each of the six privileged conferences is guaranteed to receive a large share of the BCS revenue to distribute among their member schools. The remaining five conferences, which include nearly half of all the teams in Division I, all share a much smaller portion of the BCS revenue, even if one of their teams is fortunate enough to play their way into a BCS game. Over the lifetime of the BCS, the preferred conferences have received nearly 90 percent of the total revenues. . . . Section 2 of the Sherman Antitrust Act is violated when one is in possession of monopoly power and uses that power in a way not associated with growth or development as a consequence of having a superior product or business acumen.¹⁰⁹

On March 9, 2012, the Utah Attorney General, Mark Shurtleff, posted a bid seeking partnership with a law firm for the purpose of investigating and possibly pursuing antitrust litigation against the BCS.¹¹⁰ Shurtleff lists four primary concerns for the litigation: (1) eliminating the automatic bid system; (2) establishing a transparent ranking system; (3) ensuring fair treatment to all teams and conferences; and (4) proposing competitive bidding to host any BCS bowl or national championship game.¹¹¹ This note echoes the first three concerns.

Because the new four-team format will not be implemented until 2014, it is difficult to state with certainty how effective it will be at addressing these concerns. Therefore, this note focuses on the BCS system as it currently exists and how it has been unfairly manipulated to protect profits for the major conferences. In so doing, this note will demonstrate the need for objective standards for an eight-team playoff that eliminates the opportunity for biased rankings.

B. Anti-Competitive Effects.

The BCS antitrust issue regards the legality of an agreement that overtly restrains non-BCS teams from competing for prestigious BCS bowl games, the national championship, and exorbitant revenues. As in *Law v. NCAA*, where the courts found that the restraint contained “obvious

109. *Hatch Condemns BCS ‘Monopolists’*, UTAHPOLICY.COM (July 7, 2009), http://utahpolicy.com/featured_article/hatch-condemns-bcs-monopolists. (last visited Mar. 26, 2011).

110. Dennis Dodd, *Utah attorney general forges on suing BCS despite expected changes*, CBSSPORTS.COM (Mar. 22, 2012, 12:17 PM), <http://www.cbssports.com/general/blog/dennis-dodd/17971289/utah-attorney-general-forges-on-suing-bcs-despite-expected-changes>.

111. *Id.*

anticompetitive effects”¹¹² that prevented free market competition, this section defines a variety of unreasonable BCS restraint mechanisms that function as systemic barriers to competition for non-BCS conferences.

1. Strength of Schedule

A primary component relied upon by the BCS ranking process is the strength of a team’s schedule, that is, the caliber of opponents the team faces during the season. For non-BCS teams, this has become an anti-competitive instrument used by BCS conferences to perpetuate a stigma that non-BCS teams are competitively inferior to BCS teams, not because of their on-field performances, but because of the level of competition they face within their non-BCS conferences.

The strength of a BCS schedule is bolstered by their membership in a BCS conference. As long as a BCS team defeats weak non-conference opponents, its strength of schedule will be assured by its performance within its conference. It does not matter how weak the BCS conference might be, provided its members defeat the weak non-BCS teams, and often FCS teams, on their schedule. Conversely, the same cannot be said of non-BCS schools.

In order for non-BCS teams to improve the strength of their schedules, they must find BCS teams willing to play them. The problem is that there is very little incentive for BCS teams to place tough non-BCS teams on their schedule. And, even if a top non-BCS team manages to schedule and defeat a BCS team, there is still no guarantee it will not be passed in the rankings by other BCS teams. This was the case in 2010, when Boise State defeated several BCS teams¹¹³ and annihilated most other opponents, while at the same time being passed in the rankings by BCS teams, replacing BCS teams that had lost ahead of the Broncos.¹¹⁴

2. BCS Home Field Advantage

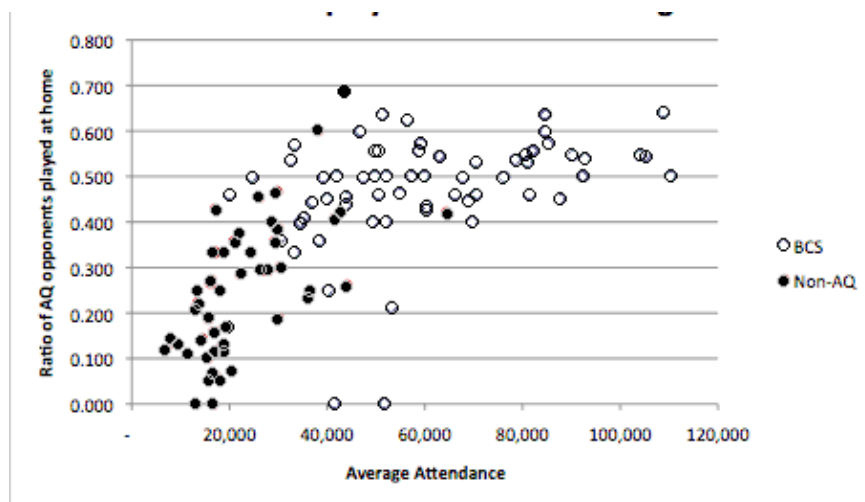
Adding to strength of schedule disparities in the BCS ranking process, BCS teams are rewarded in the polls not only for their membership in a BCS conference, but for playing their non-BCS opponents at home. The graph below demonstrates the disparity between BCS and non-BCS home games:¹¹⁵

112. 134 F.3d 1010, 1020 (10th Cir. 1998).

113. See *Football – 2010 Schedule*, BRONCOSPORTS.COM, http://www.broncosports.com/SportSelect.dbml?SPSID=48555&SPID=4061&DB_OE_M_ID=9900&Q_SEASON=2010. (Virginia Tech (33-30 W) and Oregon State (37-24 W)).

114. Larry Darter, *Boise State Slips in Halloween Edition of BCS Rankings*, SUITE101 (Oct. 31, 2010), <http://www.suite101.com/content/boise-state-slips-in-halloween-edition-of-bcs-rankings-2010-a303099>.

115. *Scheduling Maintains Bias in College Football*, BREAKING BIAS IN COLLEGE

Figure 1: BCS Teams Play More Home Games

The disproportionate number of home games for BCS and non-BCS teams translates into a substantial anti-competitive advantage for BCS teams. From 2004 through 2009, FBS teams faced one another in 3,455 football games.¹¹⁶ Their home winning percentage was 59.3%,¹¹⁷ which verifies the “home-field advantage” concept familiar to any avid sports fan. Effectively, a team playing at home has roughly a fifty percent higher chance of winning than its opponent. And since non-BCS schools are statistically unlikely to face BCS schools on their home-turf, they suffer a significant disadvantage.

3. Refusal to Deal

“We do not play the Little Sisters of the Poor.” - Gordon Gee, Ohio State President¹¹⁸

The recurring argument amongst BCS proponents is that non-BCS teams, by virtue of their non-BCS conference schedules, are inferior to

FOOTBALL: A GRASSROOTS EFFORT FOR A LEVEL PLAYING FIELD (Mar. 24, 2009), <http://ncaafbsfootball.wordpress.com/2009/03/24/scheduling-maintains-bias-in-college-football/> (last visited Mar 26, 2011). The author, a CPA with experience in statistical analysis, generated this graph from data he obtained from the team schedule/results page at ESPN.com. Note that only two non-AQ teams played a majority of their games against BCS teams at home, while a vast number of BCS teams played BCS opponents at home. Thus, even when non-AQ teams manage to schedule a game against a BCS opponent, they face an away-game disadvantage disproportionate to that which BCS teams face.

116. *Id.*

117. *Id.*

118. *Ohio State Prez Disregards TCU, Boise St.*, ESPN.COM (Nov. 25, 2010), <http://sports.espn.go.com/dallas/ncf/news/story?id=5845736>.

BCS teams and undeserving of national recognition. But, the reality is that schools like Ohio State *do* place “little sisters of the poor” onto their schedules. Furthermore, they require them to play on their home field. For example, during 2010, Ohio State scheduled home games against Ohio (75th), Eastern Michigan (167th), and Marshall (109th).¹¹⁹ What they *did not* schedule were games against top non-BCS teams; namely, the very same non-BCS teams that BCS apologists criticize for weak schedules. Boise State President Bob Kustra stated:

[Gordon Gee] claims that in the SEC, Big Ten and Big 12 it's murderer's row every week and there's absolutely little substance to that claim. . . . The BCS has finally found someone to stand up and defend the indefensible and Gordon Gee proved it—he not just proved that it's indefensible but he did so with facts that are simply wrong.¹²⁰

There may be a very good reason why BCS teams refuse to schedule top non-BCS teams. The Boise State Broncos, for example, are 7-1 during the past four years against BCS teams, which includes two consecutive victories over 2010 national championship contender, Oregon. Regardless of this accomplishment, BCS pundits continue to degrade the Broncos due solely to their obligated participation in the Western Athletic Conference [“WAC”]. It mattered little that they defeated BCS opponents or dominated their conference. The mere point that they were in the WAC justified moving BCS teams ahead of them in the rankings. To correct the misperception, Boise State's athletic director, Gene Bleymaier, sent invitations to major BCS schools requesting the chance to play. But, the very same BCS schools who complained about the Broncos weak schedules refused to play them. Bleymaier later commented: “It's been surprising how many big schools have not been receptive of us coming to their place . . . [s]ome of those schools that are saying ‘let them play our schedule’ won't play us.”¹²¹

4. Flawed Ranking Process

The BCS ranking system was controversial since its inception.¹²² Non-BCS schools are first confronted with terribly unpredictable preseason

119. Andy Gardiner, *BCS Fighting Words: Strength of Schedule*, USA TODAY (Nov. 26, 2010, 4:03 PM), http://www.usatoday.com/sports/college/football/2010-11-25-bcs-strength-of-schedule-debate_N.htm?csp=34sports.

120. Chadd Cripe, *Boise State's Bob Kustra Says Ohio State President's Comments 'Wrong . . . Ridiculous'*, IDAHO STATESMAN (Nov. 24, 2010 4:49 PM), http://voices.idahostatesman.com/2010/11/24/ccripe/boise_states_bob_kustra_says_ohio_state_presidents_comments_wron.

121. Dan Wetzel, *Boise BCS Blocked*, YAHOO.COM (Nov. 7, 2009), <http://rivals.yahoo.com/ncaa/football/news?slug=dw-boise110709>.

122. DUNNAVANT, *supra* note 70, at 258.

rankings,¹²³ which are inordinately influential in the final rankings at the end of the season.¹²⁴ Non-BCS schools must also contend with an inherent bias within the BCS ranking system in favor of schools with large fan-bases.¹²⁵

Rankings were initially determined by the AP and coaches' polls, a strength-of-schedule rating, and three computer polls.¹²⁶ As one commentator put it, this system "was the brainchild of [a] former football coach and career athletic administrator with zero qualification as a mathematician."¹²⁷ The formulas used in the construction of computer rankings are complex and lacking in transparency. In 2010, the BCS relied on six computer ranking systems, only one of which published its formulas.¹²⁸ This complexity and lack of transparency raises serious concerns regarding the procedure for ensuring that the rankings are free of miscalculations.

In December of 2010, an obscure error in one of the computer computations was accidentally discovered by Jerry Palm, who runs the web site CollegeBCS.com.¹²⁹ The error was significant enough to improperly drop Boise State out of the top ten, being replaced by a BCS team. Just prior to the discovery of the error, BCS Executive Director Bill Hancock proudly fired off a press release stating, "Once again, the BCS has delivered."¹³⁰ In reality, though, the BCS delivered an egregious error that benefitted a BCS team while hurting one of the two non-BCS teams in the top ten.¹³¹ Naturally, the error undermined the credibility of the BCS

123. See *A Look Behind the BCS Computer Ratings*, USA TODAY, Oct. 20, 1999, available at <http://www.usatoday.com/sports/comment/jzcol21.htm> (last visited Mar. 26, 2011) ("Preseason rankings are a guess." — Chris Hester of The Seattle Times, who operates one of eight computer ranking systems taken into account by the BCS in 1999).

124. See Nate Silver, *Popularity and Pedigree Matter in the B.C.S.*, N.Y. TIMES (Aug. 27, 2011), http://www.nytimes.com/2011/08/28/sports/ncaaf/football/in-bcs-popularity-and-pedigree-matter.html?_r=2 ("A team that was unanimously ranked first in the preseason poll will be ranked one to two positions higher in the final B.C.S. standings than a team that had been unranked, even if both had the same computer ranking."); STEWART MANDEL, *BOWLS, POLLS AND TATTERED SOULS* 51 (2007) ("And either or both the preseason number 1 or 2 teams have reached the title game every year since the BCS's 1998 inception.").

125. Silver, *supra* note 124.

126. MANDEL, *supra* note 124.

127. *Id.* at 16.

128. *Id.*

129. Andy Staples, *BCS Math Error Proved Minute; The Larger Problem More Troubling*, SPORTS ILLUSTRATED.COM (Dec. 7, 2010, 12:50 PM), http://sportsillustrated.cnn.com/2010/writers/andy_staples/12/07/bcs-math-error/index.html.

130. *Id.*

131. *Id.*

ranking process and did little to quell distrust amongst non-BCS teams.¹³²

“Computers, like automobiles and airplanes, do only what people tell them to do.” – Bill James, *Statistical Analyst*¹³³

BCS proponents attribute the high ranking of BCS schools to strength of schedule. But the 2010 facts do not support such reasoning, where the Mountain West and the Western Athletic Conferences went a perfect 11 - 0 against BCS conference opponents. It is equally erroneous to claim that non-BCS conferences are categorically less difficult than BCS conferences, as evidenced by at least twenty-nine games in the 2010 season in which non-BCS teams defeated BCS opponents.¹³⁴ Despite accomplishments against BCS teams, climbing the polls or even holding their place against BCS teams was a challenge for non-BCS teams.

Throughout the 2010 season, Boise State was passed in the polls by BCS teams despite a perfect season up until its last game.¹³⁵ To the collective sigh of relief from BCS proponents, the Broncos lost to nineteenth-ranked Nevada in overtime. The loss dropped the Broncos from third to outside the top ten. It was there, in the hefty drop, that Jerry Palm discovered the error. The miscalculation, which BCS executive director Bill Hancock called “unacceptable,” exposed not only a potential for error but for subjective manipulation¹³⁶ and the need for transparency. Boise State President Bob Kustra objected: “When we cannot see how these decisions are made, it becomes an affront to the concepts of integrity and fair play that we claim to value.”¹³⁷

5. Revenue Discrimination

A restraint that has the effect of manipulating price and degrading the quality of output in a manner that is unresponsive to consumer preferences is not consistent with the fundamental goal of antitrust law.¹³⁸ Even when

132. See e.g., *The BCS Formula*, BCSKNOWHOW.COM, <http://www.bcsknowhow.com/bcs-formula> (demonstrating how human bias can skew rankings).

133. Bill James, *Boycott the BCS! A Statistical Analyst Takes A Stand Against College Football's Perverse, Irrational Bowl Championship Series*, SLATE.COM (Jan. 6, 2010, 4:11 PM), http://www.slate.com/articles/news_and_politics/recycled/2010/01/boycott_the_bcs.html.

134. For a list of these games, see *Official 2010 Non-BCS Wins vs. BCS List*, CSNBBS.COM (Jan. 10, 2011, 12:31 AM), <http://csnbbs.com/showthread.php?tid=450519>.

135. See Darter, *supra* note 114.

136. Staples, *supra* note 129.

137. Chadd Cripe, *Boise State President Bob Kustra Bashes BCS For Computer Error, Lack of Transparency, Rewarding 'Mediocre' Seasons*, IDAHO STATESMAN (Dec. 7, 2010, 2:14 PM), http://voices.idahostatesman.com/2010/12/07/ccripe/boise_state_president_bob_kustra_bashes_bcs_computer_error_lack/?page=4.

138. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

a non-BCS team overcomes barriers inherent in the BCS system and earns a place in a BCS bowl game, they receive substantially unequal shares of the bowl's revenues on average [see Figure 2]. This effectively means that non-BCS teams are being forced to sell their products at a lower rate than their BCS opponents, even when both teams provide substantially the same product to the viewing public. There are certainly other factors that affect how money from a bowl is divided between the teams and their respective conferences, but Figure 2 seems to indicate that the factors that should matter the most, factors related to the public's interest in the team like TV ratings and attendance, are not given nearly enough weight.

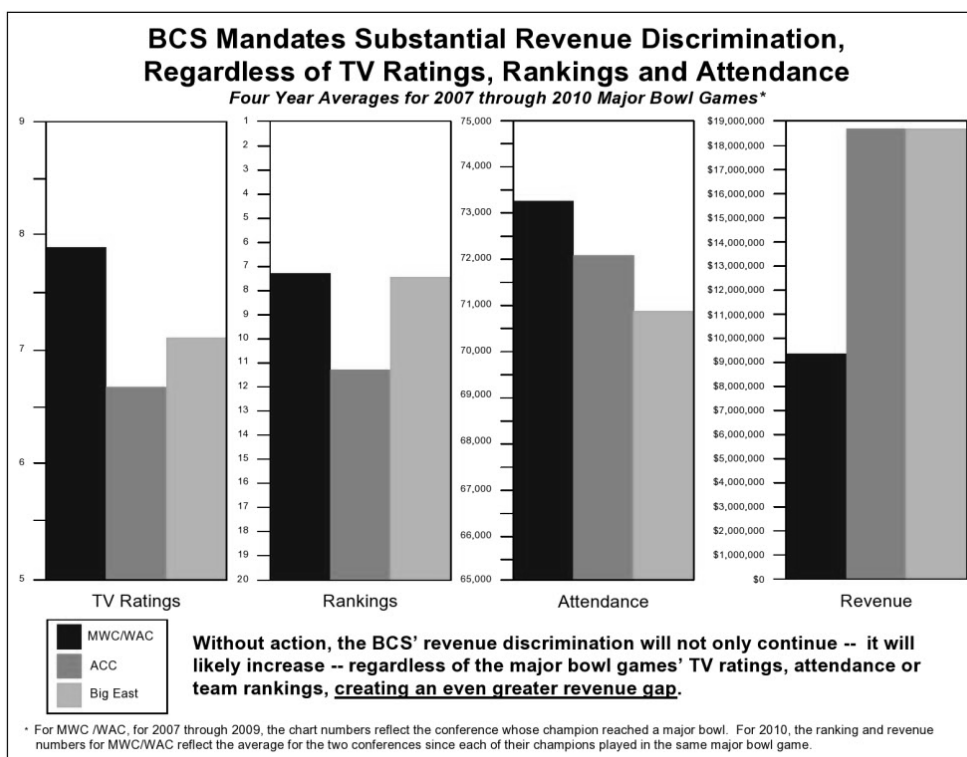


Figure 2: BCS Mandates Substantial Revenue Discrimination¹³⁹

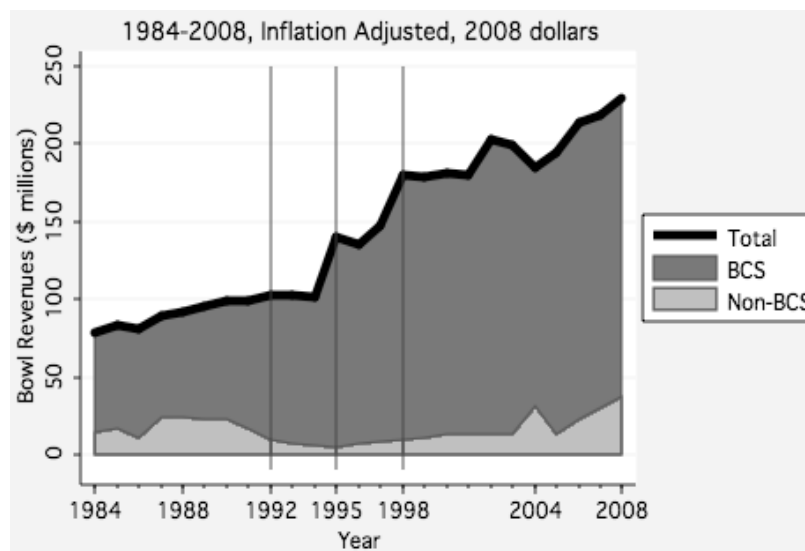
The chart above tells only a slice of the full story of the BCS's discrimination. The revenue discrimination is even greater when deserving teams are excluded from major bowls. The BCS system is designed to make it virtually impossible for teams from outside of the six Automatic Qualifying Conferences or Notre Dame to ever win the national

139. *BCS Mandates Substantial Revenue Discrimination, Regardless of TV Ratings, Ranking and Attendance*, ARENT FOX LLP, <http://www.arentfox.com/email/fishel/BCS%20Revenue%20Discrimination%20Chart.pdf>.

championship. Further, the Automatic Qualifying Conferences are guaranteed 60% of the spots in the major bowls, and barring a highly aberrational situation (such as occurred last year for the first time), those conferences, along with Notre Dame, for all practical purposes will be given at least 90% of the major bowl spots each year.¹⁴⁰

Early this year, the executive director of the BCS, Bill Hancock, argued that “[f]or the second straight year, the non-[BCS] conferences will see a record amount of revenues because of their participation in the BCS, which shows the strength and fairness of the current system.”¹⁴¹ This claim is, at best, enormously misleading.¹⁴² Figure 3 depicts the shameful disparity in revenue between BCS and non-BCS conferences.

Figure 3: Total Annual Bowl Revenue¹⁴³



Because BCS conferences are guaranteed to have at least one team in a BCS bowl game, these conferences are also guaranteed approximately \$21.2 million, while the entire collection of non-BCS conferences is only

140. Kathleen Tuck, *President Kustra Speaks Out on BCS Revenue Discrimination*, BOISE STATE UNIVERSITY (May 25, 2010, 8:37 AM), <http://news.boisestate.edu/update/2010/05/25/president-kustra-speaks-out-on-bcs-revenue-discrimination/>.

141. *Revenue Distribution Data Released*, BCS (Jan. 25, 2011, 2:41 PM), <http://www.bcsfootball.org/news/story?id=6057935>.

142. *SBJ: BCS Payouts Grow Along With Big Shares For Big Six Conferences*, AOL (Jan. 24, 2011, 11:34 AM), <http://aol.sportingnews.com/ncaa-football/story/2011-01-24/sbj-bcs-payouts-grow-along-with-big-shares-for-big-six-conferences#ixzz1IQAOAZJq>.

143. Richard W. Evans, *NCAA Bowl Finance: Something Changed in 1995*, ECONOSSEUR (July 6, 2009, 1:21 PM), <http://www.econosseur.com/2009/07/ncaa-bowl-finance-something-changed-in-1995.html>.

guaranteed a total of \$12.35 million with an additional \$12.35 million if a non-BCS team makes it to a BCS bowl game.¹⁴⁴ Thus, in 2010, the BCS paid BCS conferences \$145.2 million and the five non-BCS conferences a total of \$24.72 million.¹⁴⁵ The gross revenue disparity made evident by Figure 3 is a direct result of each BCS conference's guaranteed BCS bowl game appearances and the skewed payout schedule derived thereof.

Professor McCann posits that, even if a playoff system would produce more money, BCS conferences would oppose it because the revenue would likely be distributed more evenly to non-BCS conferences.¹⁴⁶ He recognizes that the present revenue disparity between BCS and non-BCS conferences "strikes anticompetitive tones."¹⁴⁷ Professor McCann emphasizes the importance of noting that this disparity harms more than the non-BCS football programs since a substantial portion of these payouts support other athletic programs and student-athlete scholarships.¹⁴⁸ The discriminatory distribution of bowl payouts is even more objectionable when one considers the bowl records of several BCS conferences.

From 2006 until 2011, the Big East and Atlantic Coast BCS conferences compiled a combined 3-7 BCS Bowl record.¹⁴⁹ During that time, the Mountain West Conference and WAC have posted a 4-2 record, one of which included TCU's Fiesta Bowl loss to Boise State.¹⁵⁰ Also during the past five years, the Big East and Atlantic Coast Conference ["ACC"] champions never finished in the top five of the AP Poll. During that same period, the Mountain West and Western Atlantic champions finished in the top five of the AP Poll four times. It is also noteworthy that the Mountain West and WAC provided some of the most exciting and most watched bowl games between 2006 and 2011. Conversely, the Big East and ACC provided six of the ten worst watched BCS Bowl games. In fact, three of these contests drew less than 70,000 fans.¹⁵¹

In a fair and open competitive market, one would expect the Mountain West and WAC to receive bowl revenues at least equal to or greater than

144. BCS 2010-2011 MEDIA GUIDE 6 (2010) available at <http://a.espn.com/i/nf/bcs/bcsguide2010b.pdf>.

145. *SBJ: BCS Payouts Grow Along With Big Shares For Big Six Conferences*, *supra* note 145.

146. Michael A. McCann, *Antitrust, Governance, and Postseason Football*, 52 B.C.L. Rev. 517, 547 (2011) available at <http://lawdigitalcommons.bc.edu/bclr/vol52/iss2/6>. Note again that the four-team format was only agreed to after a selection committee was agreed upon, arguably to enable the major conferences to protect their control of the playoff revenue.

147. *Id.* at 528.

148. *Id.* at 522.

149. Chadd Cripe, *Where Is The BCS Money Going?*, IDAHO STATESMAN (Jan. 30, 2011), <http://www.idahostatesman.com/2011/01/30/1508054/where-is-the-bcs-money-going.html>.

150. *Id.*

151. *Id.*

those awarded to the Big East and ACC. Instead, the Big East and ACC were awarded \$188 million from BCS games while the Mountain West and WAC conferences received less than half of that amount, \$72.85 million.¹⁵² Such disproportion is not founded on postseason performance, season performance, poll placement, public interest, or money generated from bowl games. Rather, it is based solely on the oligarchical agreement between BCS conferences that protects their revenue stream from market forces that might send the money to more deserving conferences.

6. Recruiting Deprivation

“You need good players to win.” – Mike Farrell, national recruiting analyst¹⁵³

Twenty-nine teams from BCS conferences and Notre Dame have recruited in the top fifty every year between 2002 and 2011.¹⁵⁴ Most non-BCS coaches understand firsthand the self-fulfilling prophecy that comes from being unable to recruit competitively with teams from BCS conferences. In 2007, twenty-one Division I-A schools each spent more than \$1 million on recruiting.¹⁵⁵ In comparison, the winningest college football team during the past decade, Boise State, spent just \$228,172 on recruiting.¹⁵⁶ In fact, Boise State and Hawaii (\$190,387) work on two of the smallest men’s recruiting budgets of all Division I-A schools.¹⁵⁷ The sixty-five schools with the highest recruiting budgets totaled more than \$61 million in 2007, an 86% increase since 1997.¹⁵⁸

Participating in prestigious BCS bowls enhances a school’s ability to recruit talent. There are only twenty-five teams that have finished in the AP’s top ten list between 2006 and 2011, with fifteen of those teams appearing on that list more than once.¹⁵⁹ These fifteen teams occupied forty of the fifty top ten spots over this five year period and more than half of the fifty spots have been held by ten teams: Alabama, Auburn, Florida,

152. *Id.*

153. Dallas Jackson, *Recruiting vs. Results: Does One Bring The Other?*, RIVALS (Jan. 24, 2011), <http://highschool.rivals.com/content.asp?CID=1179868>.

154. *Id.*

155. Libby Sander, *Have Money, Will Travel: The Quest For Top Athletes*, CHRON. HIGHER EDUC. (Aug. 1, 2008), <http://chronicle.com/article/Have-Money-Will-Travel-the/28750/>.

156. Graham Watson, *Are Big Recruiting Budgets Worth It In Non-BCS?*, ESPN (July 31, 2008, 4:23 PM), http://espn.go.com/blog/ncfnation/post/_/id/251/are-big-recruiting-budgets-worth-it-in-non-bcs.

157. *Id.*

158. Sander, *supra* note 155.

159. Matt Hinton, *Star Power: Recruiting Gurus' Track Record At The Top Of The Polls, By The Numbers*, RIVALS (Jan. 25, 2012, 2:38 PM), http://rivals.yahoo.com/ncaa/football/blog/dr_saturday/post/Star-Power-Recruiting-gurus-track-record-at-th?urn=ncaaf-312394.

Georgia, LSU, Michigan, Ohio State, Oklahoma, Texas, and USC.¹⁶⁰ Not coincidentally, all ten schools were also among thirteen schools that have consistently finished at the top of the recruiting rankings.¹⁶¹

Many BCS teams that rarely put good teams on the field receive significantly higher revenues from the current bowl system than highly ranked non-BCS schools simply because of their membership in a BCS conference. Highly ranked, yet underfunded non-BCS teams cannot be expected to compete with highly funded BCS schools in the long run. The unfortunate result of the bowl system is a gradual decline in quality of teams in the market. The recruiting disadvantage is made even worse for top non-BCS schools when BCS teams look beyond their own sophisticated recruiting efforts to use their affluence to steal what little the top BCS schools were able to discover and recruit for themselves. For example, in 2011 Boise State lost three verbal recruits just prior to signing day to BCS teams.¹⁶² In fact, up through 2011, Boise State and Texas Christian University [“TCU”] failed to “land a single Rivals.com Top 100 prospect since the Rivals rankings began in 2002.”¹⁶³

One might ask how non-BCS schools have managed to achieve such success considering their low revenues and recruiting rankings. Chris Peterson, Boise State head coach, commented: “It’s amazing out there the lack of homework that’s really done and people will just end up offering guys because everyone else has. ‘If they’ve offered him then he must be a good player.’ We try to stay away from that as much as we can.”¹⁶⁴ Boise State’s current quarterback, Kellen Moore, is an excellent example. Overlooked by all football programs except two WAC teams, Moore was named a Heisman finalist last year.¹⁶⁵

But schools cannot rely on discovering diamonds in the rough to compete in the long run. The inability to recruit quality players makes it difficult to compete on the field, in the market, in the stands, for bowl bids, and for television contracts. Failure in these areas in turn makes recruiting more difficult: a cycle that continually distances the haves from the have-nots.¹⁶⁶ Yes, there are exceptions like Boise State, TCU, and Utah who found ways to consistently go undefeated and win all of their BCS games.

160. *Id.*

161. *Id.*

162. Dave Southorn, *Boise State Able To Hold Onto Majority Of Large Class*, IDAHO PRESS-TRIB. (Feb. 3, 2011, 12:55 AM), http://www.idahopress.com/sports/boise/bsf-football/article_33a23e6e-2f6c-11e0-9a0c-001cc4c002e0.html.

163. McCann, *supra* note 146, at 530.

164. Tim Booth, *Broncos Buck Trend of Low-Rated Recruiting Classes*, WASH. TIMES (Feb. 1, 2011), <http://abcnews.go.com/Sports/wireStory?id=12813815>.

165. *Id.*

166. *See BCS or Bust*, *supra* note 100, at 19 (BYU head coach testified how BCS schools would lure away possible recruits with statements about how BYU will never play for the Rose Bowl or in a national championship.).

But despite these schools' miraculous successes, the recruiting deprivation imposed on non-BCS programs is yet another anti-competitive mechanism designed to guarantee market power and disproportionate revenues for powerful BCS conferences.

7. Group Boycott

The BCS resembles a group boycott in the way it limits access to non-BCS institutions to the top five bowl games because of automatic bids that are guaranteed to members of privileged BCS conferences. This anti-competitive mechanism was created in 1998 as an explicit agreement amongst the six major conferences to guarantee themselves an exclusive right to the nation's most lucrative bowls. The BCS structure assures that the ten teams selected for the five BCS bowls received exorbitant financial windfalls for themselves and their conferences. Because BCS bowl bids are most exclusively awarded to BCS conferences, a perpetuation and growing financial deficit exists between the more powerful BCS conferences and non-BCS conferences.

Before the advent of the BCS, bowl teams were selected via non-competitive bowl tie-ins. The BCS characterizes its bowl selection procedure as an improvement over the old bowl tie-in system. But, the net result for the quality of the teams selected for top bowl bids is not so different than it was before the advent of the BCS. This was evident when the BCS excluded the following teams for BCS bids in favor of lesser ranked BCS teams: 2004 #9 Boise State; 2004 #10 Louisville; 2008 undefeated #9 Boise State; 2009 #11 TCU; 2009 #10 Boise State;¹⁶⁷ and 2010 #11 Boise State.¹⁶⁸

In 2011, the bowl matchups were particularly inequitable. While #7 Boise State cruised to a 56–24 victory over Arizona State in the Maaco Bowl, the Orange Bowl pitted #15 Clemson against #23 West Virginia, the Sugar Bowl pitted #11 Virginia Tech against #13 Michigan, and the Rose Bowl pitted #5 TCU against #10 Wisconsin.¹⁶⁹ In sum, half of the teams playing in BCS bowl games in 2011 were ranked lower than Boise State.

Further complicating the challenge for non-BCS teams in getting into BCS Bowls is a rule limiting them to just one automatic bowl bid. This exclusionary policy has resulted in undefeated non-BCS teams being barred from post-season BCS Bowl games in lieu of teams from automatically

167. *BCS Bowl History*, CRASHING THE PARTY (June 27, 2010), <http://crashingthepartyfootball.blogspot.com/2010/06/bcs-bowl-history.html>. For more examples, see notes 160–169.

168. The Fiesta Bowl pitted #7 Oklahoma against unranked University of Connecticut. *Complete 2010 College Football Bowl Game Schedule, Match-Ups*, SBNATION (November 19, 2010), <http://www.sbnation.com/ncaa-football/2010/11/19/1824833/2010-college-football-bowl-game-schedule>.

169. *College Bowl Games – 2011–12*, ESPN, <http://espn.go.com/college-football/bowls>.

qualifying BCS conferences, who needed to accomplish far less.¹⁷⁰ The fact is, poor performance is not the reason undefeated non-BCS teams have been barred from national championship and BCS Bowl opportunities. Instead, they have been barred due to a conspired, biased process designed to protect the interests of more powerful programs.

Professor McCann also acknowledges that “the inability of non-BCS-affiliated conferences to affect structural change may be anticompetitive.”¹⁷¹ Professor McCann notes that the BCS Presidential Oversight Committee, which is the BCS’s “ultimate ruling authority,” consists of eight representatives: seven chosen by the six BCS conferences and Notre Dame and one chosen by the five non-BCS conferences.¹⁷² Yet Professor McCann addresses the argument that the BCS maintains monopoly control over the national championship, countering that “FBS teams could, in theory, host [a non-BCS-sponsored national championship game].”¹⁷³ This is a surprising argument, considering that Professor McCann states earlier in his note that “the dominance of the BCS in controlling the production of playoff college football games may, as a practical matter, preclude competition.”¹⁷⁴

C. Anti-Competitive Effects Outweigh Pro-Competitive Arguments.

“The fact of the matter is that the BCS has given access to those [minor] conferences that they never had before.” – Roy Kramer, former SEC Commissioner and godfather of the BCS.¹⁷⁵

In *NCAA v. Board of Regents*,¹⁷⁶ the courts ruled against the NCAA in favor of Oklahoma and Georgia, ushering in an opportunity for major college and university football programs, now known as the BCS, to establish power over the market. Ironically, the same legal arguments used in *NCAA v. Board of Regents* that enabled Oklahoma and Georgia to prevail against the NCAA might now be similarly applied in a BCS antitrust lawsuit. In a rule of reason analysis, the plaintiffs must provide credible evidence of anti-competitive costs upon the market and consumers, as discussed above. The defendant then bears “a heavy burden of establishing an affirmative defense which competitively justifies” these costs.¹⁷⁷ This note considers various defenses for the BCS system and

170. Tim Hyland, *The Bowl Championship Series: Hits and Misses*, ABOUT.COM, <http://collegefootball.about.com/od/thebcs/a/BCS-success.htm>.

171. McCann, *supra* note 146, at 528.

172. *Id.* at 529.

173. *Id.* at 540.

174. *Id.* at 539.

175. Jeremy, *The BCS: Breaking Down the Facts*, BLEACHER REPORT (July 9, 2009), <http://bleacherreport.com/articles/215003-breaking-down-the-facts-of-the-bcs>.

176. 468 U.S. 85 (1984).

177. *United States v. Brown Univ.*, 5 F.3d 658, 673 (3d Cir. 1997).

demonstrates why these defenses fail.

1. He Who Sows Shall Reap

Defense. It should not be surprising that BCS schools should feel a sense of entitlement regarding the Division 1-A football bowl structure. After all, it evolved from the investments, sacrifices, and creativity of traditional powers who abandoned lucrative ties to bowls to make the BCS a reality—not just for themselves but for teams who had never before enjoyed such opportunity. It is primarily through the fan bases of these large powers that extraordinary revenues are generated. While many non-BCS schools struggle to fill smaller stadiums, even during the best seasons, most BCS teams fill their mighty stadiums in the worst of times. According to Harvard College Sports Analysis:

The typical (i.e., average) BCS conference school has 25,533 undergrads, one pro sports team in the area, wins 57% of its games and has a ratio of 55 regular citizens to every student in vicinity of campus. The average non-BCS conference school has 20,462 students, one pro sports team in the area, wins 46% of their games and has 59 regular citizens for every student. While those baselines are similar, the difference is reflected in attendance: the average BCS School attracts 61,000 fans to each home game, while the average non-BCS School[] attracts 24,000 fans to each home game. Although BCS schools having bigger stadiums (the same disparity exists as a percentage of capacity: 92% to 66%) and stronger on field performance (11% difference in winning% is significant but not *that* significant), the most likely reason for the disparity is the tradition of BCS schools and their opponents.¹⁷⁸

In capitalizing on the strength of the market, the BCS simply regards its policies as a reflection of the marketplace. It is also fair to note that since its creation in 1998, the BCS selection process has been opened up several times, demonstrating BCS's efforts to reach beyond its sense of entitlement to share revenues more evenly with non-BCS programs.

Response. In other words, those with market control are justified in establishing a system that entrenches their control. But Division 1-A college football belongs to the nation, not elite teams in the BCS. There is a difference between being a proud competitive member in a market and laying claim to ownership. While the BCS system grants a theoretical opportunity to non-BCS to compete in the national championship, it is not a realistic opportunity precisely because of the major conferences' senses of

178. Alex Koenig, *What Factors Contribute to Attendance in College Football?*, HARVARD C. SPORTS ANALYSIS COLLECTIVE (Jan. 17, 2011), <http://harvardsportsanalysis.wordpress.com/2011/01/17/what-factors-contribute-to-attendance-in-college-football/> (emphasis in original).

entitlement.

Bill Hancock, BCS Executive Director, argues, “It’s not about money. . . . People like to talk about the money, but the fact is the money goes to the teams that are in the games. What’s unfair about that?”¹⁷⁹ The problem is that the selection process for the bowl games is unreasonable. The founding purpose of the BCS was to give the nation a true national championship—to pit the best teams against each other. The automatic bid mechanism cannot be described as anything other than allowing BCS conferences to maintain control over the market. The effect of this mechanism is disproportionate revenue distribution, unequal recruiting opportunities, and a degradation of the quality of bowl games. Until BCS bowl participants are chosen by rankings alone, the system will remain fundamentally antithetical to the spirit of the Sherman Act.

2. Undisputed National Champion

Defense. Herein lies the BCS’s most important pro-competitive argument. Unlike the pre-BCS system, when bowl tie-ins required selecting a somewhat ambiguous national champion from biased polls, the BCS structured ranking process has proven its ability to create an uncontested championship game. The title of champion is determined by the result of this single game, rather than by comparisons of different games. Antitrust law does not require businesses to adopt policies that best serve free market principles, but only that businesses act reasonably with respect to those principles.

Response. While the BCS system produces a game that is widely considered the championship game, it does not guarantee the public a clear national champion. Unlike every other NCAA sport that relies on a playoff system to determine a champion, the BCS employs a largely secretive ranking process that denies opportunity to all but two teams to compete for the national title. It is unreasonable to crown the victor of this game the undisputed national champion while other highly ranked teams finish the season and postseason undefeated.¹⁸⁰

In 2005, the University of Utah wedged open the BCS door by becoming the first team outside the BCS alliance to play in a BCS sanctioned bowl game, resulting in a dominating 35-7 victory over Pittsburgh in the Fiesta Bowl.¹⁸¹ On New Year’s Day 2007, Boise State University rang in the new

179. J.P. Giglio, *BCS All About Control And Money*, NEWS & OBSERVER (Aug. 1, 2010, 2:00 AM), <http://www.newsobserver.com/2010/08/01/v-print/607135/bcs-all-about-control-of-money.html>.

180. Professor McCann points out that “in the twelve years since [the inception of the BCS], the teams ranked number one and number two by the BCS have played each other every time in the postseason.” McCann, *supra* note 146, at 519. But this does not mean that the teams ranked number one and number two deserved those rankings.

181. *Efficient Smith Leads Dominant Win*, ESPN (January 1, 2005) available at <http://scores.espn.go.com/ncf/recap?gameId=250010221> (last visited November 13,

year with one of the most stunning upsets and most exciting games in college football history, defeating the vaunted Oklahoma Sooners in overtime with three unimaginable plays executed to perfection.¹⁸² Both Boise State and Utah finished the years undefeated and neither were given the opportunity to compete for a national championship.

One of the BCS's favorite mantras is "every game counts" because a team typically must win every regular season game to stay in national title contention.¹⁸³ But the premise that perfect performance in each game will result in a shot at the national title is only true for BCS schools. In 2008, Boise State and Utah posted undefeated records and both finished in the AP's top ten list. Utah soundly defeated Alabama in the Sugar Bowl, but Boise State was not invited to a BCS bowl game. In 2009, Boise State and TCU went undefeated and were ranked #6 and #3, respectively. In an apparent attempt to avoid the potential embarrassment of two non-BCS teams winning BCS bowl games, the two teams were pitted against each other in the Fiesta Bowl. Boise State won and finished yet another year undefeated with no chance at a national championship. Against these examples over the last six years, it is difficult to see how the present BCS system can be considered a reasonable means of establishing an undisputed national champion.

3. Bowl Tradition

Defense. Perhaps the most common criticism of the BCS is its automatic selection of lesser-ranked BCS teams for BCS Bowls. However, it is the pro-competitive value in this agreement that ensures that the most popular products are placed into bowl games. While BCS detractors complain about the "unfair" manner in which BCS selects BCS Bowl teams, they overlook one very important point: the team selection process was never designed to guarantee bowl bids to top ranked teams. Instead, the intent was to honor longstanding conference affiliation agreements while also allowing bowl committees the "flexibility to exercise freedom of selection that would create locally attractive games to enhance ticket sales."¹⁸⁴ Just because some might feel this is unfair, does not make it a violation of antitrust law.

Response. Every year, the NCAA Division I Men's Basketball Championship has delivered exciting tournaments that have produced a competitive spirit that is non-existent in the BCS championship process,

2012).

182. *Game History*, FIESTA BOWL, http://www.fiestabowl.org/index.php/tostitos/history_display/36th_annual_tostitos_fiesta_bowl/.

183. See McCann, *supra* note 146, at 520 ("In other words, every regular season game counts, a phenomenon that has been credited with increasing attendance, interest, and financial investment in those games.").

184. *BCS Chronology*, *supra* note 76.

where every team in the tournament has a chance at the national title. A classic example is the 2011 NCAA Division I Men's Basketball Championship, where Virginia Commonwealth and Butler beat traditional powers to make the final four.¹⁸⁵ In the few times that the BCS has allowed a non-BCS team to compete in post-season BCS Bowl games, the market has benefited from some of the most exciting games in college football history.

How many other classic BCS games never materialized because the BCS refused to allow undefeated non-BCS teams to compete in lieu of lesser-accomplished BCS teams who brought duds to BCS Bowls in attendance, television ratings, and revenue? The bottom line is the BCS Bowl selection process has proven itself, time and again, as an inferior alternative to the playoff formats used by all other team sports in the NCAA. The argument above assumes that the traditional bowl system will maximize ticket sales and best serve the public's interest, but why would this only be true for Division I-A college football? Arguably, the public wants, and will pay more for, a system that produces the most competitive matches between the best teams.

The BCS characterizes its bowl selection process as an improvement over the old bowl tie-in system. But an improvement does not mean this new process is reasonable. The net result for the quality of the teams selected is not so different than before the advent of the BCS. The opportunities for non-BCS teams to play in BCS bowl games are severely limited by the BCS exclusionary structure that limits them to a single automatic bid. The BCS has, on multiple occasions, excluded top ranked non-BCS schools from bowl games,¹⁸⁶ depriving the public of potential Cinderella-story upsets and increased interest in college football. How many fans will have to turn their sets off in the middle of a boring BCS games¹⁸⁷ because of a system that prefers BCS conference favoritism to non-BCS competitive excellence?

185. Paul J. Weber, *From First 4 to Final 4*, STOCKTON RECORD, Mar. 28, 2011.

186. See *infra* notes 169–178.

187. Adam Spencer from Bleacher Report ranked the 2012 Championship game between LSU and Alabama as the most boring BCS bowl game in history. Despite being the consensus #1 and #2 teams in the country, “the offensive ineptitude displayed by both teams made this game the hardest BCS game to watch.” Adam Spencer, *Alabama vs. LSU and the Most Boring Games in BCS Bowl History*, BLEACHER REPORT (Jan. 10, 2012), available at <http://bleacherreport.com/articles/1017998-alabama-vs-lsu-and-the-most-boring-games-in-bcs-bowl-history/page/6> (last visited March 26, 2012). Caleb Slinkard from The Commerce Journal commented: “A playoff system wouldn't ensure that we wouldn't see anymore boring postseason games, but it would mean that we would see more meaningful and more exciting games.” Caleb Slinkard, *BCS bowl system has become unfortunate joke*, THE COMMERCE JOURNAL (Jan. 12, 2012), available at <http://commercejournal.com/opinion/x1770107997/BCS-bowl-system-has-become-unfortunate-joke> (last visited Mar 26, 2012). In other words, an eight-team playoff would not leave the next six highest ranked teams thinking, “If we were given a chance, we would have crushed the winner.”

In *NCAA v. Board of Regents*, the court cited lack of consumer responsiveness as a sign of antitrust violations.¹⁸⁸ The BCS selection process denies the best possible games to the public, who in large part disapprove of the BCS system.¹⁸⁹ The collusion of the powerful BCS conferences, which is premised on protecting the bowl tradition, is simply a mechanism for retaining market control. This control diminishes the value of BCS Bowls and disserves the public interest in violation of the spirit of the Sherman Antitrust Act.

4. BCS Creates Funding

Defense. There is good reason why college presidents are not eager for a playoff in Division I-A college football. Exorbitant revenues derived from the BCS system are funding athletic programs like never before in college athletics. Professor Michael McCann argues that “[a] playoff system, in contrast, could enable an underperforming regular season team to wait until the playoffs to put forth their best effort and performance.”¹⁹⁰

Response. This speculative fear does not seem to be supported by evidence from other sports. In fact, CBS entered an eleven-year deal with the NCAA in 2000 for exclusive broadcast rights to the March Madness basketball tournament for \$6 billion, while ESPN bought rights to the BCS Championship from 2011 to 2014 for only \$495 million; a difference of roughly \$380.5 million per year.¹⁹¹ Big Ten commissioner Jim Delany states: “An NFL-style football playoff would provide three to four times as many dollars to the Big Ten as the current system There is no doubt in my mind that we are leaving hundreds of millions of dollars on the table.”¹⁹²

“In 2005, TV executives and unidentified college officials estimated that a 16-team playoff would generate around \$750 million annually, dwarfing the \$220 million the current bowl system generates.”¹⁹³ But the more important point is that this increased revenue is disproportionately favoring the powerful BCS conferences over non-BCS conferences.¹⁹⁴ The cost of the BCS system extends far beyond dollar figures though. In examining the growing commercialism in college football, it is easy to see the mounting risks to longstanding ideals on amateurism.

188. 468 U.S. 85 (1984).

189. See Zimbalist, *supra* note 99, at 8.

190. *Id.*; MANDEL, *supra* note 124, at 25.

191. Michael A. McCann, *Antitrust, Governance, and Postseason Football*, 52 B.C.L. REV. 517, 544 (2011), available at <http://lawdigitalcommons.bc.edu/bclr/vol52/iss2/6>.

192. Mandel, *supra* note 126, at 19.

193. Brendan Frazier, *BCS Bigotry, Corruption, And Scandal*, SPORTS BUSINESS DIGEST (Jan. 20, 2011), available at <http://sportsbusinessdigest.com/bcs-bigotry-corruption-and-scandal/> (last visited Mar. 26, 2011).

194. Evans, *supra* note 143.

Despite rampant commercialization of college athletics, the NCAA still clings to its primary organizational purpose of safeguarding “intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”¹⁹⁵ In attempting to maintain a “clear line of demarcation between intercollegiate athletics” and commercialism,¹⁹⁶ the NCAA conducts playoff championships that allow teams to determine champions. However, the same cannot be said about the BCS.

Unlike the NCAA, which defines its primary motive as protecting the sanctity of amateurism, it seems that the primary motive of the BCS is to preserve the sanctity of monopolized commercialism. Its primary goal appears to be guaranteeing BCS bowl bids, the national title, and exorbitant revenues to favored BCS teams. With this profit motive guiding its purpose, it should not be surprising to find a championship process that is fully controlled by the BCS using biased agreements, biased polls, and secret computer formulas.

The hidden costs of the BCS’s underlying profit motive are becoming increasingly apparent through the corruption scandals plaguing BCS Bowls like the Fiesta Bowl,¹⁹⁷ star athletes like Cameron Newton,¹⁹⁸ and elite BCS programs like Ohio State and Auburn.¹⁹⁹ The emphasis is no longer on the welfare of the student body, school, athletes’ education, community or the fans. Instead, the emphasis is on big money interests cashing in on the “amateur” college athletics market.

The commercial aspect of the BCS case also impacts its comparison to NCAA precedents. In *NCAA v. Board of Regents*,²⁰⁰ the Court acknowledged a degree of latitude for NCAA anti-competitive restraints aimed at maintaining amateurism in college sports. The deprivation of opportunity and funding to non-BCS schools has the opposite effect of encouraging amateurism in college football. It not only imposes a potentially lethal cost upon non-BCS programs, but threatens the functional

195. Letter from Myles Brand, President, NCAA, to William Thomas, Chairman, House Comm. on Ways and Means (Nov. 13, 2006), *available at* http://www.nacua.org/documents/NCAALetter_TaxExempt_ResponsetoHouseWaysMeansCmte.pdf (last visited Apr. 02, 2011).

196. *Id.*

197. Ginger Rough, *Fiesta Bowl Scandal Prompts Senate Ethics Inquiry*, THE ARIZONA REPUBLIC (Apr. 1, 2011), *available at* <http://www.azcentral.com/community/scottsdale/articles/2011/04/01/20110401fiesta-bowl-investigation-fallout.html>.

198. Dennis Dodd, *NCAA President: I'd Be 'Happy To Help' Create Playoff*, CBS SPORTS (Mar. 2, 2011), *available at* <http://www.cbssports.com/collegefootball/story/14761655/ncaa-president-id-be-happy-to-help-create-playoff>, (last visited Apr. 01, 2011).

199. Thomas O'Toole, et al., *Ex-Auburn Players Tell Of Cash Handshakes, Sexual Favors*, USA TODAY (Mar. 31, 2011), *available at* http://www.usatoday.com/sports/college/football/sec/2011-03-30-auburn-payments-hbo-real-sports_N.htm.

200. 468 U.S. 85 (1984).

integrity of the concept of amateurism in college football.

5. Non-BCS Conferences Endorse BCS

Defense. Non-BCS conferences sign agreements that allow them to participate in the BCS system. It would seem odd if one of these conferences alleged an antitrust claim against an organization in which the conference is a member.

Response. This defense, which seems best characterized as an issue of standing, is beyond the scope of this note. But it is worth noting that this defense cuts both ways. Boise State President, Bob Kustra, told the *Idaho Statesman* that he was compelled to sign with the BCS because “[e]verybody understood that there are so many financial ramifications to not signing it.”²⁰¹ While non-BCS conferences receive significantly less revenue than BCS conferences, the little that they receive is an indispensable part of their budget that they would be hard-pressed to earn outside the system, due to the BCS conference’s overwhelming market control. University of Utah President, Michael Young, stated that “[i]f a conference wishes to compete at the highest levels of college football, and the only postseason system in place for that is the BCS, no one conference can afford to drop out and penalize its football programs and student-athletes.”²⁰²

It may be the case that a party to the BCS system could not claim standing to sue, but that is irrelevant to whether the BCS system is unreasonably restraining trade.

On April 12, 2011, a collection of lawyers and professors of law and economics sent a letter to the Antitrust Division of the Department of Justice requesting an investigation of the BCS as “a cartel that controls distribution of competitive opportunities and benefits associated with major college football’s post-season.”²⁰³ The letter cites in support of its claim: the de facto exclusion of non-BCS schools from the national game due to the BCS’s “mathematically dubious rating system,” the discriminatory nature of the automatic bid mechanism, and the requirement that championship contenders not invited to the national championship game “must accept other BCS bowl invitations rather than join a rival post-season system.”²⁰⁴ If the Justice Department agrees with these contentions, it will be no hindrance to antitrust prosecution that non-BCS schools were

201. *Mountain West, WAC Sign BCS Contract*, MOONDOGSPORTS.COM (Jul. 15, 2009), <http://moondogsports.com/2009/07/15/mountain-west-wac-sign-bcs-contract/> (last visited Mar. 26, 2011).

202. *Id.*

203. Letter from Roger Abrams, Professor, Ne. Univ., et al, to Christine Varney, Attorney Gen., Dep’t. of Justice, Antitrust Div. (April 12, 2011), *available at* <http://www.oskr.com/pdf/letterto DOJ04122011.pdf> (last visited May 11, 2011).

204. *Id.*

economically forced to sign BCS agreements.

6. A Chance Where There Once Was None

Defense. Unlike the past, the BCS process has opened opportunities for less affluent programs to compete in two of the four BCS bowls by finishing in the top twelve of the national ranking. In fact, it is solely because of major conferences, which forfeited longstanding traditional bowl agreements that non-BCS teams are able to participate as never before in the national limelight for major bowl games.²⁰⁵

Response. This token opportunity touted by BCS proponents fails to satisfy any reasonable standard of promoting competition. One scholar argues that this opportunity was in response to an inquiry by the United States Justice Department, which was commenced after Louisville posted a 1993 season record of 7-1, achieved a top ranking, but was automatically excluded from BCS bowl games.²⁰⁶ The illusory nature of this opportunity was apparent during the 1996-97 season, when BYU posted a 13-1 record, was ranked fifth, but was not invited to a BCS bowl game.²⁰⁷ To make matters worse, BYU was ranked higher than four teams that competed in BCS bowl games that year.²⁰⁸

Since 2004, there have been more undefeated non-champions than undefeated champions.²⁰⁹ The following is a non-exhaustive list of instances in which the BCS has failed to give an undefeated team an opportunity at the title. Note that, except for TCU's 2009 and 2010 seasons, the undefeated team ended the regular season ranked outside the top-four and, therefore, would not have been invited to a four-team playoff:

1998: The Tulane Green Wave and the Tennessee Volunteers finished the regular season as the only undefeated teams. Tennessee played 11-1 Florida State in the BCS National Championship Game while Tulane did not even get a BCS bowl invite. Instead, they handily defeated BYU in the Liberty Bowl 41-27, to finish the season 12-0 and ranked seventh in the polls behind BCS teams with inferior records.²¹⁰ Tulane ended the regular season ranked #10.²¹¹

205. Graham Spanier, *Inclusive BCS Passes Antitrust Test*, NCAA NEWS (Sept. 1, 2003), available at <http://www.ncaa.org/news/2003/20030901/editorial/4018n27.html>.

206. Zimbalist, *supra* note 99, at 8.

207. *Id.* at 9.

208. *Id.*

209. Mike MacConnell, *System Failure: 12 Times the BCS Got it Wrong*, BLEACHER REPORT (Jun. 3, 2010), available at <http://bleacherreport.com/articles/400603-system-failure-12-times-the-bcs-got-it-wrong>.

210. *Id.* at 2.

211. *1998-1999 College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/1998_archive_bcs.html (last visited August 25, 2012).

1999: The Marshall Thundering Herd finished the regular season 12-0 and was crowned the MAC Champions. But, like Tulane the year before, Marshall would not even receive a BCS bowl bid. Like Tulane, they handily defeated BYU 21-3 in the Motor City Bowl, finishing the season 13-0.²¹² Marshall ended the regular season ranked #12.²¹³

2001: BYU entered its final game undefeated and ranked No. 12, but was informed by the BCS that, regardless if they continued to be undefeated or not, they had been “released” from consideration for a BCS bowl in lieu of defeated BCS teams.²¹⁴ This was because, despite a 12-0 record, BYU was ranked #12.²¹⁵

2004: Utah went undefeated. Though left out of the championship picture, they would be the first non-BCS school to compete in a BCS Bowl game, which resulted in their complete domination of 20th ranked Pittsburgh, 35-7.²¹⁶ Utah ended the regular season ranked #6.²¹⁷

2006: Boise State and Ohio State were the only undefeated teams, but Ohio State got the nod to play in the national championship, losing to 11-1 Florida 41-14. Meanwhile, the Broncos upset powerhouse Oklahoma 43-42 in overtime on the infamous Statue of Liberty play. Boise State was the only team to finish undefeated that year, but was given no chance to compete for the national title.²¹⁸ Boise State finished the regular season ranked #8.²¹⁹

2007: Hawaii went undefeated without any chance of competing for the national title. They would go on to be the only non-BCS team to ever lose a BCS game.²²⁰ Hawaii finished the regular season ranked #10.²²¹

2008: Undefeated Utah had to watch two 12-1 BCS teams play for the

212. MacConnell, *supra* note 209, at 3.

213. 1999-2000 *College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/1999_archive_bcs.html (last visited August 25, 2012).

214. Pete Misthaufen, *Mountain West Conference: Time For Expansion*, BLEACHER REPORT (Jan. 29, 2010), <http://bleacherreport.com/articles/335401-a-call-for-mountain-west-conference-expansion>.

215. *Bowl Championship Series Standings*, THE NATIONAL FOOTBALL FOUNDATION AND COLLEGE HALL OF FAME, INC. (Dec. 3, 2001), *available at* http://www.bcsguru.com/images/bcs_2001.pdf.

216. MacConnell, *supra* note 209, at 6.

217. 2004-2005 *College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2004_archive_bcs.html (last visited August 25, 2012).

218. MacConnell, *supra* note 192, at 7.

219. 2006-2007 *College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2006_archive_bcs.html (last visited August 25, 2012).

220. MacConnell, *supra* note 209, at 8.

221. 2007-2008 *College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2007_archive_bcs.html (last visited August 25, 2012).

national championship. Instead, the Utes easily defeated the Alabama Crimson Tide 31-17 in the Sugar Bowl, finishing 13-0. The Utes were not the only undefeated team in 2008.²²² Utah finished the regular season ranked #6.²²³

2008: For the second time in three seasons, the Broncos went undefeated. But, despite proving their worth against Oklahoma, they were again denied a chance at the national title. They were even denied a BCS Bowl game bid.²²⁴ Boise State finished the regular season ranked #8.²²⁵

2009: The Broncos and TCU both went undefeated. The two teams were matched against one another in the Fiesta Bowl; a tactic some have called a fail-safe strategy by the BCS to avoid the catastrophic potential of both teams defeating BCS teams. Boise State won the game, becoming the second team in NCAA history to finish 14-0.²²⁶ TCU and Boise State finished the regular season ranked #4 and #6, respectively.²²⁷

2010: TCU went undefeated and was denied any chance to compete for the national title. They did, however, defeat Wisconsin in the Rose Bowl.²²⁸ TCU finished the regular season ranked #3.²²⁹

After TCU's Rose Bowl victory, TCU quarterback, Andy Dalton, commented that he "felt like [they] were playing for all the non-[BCS]s."²³⁰ This mentality of BCS vs. non-BCS reflects shortcomings of a BCS process that is founded upon policies of exclusion. Hall of Fame coach, Bobby Bowden, was asked whether he thought Boise State deserved consideration for the national championship game. He responded, "If a team has not lost, how can you prove they're not the best?"²³¹ Strangely,

222. MacConnell, *supra* note 209, at 9.

223. 2008-2009 College Football Season Final BCS Standings, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2008_archive_bcs.html (last visited August 25, 2012).

224. MacConnell, *supra* note 209, at 10.

225. 2008-2009 College Football Season Final BCS Standings, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2008_archive_bcs.html (last visited August 25, 2012).

226. MacConnell, *supra* note 209, at 12; *Fake Punt, TCU's INTs Spark Boise State to 14-0, Fiesta Win*, ASSOCIATED PRESS (January 4, 2010) <http://scores.espn.go.com/ncf/recap?gameId=300042628>.

227. 2009-2010 College Football Season Final BCS Standings, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2009_archive_bcs.html (last visited August 25, 2012).

228. Gregg Patton, *TCU Hands Another Goliath A Loss*, THE PRESS-ENTERPRISE, available at http://www.pe.com/columns/patton/stories/PE_Sports_Local_D_patton_02.ff6601.html.

229. 2010-2011 College Football Season Final BCS Standings, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2010_archive_bcs.html (last visited August 25, 2012).

230. *Id.*

231. Jon Solomon, *Q&A with Bobby Bowden*, AL.COM (Sept. 10, 2010), http://www.al.com/sports/index.ssf/2010/09/qa_with_bobby_bowden.html.

Bowden later supported the BCS system over a playoff system, describing himself as “old school.”²³² But when the old school system constitutes an unreasonable restriction of fair trade, inimical to the competitive ideal underlying Bowden’s comment, then it is time to move on.

Much focus is given to the harm done to non-BCS programs due to the discriminatory BCS selection process, but arguably the primary victims are the student athletes at these programs. While the school can continue to hope for a shot at the national title years, maybe decades in the future, college athletes have only four or five years to play in the big game. America was born on the dreams of the oppressed and antitrust law can be viewed as a legislative effort to make those dreams realizable. One of the best places to observe the aspirant American culture is on college football fields, where thousands of student athletes compete for recognition. Daryn Colledge and Korey Hall, who play for the Green Bay Packers, were leaders on the Boise State team that shocked the football world against the Oklahoma Sooners in the 2007 Fiesta Bowl. But for every Daryn Colledge or Korey Hall, how many great non-BCS players are overlooked, in large part due to the BCS’s maltreatment of non-BCS conferences?

7. Recently Adopted Playoff System

Defense: In 2014, the BCS will implement a four-team playoff system that will address many of the concerns presented in this note.

Response: A four-team playoff might seem like a step in the right direction, but this particular four-team playoff is a step in the *wrong* direction. First, limiting the playoffs to four teams is a fundamental error, as demonstrated in the previous subsection, which lists many instances in which an undefeated team failed to rank in the top four.²³³ Consider also that the regular seasons in 2004-05 and 2009-10 ended with five undefeated teams.²³⁴ In cases like these, a four-team playoff will still leave undefeated players with the terrible realization that, despite their best efforts on the field, the system had defeated them even before the season began.

Still, it is reasonable to conclude that, even in such cases, the four-

232. *Id.*

233. Note that the discussion in subsection C.6 of this note lists ten controversial seasons and that, of those ten, the four-team playoff would only have addressed one of the controversies fully: TCU’s 2010 season. An eight-team playoff would have addressed six of the most recent seven controversies, the only exception being Hawaii’s 2007 season. This is certainly a substantial enough improvement to warrant one more tier to the playoff format.

234. The following teams were undefeated at the end of the 2004-05 regular season: USC, Oklahoma, Auburn, Utah, and Boise State. *2004-2005 College Football Season Final BCS Standings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2004_archive_bcs.html (last accessed August 25, 2012). The following teams were undefeated at the end of the 2009-10 regular season: Alabama, Texas, Cincinnati, TCU, and Boise State. Though they were the only team to go undefeated in both regular seasons, Boise State was ranked lowest each time.

team playoff does not prejudice these players any more than if there was no playoff at all. But the second problem with the adopted system is why the system is potentially worse than the present system: the selection method. Under the present BCS model, teams are ranked according to their average scores in the Harris Interactive Poll, the Coaches Poll, and six computer rankings.²³⁵ The Harris Interactive Poll is decided by 115 voting members, the Coaches Poll is decided by 59 voting members, and the computer rankings are supposed to be controlled solely by statistics.²³⁶

Under the adopted system, millions of dollars in revenue and the title hopes of so many teams and players will be in the hands of a single committee. BCS executive director Bill Hancock stated that the committee will resemble the NCAA March Madness selection committee,²³⁷ which is a ten-member committee.²³⁸ Of course, the glaring difference is that March Madness is a sixty-four team playoff, so teams that were not considered strong enough to make the cut could hardly claim to be title contenders. A four-man playoff cannot rely upon the same rationale. Notre Dame athletic director, Jack Swarbrick, explained that the committee will publish weekly top-20 rankings, stating: “We didn’t want the top four teams to just come out of the blue at the end of the season.”²³⁹ While this is a noble effort to eliminate surprise from the selection process, the committee will not escape accusations of bias and corruption for snubbing teams with arguably equal or better records than the “fortunate four”.

IV. LESS RESTRICTIVE ALTERNATIVES

If the courts arrive at a rule of reason judgment that BCS anticompetitive activity outweighs pro-competitive benefits, the plaintiff may demonstrate that the benefits may be achieved through a less restrictive alternative.²⁴⁰ This note favors replacing the anti-competitive restraints that currently favor BCS conferences with a national championship playoff that affords

235. *BCS Explained*, COLLEGEFOOTBALLPOLL.com, http://www.collegefootballpoll.com/bcs_explained.html (last accessed November 12, 2012).

236. *Id.* As noted earlier, the lack of transparency regarding the computer ranking algorithms creates the potential for unchecked bias and error.

237. Dan Wolken, *Playoff Selection Committee Will Resemble Basketball's*, USA TODAY, September 19, 2012, <http://usatoday30.usatoday.com/sports/ncaaf/story/2012/09/19/playoff-selection-committee-will-resemble-basketballs/57808388/1> (November 12, 2012).

238. *Meet the NCAA Men's Division I Selection Committee*, BRACKETOGRAPHY.com, <http://www.bracketography.com/selectioncommittee.htm> (last accessed November 12, 2012).

239. Asher Feldman, *Playoff Selection Committee to Release Top-20 Ranking Starting Midyear*, BCSKNOWHOW.com, June 27, 2012, <http://www.bcsknowhow.com/playoff-selection-committee-to-release-top-20-rankings-starting-midyear> (last accessed November 12, 2012).

240. *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977)

all 120 Division I FBS football teams an equal opportunity to compete. Many top college football minds, such as ex-Florida coach Urban Meyer and Penn State Coach Joe Paterno, believed that the issue could be resolved with a playoff.²⁴¹ Texas coach Mack Brown also voiced disapproval of the BCS system: “To me, if everyone wins out, there is going to be about five one-loss teams, and that’s more reason to look at a different system. Somebody is going to be treated unfairly.”²⁴²

A. Continuity Ranking System

The first step to establishing a fair playoff is to create a more transparent method of ranking teams. As discussed above, the current ranking system employed by the BCS is mostly kept secret from the public. Even despite this secrecy, a dedicated journalist managed to spot a critical error,²⁴³ which illustrates the potential for injustice if one considers how many errors might persist undetected. It is also critical that the ranking system eliminates much of the ambiguity surrounding pre-season rankings.²⁴⁴

One possible method of eliminating ambiguity would be to equate preseason rankings to the final rankings of the previous year. While such a method would entirely eliminate the ambiguity of preseason rankings and preserve continuity between seasons, it does not account for recruiting strength and other changes that occur between seasons. But no system will perfectly rank teams’ preseasons, which is why a ranking system should give great weight to what occurs on the field and be capable of giving a low pre-season ranked team the opportunity to climb the ladder quickly in a single season.

The following is an example of such a system. First, assign each team a certain number of rank points equal to the total number of teams minus the team’s preseason ranking. For example, a team ranked number one out of 120 teams would have 119 rank points. The winner of a game would earn a certain number of points and the loser would lose that same number of points. Division rankings could be determined solely on how many points a team has; higher point teams enjoy higher rankings.

To calculate the points, assign each game a base value of points equal to the square root of the total number of teams (just under eleven in the case of 120 teams). There needs to be an incentive for teams to play difficult games. Thus, a bonus/deduction can be added depending on whether the higher ranked team lost/won. For example, the bonus/deduction could be the difference of the teams’ rank points divided by the square root of the total number of teams.²⁴⁵

241. Solomon, *supra* note 231.

242. *Id.*

243. See MANDEL, *supra* note 124.

244. See Staple, *supra* note 129.

245. The base value of the game and the denominator for the bonus/deduction is

The bonus/deduction rewards teams who play tough schedules. Clearly, it would be in a team's best interest if its future opponent accumulated as many points as possible before they met, since that would maximize a potential bonus or minimize a potential deduction. But what if team A beats a lower ranked team near the beginning of the season and that opponent goes on to win the rest of its games against high ranked schools? Then it stands to reason that the opponent should have had a higher number of rank points near the beginning of the season and that team A should have gained more from its early season win. Accounting for this "hindsight correction" is quite feasible using techniques from linear algebra.²⁴⁶

There are several benefits to a system such as this. First, it is entirely clear from a series of games what will be each team's point total and, consequently, its ranking. This ranking system is determined solely by results on the field, leaving teams with a clear perspective on where they stand if certain conditions are met. If one knows who will win all the upcoming games, one can use a computer program to state with certainty the next rankings for the entire division.

Second, this system dispenses with categories altogether and treats analogous games equally. If two bottom-ranked teams play each other, the same number of points is on the line as if two top-ranked teams play each other. Every ranking makes a difference in the calculation, thus there is continuity of benefits gained by challenging a team with even a slightly higher points total. If a team continues to win games against similarly ranked opponents, it will steadily rise at the same rate as other equally successful teams regardless of their preseason ranking. The system also preserves continuity between seasons, so that no team suddenly rises or falls due to ambiguous standards. The continuity of the calculations is critical to ensuring fair competition.

Third, teams are encouraged to schedule tough competition. The bonus/deduction is carefully formulated so that a top team who plays a last place team gains almost nothing. In a league with 121 teams, for example, the base value for each game would be eleven. If the #1 team beats the #121 team, the deduction would be 10.954, leaving only 0.046 points of the

more or less arbitrary. I chose the square root of the number of the teams so that a game in which the top ranked team beats the bottom ranked team would yield no point difference for either team. That is, the deduction would entirely counteract the base value. If the bottom ranked team won, the allocated points would be double the base value. I wrote a computer program to analyze a 10-game, 120-team season. It confirmed that, with these values, a team that is ranked worst preseason can still finish the season #1 even if there are top-ten teams that have only a few more losses.

246. This note originally included an appendix mathematically proving the viability of the "Continuity Ranking System" proposed here, along with a computer-generated table listing the results of a hypothetical season of ten games and 120 teams, which demonstrated that even if a team is ranked last preseason, it can climb to first place even when top-twenty-five teams only have a few more losses. But, this note is a bit lengthy as it is.

original eleven base value points. This encourages teams to play teams that are at or above their ranking and reduces the prospect that teams will pad their win records by scheduling easy games.

Probably the strongest objection to this system would be that it does not take into account all the fine nuances of ranking teams. How close was a particular game? Was it a fluke? How many star players were injured? Most of these nuances, however, will inevitably include human bias and the politics of college sports that has prejudiced so many non-BCS schools. Such an objection seems to be nothing more than double-speak for a desire to maintain control over which teams deserve preferential treatment. Fair competition requires clear rules that are objectively applied. Unless Division I-A college football implements a playoff system as extensive as other NCAA sports, it must use a fair ranking system to determine which teams will be given a shot at the national title.

B. Eight-Team Playoff

According to a *Sports Illustrated* poll, 90% of college football fans disapproved of the BCS system.²⁴⁷ This note is sympathetic to concerns that a 16-team playoff would increase risks of injury, pose significant logistical challenges, and cut into academic time. An eight-team, formatted properly with objective rankings, would reduce these concerns while still offering undefeated teams a shot at the national championship:

- 1) Begin season the last week of August; play first playoff game during holiday break
- 2) Allow one week between games (bowl schedules remain unaffected)
- 3) Limit season to 11 games: 7 in-conference; 4 out-conference
- 4) Select playoff teams from the eight top-ranked teams
- 5) Allow rankings to determine home field advantage

The newly adopted playoff system will rotate semi-final games between six bowls, while the national championship will be held at a neutral location. This is precisely the number of bowls required to host an eight-team playoff: four bowls for quarter-final games, two bowls for semi-final games, and one national championship. The six bowls can rotate between quarter- and semi-final games just as they are now scheduled to rotate semi-final games. Thus, each bowl will share in the financial windfall that the playoff system will generate. Bowls would be wise to secure their position as part of the playoff series since, as one commentator has noted, “qualifying for the playoff will be so important that achieving the equivalent of what is currently a BCS bowl berth may no longer hold the

247. Dan Wetzel, *Wetzel's Playoff Plan: Money Talks*, RIVAL.COM (Dec. 7, 2010), <http://rivals.yahoo.com/ncaa/football/news?slug=dw-ncaafplayoff120709> (last visited Mar. 28, 2011).

same meaning.”²⁴⁸

Critics remark, and this note acknowledges, that even an eight-team playoff has the potential of denying undefeated teams a chance at the national championship. Thus, it is critical to implement a ranking system like the proposed continuity ranking system.

V. CONCLUSION

This note has presented the BCS issue as it might play out in a courtroom. But sometimes the issues can be more plainly expressed by those on the street who are most affected. In an effort to present a complete perspective, this note concludes with what might be called a tailgate discussion between those who favor and those who oppose the BCS.

A. BCS Perspective

The BCS antitrust issue is in the process of blowing away with the hot air it came in on. It is not a violation of antitrust law because the BCS merely created a product where none previously existed. The BCS does not pretend to be anything other than what it was intended to be: a Bowl Championship Series for determining two teams for the “BCS National Championship.” It does not call itself the NCAA National Championship or anything else. By having automatic bid conferences, the BCS is openly stating that it is their right to pick from their favored conferences. And though some might find this unfair, there is nothing that requires any team to be a part of the BCS. Likewise, there is nothing to prevent the NCAA, non-BCS teams, or any other entity from forming their own championship bowl selection process.

Also, a BCS antitrust lawsuit has no legs since teams like Boise State, by virtue of its poor recruiting each year, will come and go. But even if these teams do not fold, the BCS can neutralize non-BCS antitrust threats by absorbing the most successful teams into the BCS, like they did with TCU and Utah this last year²⁴⁹ and Boise State this year.²⁵⁰

A BCS antitrust lawsuit certainly cannot be premised on discrimination, oppression, and unfairness. It is simply about supply and demand; market share and revenue generation. Not just for the big programs that made it all possible, it is for the little guys too. As the University of Nebraska

248. Stewart Mandel, Sports Illustrated, September 25, 2012, http://sportsillustrated.cnn.com/2012/writers/stewart_mandel/09/25/bcs-playoff-seventh-bowl/index.html?sct=cf_bf4_a8 (last accessed November 12, 2012).

249. TCU joined the Big East in late 2010 and Utah joined the Pac-12 in early 2011.

250. Andy Katz, *Big East introduces 5 new schools*, ESPN.COM (Dec. 8, 2011), http://espn.go.com/college-sports/story/_/id/7327683/big-east-conference-introduces-boise-state-broncos-san-diego-state-aztecs-houston-cougars-smu-mustangs-ucf-knights (last visited Mar. 26, 2012).

Chancellor Harvey Perlman commented at a hearing before the Senate, the BCS “may seem unfair and it may very well be unfair. That’s the way the world is, I’m afraid.”²⁵¹

But, if you really want to make the antitrust issue about “fairness,” BCS teams would tell you that “fairness” is about being justly compensated for being the teams that generate most of the revenue for the market. Television stations and bowls would argue that “fairness” is about whatever maximizes ratings and bowl attendance. This so-called BCS caste system existed long before your Johnny-come-lately non-BCS programs. It does not attend to the few, but instead the multitudes of BCS fans that actually sustain the television ratings, gate receipts, market enthusiasm, and revenues. So, in an antitrust lawsuit, “fairness” would be defined as whatever best serves consumers. In assessing “who gets this done,” one need look no further than game attendance records. In serving the greater needs of the market, what is good for the BCS is good for America. For this reason, non-BCS teams are undeserving of lucrative bowls, which college presidents know.

B. Non-BCS Perspective

The BCS issue will not go away for the same reasons antitrust law brought behemoths like American Tobacco and Standard Oil to their knees. The claim that the BCS created a market where one did not previously exist is flawed. The BCS did not create bowl football, but instead hi-jacked it. It is a single market for which there is no substitute.

The BCS ranking process, proven to be corruptible and flawed, refutes any claim that the BCS has created a process for determining a legitimate national champion. Every other team sport in America has a playoff to determine its champion, not by secret BCS formulas, but by teams competing on the field. As such, the current BCS process can never conclusively determine the nation’s greatest team.

The disproportionate revenue distribution to BCS schools has nothing to do with market forces. From 2007 through 2010, non-BCS teams have arguably played in more exciting BCS Bowl games with higher television ratings, attendance, and rankings than the Big East and the ACC, yet they received far less. This does not include the many times less qualified BCS teams were selected over higher ranked, more marketable non-BCS teams.

Imagine any other mega-corporation in America conspiring to impose boycotting strategies upon weaker competitors who, by the monopolist’s own ranking process, bring arguably superior products to the market. Through 2011, Utah, Boise State, and TCU never lost to a BCS team in a

251. Dana Milbank, *Milbank: ‘Utes Play Huskers In The Orrin Bowl*, UTAHPOLICY.COM (July 9, 2009), http://www.utahpolicy.com/featured_article/milbank-utes-play-huskers-orrin-bowl.

BCS Bowl—ever. And therein lies the greatest argument in favor of an antitrust judgment against the BCS, debunking the non-BCS inferiority myth. The begrudged signing of the BCS/ESPN agreement by college presidents does little to nullify unlawful antitrust elements in the agreement. Rather, the agreement exposes the BCS's monopolistic might over disadvantaged conferences.

If an antitrust lawsuit ever materializes, it will be because the BCS succumbed to its own greed-begets-greed design. The 2011 headlines are inundated with stories about corruption in BCS Bowls and top BCS college football programs. Former BCS college athletes are coming forward. The basic corrupt design of the BCS not only hurts non-BCS teams, but the entire college football market, including student-athletes, colleges and universities, communities, and fans. For this reason, the courts will be compelled to review monopolistic market mechanisms that suppress weaker competition through discriminative anti-competitive subjugation.

As with the *Standard Oil* antitrust case, which resolved the meaning of the Sherman Act two decades after it was passed,²⁵² it might take time for the wheels of antitrust justice to overcome inertia, but it is nonetheless undeterred. As non-BCS programs continue to set their sights on defeating the BCS at its own game on the field, the law will inevitably gain momentum for protecting their right to compete for the American dream.

252. The Sherman Antitrust Act was passed in 1890, but *Standard Oil Co. v. United States* was not decided until 1911.

TEXTUALISM’S LAST STAND: A REVIEW OF SCALIA AND GARNER’S *READING LAW*

GREGORY BASSHAM*

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In recent years, there has been a marked shift in the way many judges interpret statutes and constitutions. Instead of looking to lawmakers’ “intent” or “purpose”—the long-standard watchwords—judges increasingly say they are looking for the “original public meaning” of legal texts. This view, roughly that legal text means what a typical reader at the time of enactment would have understood it to mean, is known as “textualism.”¹ The primary architect of this textualist turn in the law is Supreme Court Justice Antonin Scalia.

In *Reading Law: The Interpretation of Legal Texts*,² Scalia has teamed up with the distinguished lexicographer and usage expert, Bryan A. Garner, to write a thick, hard-punching, and highly readable book. It is an odd-couple partnership in some ways—Scalia, the witty, pugnacious, conservative icon; Garner, the tweedy, scholarly, pro-choice, pro-gay-marriage wordsmith. Yet the authors’ strengths (and weaknesses) complement each other in a kind of literary and dialectical *feng shui*. The book may not be the “great event in American legal culture”³ that Judge Frank Easterbrook touts it to be in his glowing Foreword. But it is fair to say that it may become a minor classic.

In addition to readability, the book has other notable virtues. First, it modifies and develops Scalia’s textualist theory in ways that make it both

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1. Some commentators call this view “original textualism,” wishing to distinguish it from forms of textualism that do not view meaning as fixed at the time the text was written or enacted. Like Scalia and Garner, I shall ignore that distinction here.

2. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) [hereinafter *READING LAW*].

3. *Id.* at xxvi.

more determinate and less vulnerable to liberal hijackers (the so-called “new textualists,” discussed below). Second, it contains the fullest statement to date of Scalia’s criteria for upholding prior holdings that cannot be squared with original meaning. Third, it contains a detailed, lucid, and often entertaining treatment of traditional judge-crafted interpretive maxims—so-called “canons of construction.” Finally, it contains a truly superb bibliography of books and articles on legal interpretation.

The major weaknesses of the book, I shall argue, are first, its inadequate defense of textualism vis-à-vis its major rivals; second, a variety of confusions and inconsistencies that result from faulty views of language and a failure to distinguish various relevant senses of textual “meaning;” and third, problems with the authors’ attempted merger of textualism with the interpretive canons.

I turn first (in Part I) to a summary of the central argument of the book, highlighting ways in which the account modifies or fleshes out previous versions of Scalia’s textualist theory. In Part II, I explain why the argument is unsuccessful and why no form of textualism is ultimately defensible.

I. THE FAIR READING APPROACH: WHAT AND WHY

Scalia and Garner argue for an approach to reading legal texts that they call “the fair reading method.” The method has three parts: textualism (an interpretive theory that equates the meaning of legal texts with original public meaning); a theory of valid canons (judge-made interpretive rules or presumptions that both jibe with textualism and its underlying values and provide greater certainty and objectivity in legal interpretation than textualism left to its own resources can); and a theory of stare decisis, which Scalia and Garner describe as an “exception” to textualism “born not of logic but of necessity.”⁴

By “textualism,” Scalia and Garner mean the thesis that “[i]n their full context, [legal] words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.”⁵ They explain this definition more fully as follows.

First, the theory is “textualist” because it emphasizes the conventional meaning of legal language—what the words actually *say*—as opposed to

4. *Id.* at 413–14.

5. *Id.* at 16. Query: Why limit novel applications or changing denotations to technological innovations? Most general terms are elastic enough to encompass new discoveries and unanticipated applications (as “star,” for example, is now understood to embrace neutron stars). Scalia and Garner are evidently concerned that if this referential elasticity is extended to contestable general terms such as “justice,” “equal protection,” and “cruel and unusual punishments,” judicial lawmaking is invited.

what the drafters or enactors of the language may have meant or intended.

Second, textualists recognize that words have determinate meaning only in context. For instance, the phrase “keep off the grass” means one thing on a yard sign and something quite different if offered as a piece of advice by a substance abuse counselor.⁶ Thus, the meaning of legal language cannot be determined simply by looking up words in a dictionary. Context must also be considered.

Scalia and Garner are careful, however, to limit the kinds of context legal interpreters may take into account. Broader issues of social, historical, or cultural context are excluded (presumably because they invite subjectivity or manipulability). So too, is any “inside” information about lawmakers’ intentions, purposes, or expectations not apparent from the words themselves. All that may be considered by way of context are (a) “a word’s immediate syntactic setting—that is, the words that surround it in a specific utterance,” (b) “a word’s historical associations acquired from recurrent patterns of past usage,” and (c) the evident purpose of the text as “gathered only from the text itself”—what Scalia and Garner call the “textual purpose” of the language.⁷ To give it a name, suppose we label this restricted notion of context “immediate-utterance context.”

By “reasonable people” Scalia and Garner don’t mean actual individuals who shared a particular textual understanding at the time when a given text achieved the force of law. This would require a “collective intent,” which they claim is “pure fiction.”⁸ Rather, the relevant standard is analogous to the hypothetical “reasonable person” construct in tort law. The meaning of a legal text is its original public meaning, and the determinant of original public meaning is an “objectivizing construct,” the “reasonable reader,” whom in addition to being reasonable and a reader,⁹ is presumed to be:

fully competent in the language; fully conversant with any relevant

6. See Gerald Graff, “Keep Off the Grass,” “Drop Dead,” and Other Indeterminacies: A Response to Sanford Levinson, 60 *TEX. L. REV.* 405, 407–08 (1982).

7. See *READING LAW*, *supra* note 2, at 33 (emphasis added). This restrictive approach to linguistic context is new in Scalia’s jurisprudence. In previous writings, he has permitted more wide-ranging forays into context, including the entire “*corpus juris*” and historical and cultural contexts, in order to discover the “import” or semantic content that vague or ambiguous language would have had to reasonable readers at the time of enactment. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17, 38, 144 (Amy Gutmann ed., 1997) [hereinafter *INTERPRETATION*]. In practice, Scalia and Garner do permit wider explorations of context, as is clear in their discussions of gun control and capital punishment. See *READING LAW*, *supra* note 2, at 400–01.

8. *READING LAW*, *supra* note 2, at 392.

9. Slight quibble: Texts can be heard as well as read. See JORGE J. E. GRACIA, *HOW CAN WE KNOW WHAT GOD MEANS? THE INTERPRETATION OF REVELATION 18* (2001) (defining a “text” as “a group of entities, used as signs, selected, arranged, and intended by an author to cause specific acts of understanding in an audience in a certain context.”). Strictly, then, Scalia and Garner should say that the relevant standard is the “reasonable reader or hearer.”

technical meanings and terms of art; cognizant of the immediate-utterance context of the text (i.e., immediate syntactic context, historical word-associations, textual purpose); familiar with Garner and Scalia's approved list of valid canons of construction (about one-third of the possible candidates, they remark);¹⁰ and invariably sound in his or her judgments about how the canons bear on the meaning of a text.¹¹

The book's extensive discussion of interpretive canons is a development that was foreshadowed in Scalia's widely-read 1997 essay, *A Matter of Interpretation*.¹² There Scalia argued that the canons, properly viewed and selected, are valuable aids to legal interpretation. In *Reading Law*, Scalia and Garner attempt to make good on this claim. They propose 57 "valid" canons designed, generally, to produce both intelligent public-meaning readings of legal texts and judicial interpretations that further what they see as fundamental legal and political values (primarily: clarity, fairness, predictability, stability, and democracy). Canons that reflect anti-textualist assumptions, such as those that stress factors such as intent, extra-textual legislative purposes, or the controlling "spirit" or "equity" of legal texts, are ignored as invalid. Potential conflicts between the canons are resolved by means of a "principle of interrelating canons," which states that no canon of interpretation is absolute, and that, in cases of conflict, competing canons need to be balanced to produce the soundest interpretation.¹³ Some of the canons are admittedly based on policy considerations rather than on an attempt to discover and honor original public meaning. For example, canons such as the rule of lenity ("resolve ambiguities in favor of the defendant in criminal cases"), the constitutional-doubt canon ("avoid interpretations that place a statute's constitutionality in doubt"), and the prior-construction canon ("if words have already received authoritative interpretation, stick with that interpretation") are clearly policy-based canons that in some cases can run counter to apparent original public meanings. To resolve such conflicts, Scalia and Garner stipulate that the canons are "so deeply ingrained" in American legal culture that they "must be known to both drafter and reader alike so that they can be considered inseparable from the meaning of the text."¹⁴

The final element of Scalia and Garner's fair reading method is a somewhat grudging acknowledgment, reserved for a brief "Afterword," of their commitment to the principle of stare decisis. There is an obvious tension between their official textualist doctrine—namely, that the original

10. *READING LAW*, *supra* note 2, at 9.

11. These various elements are pieced together from different passages in the book. *See id.* at 33 for competence in the language, 73 for technical terms, 33 for context, 393 for familiarity with the canons and invariably sound judgment.

12. *INTERPRETATION*, *supra* note 7, at 25–29.

13. *READING LAW*, *supra* note 2, at 59–60.

14. *See id.* at 31.

public meaning of a binding legal text is “the law”—and the requirement that precedent (absent compelling reasons) be followed. As Scalia sees it, “[t]he whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.”¹⁵ Acknowledging that courts “cannot consider anew every previously decided question that comes before them,”¹⁶ Scalia and Garner accept stare decisis as a legitimate “exception to textualism.”¹⁷ Inferior courts in a judicial hierarchy must follow controlling higher-court precedents, even when they plainly conflict with original textual meaning.¹⁸ Courts that are free to overrule a non-textualist prior holding must weigh a variety of competing legal values. In constitutional cases, Scalia and Garner state, the relevant considerations include: (1) Whether harm will be caused to those who justifiably relied on the decision, (2) how clear it is that the decision was textually and historically wrong, (3) whether the decision has been generally accepted by society, and (4) whether the decision permanently places courts in a position of making policy calls appropriate for elected officials.¹⁹ This important passage—included almost as an afterthought and only very thinly supported by argument or citations—contains the fullest statement to date of Scalia’s criteria for overruling constitutional non-textualist precedent. Thus, the various components of Scalia and Garner’s fair reading method of interpreting legal documents are these: original public meaning (as determined by the “objectivized reasonable reader”); a numbered list of fifty-seven valid canons that serve as guides and in some cases as implicit public-policy qualifiers to original public meaning; and a pragmatic exception for stare decisis. How do they argue for this theory of legal interpretation?

The most novel component of the fair reading method is the addition of the approved canons, which serve various ends. Most are selected because they offer commonsensical ways of getting at likely original textual meaning. Others, as we have seen, were selected because they reflect widely held legal values or important policy preferences. Still others have a clear polemical edge to them and are designed to counter views that, as Scalia and Garner see things, give judges too much wiggle room for judicial policymaking. More generally, the canons are added to the core textualist theory to make it more concrete—and thus provide greater clarity, consistency, and predictability—by offering specific interpretive tips. Much as a manual of English usage might provide both general principles of effective writing and specific rules of sound grammar and

15. INTERPRETATION, *supra* note 7, at 139.

16. READING LAW, *supra* note 2, at 414.

17. *Id.*

18. *See id.* at 41.

19. *Id.* at 412.

punctuation, Scalia and Garner use the canons of construction to operationalize a particular brand of textualism, thus producing a kind of “how-to” guide for judges and legal theorists who share their core jurisprudential values.²⁰

But why embrace textualism at all? Here the authors for the most part restate arguments offered in previous works. They claim that textualism is the best approach to legal interpretation because it (1) leads to greater certainty and predictability in the law; (2) curbs judicial policymaking; (3) enhances respect for the rule of law; (4) remains faithful to constitutional requirements of valid lawmaking, such as nondelegability, bicameralism, and presidential participation, by counting as “law” only what has been voted upon and enacted by the authorized lawmaking agents; and (5) encourages better legal draftsmanship by enforcing laws as they are written, even when this produces outcomes that conflict with legislative intentions, purposes, just outcomes or wise policy.²¹ In addition, Scalia and Garner also support textualism by appealing to legal tradition, claiming that textualist approaches were “the all-but-universal means of understanding enacted texts”²² until roughly the mid-twentieth century.

Scalia and Garner’s case for textualism centers mostly on the theory’s

20. The authors note that “many judges who believe in fidelity to text lack the interpretive tools necessary to that end” and remark that one of the purposes of their book is to address this need. *See id.* at 7.

21. *See id.* at xxviii–xxix for a discussion of reasons 1–3 and 5. *See id.* at 388 for a discussion of reason 4. Elsewhere, Scalia has defended textualism by noting that it saves time and energy by excluding putative extrinsic sources of law, such as legislative history. *See* INTERPRETATION, *supra* note 7, at 36–37.

22. READING LAW, *supra* note 2, at xxviii. This claim is misleading. In fact, until roughly the end of the eighteenth century, the prevailing approach tended to exalt the “equity” or “spirit” of laws over their literal or textual meaning and this equitable approach continued to have considerable vitality throughout most of the nineteenth century, as illustrated by such classic late-nineteenth century cases such as *Riggs v. Palmer* and *Church of the Holy Trinity v. United States*. *See* *Riggs v. Palmer*, 115 N.Y. 506 (1889); *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). *See also* GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 2–7 (1992) (tracing briefly the course of equitable interpretation from Aristotle through medieval canon law, early modern continental jurisprudence, and eighteenth-century English statutory interpretation up to the American founding era). Equitable interpretation was endorsed by Grotius, Pufendorf, Vattel, Mathew Bacon, Henry Home, Thomas Rutherford, Blackstone, and virtually every other major authority on legal interpretation that influenced the American founders. James Wilson, in his influential *Lectures on Law*, stated that “equity is synonymous with true and sound construction.” 2 JAMES WILSON, *Lectures on Law*, THE WORKS OF JAMES WILSON 502 (Robert McCloskey ed., 1967). Alexander Hamilton asserted that “many things within the letter of a statute are not within its equity and vice versa” and that “in law as in Religion the letter kills, the spirit makes alive.” 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 357 (Julius Goebel Jr. & Joseph H. Smith eds., 1964). On the prevalence of non-textualist approaches in the founding period, see William N. Eskridge Jr., *Early Understandings of the Judicial Power in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001).

comparative advantages over what they claim are its three leading competitors: intentionalism, purposivism, and consequentialism. Each of these theories, they argue, suffers from fatal defects. Consequentialism (which “interpret[s] laws so as to produce sensible, desirable results”) invites uncertainty and short-circuits democracy by encouraging judges to “say that the law is what they think it ought to be.”²³ Purposivism (which “interpret[s] unclear laws in ways that best advance their intended purposes”) leads to unpredictability and judicial manipulability, since “purposes” (goals, justifying reasons, or desired general outcomes) can be defined at many levels of generality.²⁴ Intentionalism (which “interpret[s] laws as their makers intended”) assumes a dubious “group mind,” creates uncertainty by offering no clear guidelines about how “intent” should be determined, violates both the rule-of-law value of fair-notice and constitutional requirements of valid lawmaking by giving effect to unenacted intentions, and rests on the patent legal fiction that lawmakers always have a specific intention or expected application on every potential interpretive issue.²⁵ Textualism isn’t perfect, Scalia and Garner admit; but it offers the only method that recognizes the limited role of judges in a government of laws rather than of men, and provides the only objective standard by which legal meaning may be determined and applied.²⁶

23. *READING LAW*, *supra* note 2, at 22.

24. *See id.* at 18–19.

25. *See id.* at 376–77, 392–93. It is worth noting that this argumentative strategy—“either textualism or purposivism or intentionalism or consequentialism, and not the latter three”—is a false dilemma. Many contemporary legal theorists embrace a *mixed*, or *pluralistic*, interpretive theory which includes elements of all four approaches. *See, e.g.*, KENT GREENAWALT, *STATUTORY INTERPRETATION: 20 QUESTIONS* 35–57 (1999). Indeed, pluralistic theories are probably the leading contemporary competitor to textualism.

26. *See* *READING LAW*, *supra* note 2, at 393. Scalia and Garner also critique non-originalism, or Living Constitutionalism, a widely accepted approach to constitutional interpretation, which denies that the Constitution must be interpreted in accordance with its original meaning, but argues instead that it may be given new meanings to accord with the times. Such a view, they claim, is anti-democratic and invites uncertainty and judicial policymaking. Moreover, the “conclusive argument” against non-originalism is that it “is not an interpretive theory—it is nothing more than a repudiation of originalism, leaving open the question: How does a judge determine when and how the meaning of a text has changed?” *See id.* at 89. “It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never converged on an appealing and practical alternative.” *Id.* at 91–92 (quoting RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2004)). For responses to this “it takes a theory to beat a theory” argument, see Gregory Bassham, *Justice Scalia’s Equitable Constitution*, 33 *J. C. & U. L.* 143, 165–66 (2006) and Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1, 88 (2009).

II. WHY THE FAIR READING METHOD ISN'T FAIR, REASONABLE, OR COHERENT

Scalia and Garner's fair reading method is an improvement in some ways on many previous versions of textualism. It recognizes clearly the importance of context in determining meaning, specifies which elements of context may and may not be consulted, makes textualist interpretation more predictable and less manipulatable by the addition of the canons, addresses the familiar problem of "dueling canons"²⁷ by making the canons only presumptively binding and eliminating putative canons that conflict with text-based approaches,²⁸ permits departures from plain textual meaning in cases of scrivener's error or patent absurdity, recognizes the value of stare decisis, and spells out more clearly than most textualist theories the conditions under which non-originalist constitutional holdings should be overruled. Such features help to address many of the standard criticisms of text-based approaches. Nonetheless, there are still significant problems with Scalia and Garner's fair-reading version of textualism, and to these I now turn.

One problem concerns Scalia and Garner's claim that the fair reading method applies not only to statutes, constitutions, and administrative regulations, but to all "legally operative" texts, including contracts and wills.²⁹ Officially, the fair reading method is not a theory of adjudication, that is, a theory that applies only to judges. It is an all-purpose theory of legal interpretation that tells anyone—judges, lawyers, presidents, or ordinary citizens—how to interpret legal texts and draw out their fair implications. In reality, Scalia and Garner focus heavily on how judges should interpret and apply governmental texts such as statutes, ordinances, and constitutions. Worse, in theory, the approach they endorse has a much wider application.

And therein lies a problem. For in most communicative contexts people are not interested in knowing how an "objectified" reasonable reader (or auditor) would understand a particular bit of language. They want to know what "message" or "thought" the communicator is attempting to convey. If a serious love interest of mine quotes a passage from Shakespeare's sonnets, I want to know what *she* meant by it, not how some bloodless abstraction with an old dictionary would interpret it. The same is true in most communicative contexts—including legal ones. If a police officer says to me, "knock that off or you're going to jail," I want to know what conduct of mine *he* finds objectionable, not what some reasonable auditor,

27. See Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-406 (1950) (arguing that the canons are mutually inconsistent and that judges' choice of canons is based on other considerations).

28. READING LAW, *supra* note 2, at 59, 234-35.

29. *Id.* at 42.

considering only the immediate utterance-context, would conclude that he means. In short, in most linguistic contexts we are not textualists and certainly not clause-bound textualists of the sort Scalia and Garner treat as normative in legal contexts.³⁰

As Wittgenstein reminded us, language has many functions.³¹ But certainly one central function of language is to transmit intention-messages from one person to another. And this is true in law as in most other linguistic contexts. There may be special reasons—having to do, perhaps, with curbing judicial discretion, increasing predictability, and giving people fair notice—why objectified public meaning is the appropriate hermeneutical standard when judges interpret statutes and other enacted laws. But in other legal contexts, such as the interpretation of wills, contracts, military commands, and police orders, it is usually “intent” rather than “public meaning” that interpreters are interested in. In fact, given the diversity of legal contexts, it is extraordinarily unlikely that any single interpretive theory will apply to them all.

Even as a theory of judicial interpretation or adjudication, Scalia and Garner’s fair reading method runs into big problems. Let me highlight three: various difficulties with their notion of “public meaning,” the inherent literalism built into their approach, and conflicts between textualism and the canons.

Scalia is widely credited with popularizing the shift in originalist constitutional theory from original intention to objective public meaning.³² This shift has certain advantages but also some drawbacks.³³ One of the drawbacks is the extraordinary slipperiness and ambiguity of the notion of “meaning.”

What sort of animal is (linguistic) meaning? Philosophers and linguists commonly distinguish various aspects of meaning, including *reference* (the set of objects that words pick out or refer to), *sense* (roughly, the essential qualities or attributes cited in a word’s definition), and *connotation* (roughly, the images, feelings, and emotional associations words call to mind either for particular individuals or conventionally, as “home” for many people connotes warmth and comfort).³⁴ They also commonly

30. Stanley Fish gives the example of one spouse complaining to another, “We never go out anymore.” Would we say that the “meaning” of this statement is determined by what a hypothetical reasonable reader would surmise, knowing nothing about the spouses or their marriage other than what is revealed in the immediate utterance-context? See Stanley Fish, *Is There a Constitution in This Text?*, N. Y. TIMES (Oct. 8, 2012), <http://opinionator.blogs.nytimes.com/2012/10/08/is-there-a-constitution-in-this-text/>.

31. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. E. M. Anscombe trans., 3rd ed. 1958).

32. See JONATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS* 158 (2005).

33. See BASSHAM, *supra* note 22, at 47–51.

34. See generally JOHN LYONS, *1 SEMANTICS* 174–215 (1977). Some would

distinguish between *sentence meaning* (the acontextual conventional meaning of words, abstracted from any particular occasion of use), *speaker's meaning* (the meaning of a text as understood or intended by its author), *utterance meaning* (the conventional meaning of words as expressed in a particular context), and *audiencial meaning* (the meaning of a text as understood or interpreted by a particular audience, such as the framers or those who ratify a particular legal text).³⁵

Scalia and Garner's proposed interpretive touchstone, "objectivized original public meaning," does not map neatly onto any of these familiar distinctions. It's a jerry-rigged construct, designed to insure that interpreters—particularly judges—approach texts in ways that respect what Scalia and Garner regard as core values. In fact, Scalia and Garner are quite vague about how precisely objectivized original public meaning should be determined. In previous works, Scalia conceded that such meaning could not be ascertained merely by consulting dictionaries and linguistic contexts. He has often noted that language is unclear in context and serious research is necessary to determine the "import" that language would have had to a reasonable, fluent, and appropriately informed reader of the time. By "import," Scalia meant what Ronald Dworkin calls a "clarifying translation"³⁶ of a legal phrase or provision. For example, the Eighth Amendment of the U.S. Constitution prohibits the imposition of "cruel and unusual punishments." Scalia concedes that the phrase is unclear in context and hence requires a clarifying translation. Such a translation would state clearly the legal rule or principle a typical reasonable reader of the time, in 1791, would have understood the clause to enact. One possible clarifying translation is this: No punishments that are *really* cruel and unusual—not merely those that are generally believed to be so at the time of enactment—may be inflicted. Scalia, as he consistently does, rejects this "realist" reading and suggests instead that the relevant clarifying translation

include "illocutionary acts" as components of meaning. *Id.* These involve both the delivery of some propositional content and a performative speech act, such as promising, demanding, or requesting. *See id.* at II: 730. At a more abstract level, philosophers and linguists debate whether meaning is best understood in terms of truth-conditions, use, verification-conditions, pragmatic meaning, or a host of other options. *See generally* John Skorupski, *Meaning, Use, Verification*, in *THE COMPANION TO PHILOSOPHY OF LANGUAGE* 29–59 (Bob Hale & Crispin Wright ed., 1997).

35. For versions of these distinctions, *see* GRACIA, *supra* note 9, at 38–39; Jerrold Levinson, *Intention and Interpretation: A Last Look*, in *INTENTION AND INTERPRETATION* 221, 222–23 (Gary Iseminger ed., 1992); and Michael S. Moore, *The Semantics of Judging*, *S. CAL. L. REV.* 151, 247–49 (1981). There is a large literature in literary theory about whether textual meaning should be understood in terms of speaker's meaning/authorial intent ("intentionalism") or audiencial meaning or some other nonintentionalist criterion. *See generally* *THE DEATH AND RESURRECTION OF THE AUTHOR?* (William Irwin ed. 2002) and ISEMINGER, *supra*. I have borrowed the useful expression "audiencial interpretation" from Jorge Gracia. *See* GRACIA, *supra* note 9, at 70.

36. *See* Ronald Dworkin, *Comment*, in *INTERPRETATION*, *supra* note 7, at 117.

is this: No physical punishments that are unusual and were *generally thought to be cruel* at the time of enactment may be inflicted.³⁷

Scalia admits that determining the relevant clarifying translation may be extremely difficult and time-consuming, particularly for busy judges who may not be well-trained in historical research.³⁸ Yet it is unavoidable if we are to have a fixed, objective, and reasonably clear interpretive standard.

In *Reading Law*, Scalia seems to back away from this clarifying-translation approach and opt for something closer to the old “specific-intent” originalist methodology. Why? My guess is that it is because liberal constitutional theorists—the so-called “new textualists”—have latched on to the clarifying-translation strategy as a powerful new weapon against conservative textualists like Scalia.

New textualists, such as Akhil Reed Amar,³⁹ Jack Balkin,⁴⁰ and Lawrence Solum,⁴¹ agree that original textual meaning is the proper standard of sound constitutional interpretation. However, they claim—and argue powerfully—that original meaning generally supports progressive values over conservative ones, and often requires difficult and contestable normative judgments to be made by unelected judges.⁴² For these reasons, new textualists are a major threat to such old-style originalists as Robert Bork, Keith Whittington, Richard Kay, Clarence Thomas, and Scalia.

Scalia and Garner seek to counter this threat in two ways. First, they deny that there is any relevant difference between constitutional “interpretation” and constitutional “construction.” New textualists frequently distinguish these, claiming that interpretation is the search for

37. INTERPRETATION, *supra* note 7, at 146. The restriction to “physical” punishments is something new in Scalia’s Eighth Amendment jurisprudence. See *READING LAW*, *supra* note 2, at 84.

38. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989). In *READING LAW*, Scalia and Garner soften this stance, arguing that in most cases ascertaining the relevant original understanding is not that difficult. See *READING LAW*, *supra* note 2, at 401–02.

39. See, e.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000). See generally AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005).

40. See, e.g., Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007). See generally JACK BALKIN, *LIVING ORIGINALISM* (2011).

41. See, e.g., Lawrence B. Solum, *The Interpretation/Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

42. See generally James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011) (citing recent progressive interpretations of the commerce clause, the congressional enforcement clauses of the Reconstruction Amendments, the Ninth Amendment, the Fourteenth Amendment Privileges or Immunities clause, to name a few). Ryan traces the roots of new textualism back to Ronald Dworkin’s “Comment” in INTERPRETATION, *supra* note 7, at 144–49. In fact, all the crucial distinctions Dworkin made in that piece were contained in his remarkable 1981 tour de force, “The Forum of Principle.” See Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

original public meaning, whereas construction is the task of applying that meaning (particularly when the language is vague or abstract) to particular cases.⁴³

Scalia and Garner deny that there is any meaningful interpretation/construction distinction, arguing that courts have never recognized one and that the task of courts is single and whole: “to ascertain the meaning and will of the lawmaking body, in order that it may be enforced.”⁴⁴ But of course the difference between ascertaining meaning and applying that meaning is perfectly straightforward—think of a baseball ump making a close call at first base or a devout Christian casuist drawing a plausible but debatable inference from Jesus’s command to “resist not evil.”⁴⁵ Scalia and Garner resist the distinction—often covertly employing it⁴⁶—because they dislike the idea that judges might need to use their own judgment in applying open-ended constitutional language.

The second response Scalia and Garner make to the new textualist threat is sharply to limit the kinds of context that interpreters may legitimately consider, to adopt canons that limit judicial discretion in applying vague or

43. See, e.g., Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE, 3–4 (Robert W. Bennett & Lawrence B. Solum ed., 2011). Though versions of the interpretation/construction distinction date back at least to the first half of the nineteenth century, current discussions of the distinction in constitutional theory owe much to Keith Whittington. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 5–14 (1999). For Whittington, “interpretation” “represents a search for meaning already in the text,” whereas “construction” is a creative and political process that goes beyond a text’s discoverable meaning. *Id.* at 6, 12. This way of drawing the interpretation/construction distinction calls into doubt the legitimacy of constitutional construction by unelected judges. See ROBERT LOWRY CLINTON, GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM 24–25 (1997). Other legal theorists think of “construction” as the conversion of norms that emerge from interpretation into other norms (e.g., multi-part legal tests) that are better suited to judicial enforcement. See, e.g., Mitchel Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on Carving Up Implementation Space*, 27 CONST. COMMENT. 39, 42–44 (2010). I prefer to think of “construction” in terms of what Larry Solum calls “the model of construction as principle.” On this model, judges engaged in construction should aim to create constitutional doctrines or make particular applications “that comport with political ideals for which the general, abstract, and vague provisions of the Constitution aim.” Solum, *supra*, at 70. “When we construe a constitutional provision, we determine the legal effect of the text.” *Id.* at 3. No multi-parts tests or elaborate “doctrine” need be produced; any application of a vague or otherwise indeterminate constitutional norm to specific cases counts as construction. *Pace* Whittington, such determinations need not be notably “creative” or “political,” though they may well be contestable.

44. READING LAW, *supra* note 2, at 15.

45. Matt. 5:39. For a strikingly literalistic reading of this passage, see LEO TOLSTOY, A CONFESSION, THE GOSPEL IN BRIEF AND WHAT I BELIEVE 318–27 (1974).

46. See, e.g., READING LAW, *supra* note 2, at 85–86 (arguing that the fourth amendment search-and-seizure provision prohibits police from planting a GPS tracker on a car without a warrant). This is one of many examples Scalia and Garner discuss, where the hard part is applying the law, not ascertaining its meaning.

abstract constitutional language,⁴⁷ and to embrace a methodology for determining public meaning that prioritizes readers' specific application-intentions (i.e., what they specifically hoped, expected, or intended the law to prohibit or permit) over any alleged abstract semantic intentions. A striking example of the latter is their discussion of the term "vehicle" in H. L. A. Hart's classic hypothetical about a city ordinance that states: "No person may bring a vehicle in the park."

What sorts of things would such an ordinance, properly interpreted, prohibit? Ordinary cars, trucks, motorcycles, clearly. But what about bicycles, airplanes, rollerblades, hot dog carts, toy dump trucks, motorized wheelchairs, jet-powered bicycles, decommissioned tanks, a child's little red wagon, snow sleds, golf carts, city garbage trucks, snowmobiles, fire-trucks, police paddy wagons, and ambulances? One standard way to approach such issues is to recognize, first, that the term "vehicle" is vague and thus has no "plain meaning" that can be straightforwardly applied, and second, that a sensible way to make the meaning of "vehicle" more concrete in this context is to examine the guiding purposes for the ordinance. Was the main purpose to promote safety in the park? Then airplanes are clearly prohibited and toy dump trucks are clearly permitted. Or was the primary purpose to limit noise? If so, then city garbage trucks and police paddy wagons are plausibly "vehicles" but rollerblades and decommissioned tanks are not. Regardless of whether the primary purpose was to improve safety or to reduce noise, ambulances and other emergency vehicles are presumably not covered by the ordinance. To conclude that they are would be to revert to a kind of "formalistic" or "literalistic" approach to legal interpretation that has been consistently rejected in Anglo-American law for over a century.

Scalia and Garner approach the case very differently. As textualists, they reject any resort to extratextual purposes in interpreting statutes. Their touchstone is objectivized original public meaning: how would a hypothetical reasonable reader, correctly applying the canons and looking only at the immediate utterance-context, determine what the ordinance prohibits and permits? In answering this question, dictionaries would be a good place to start. However, dictionaries are not always adequate. Often the definitions they provide are vague or do not accurately reflect ordinary usage. Such is the case with the term "vehicle," which a typical dictionary might define as "a means of conveyance, usually with wheels, for transporting people, goods, etc.; a car, cart, truck, carriage, sledge, etc."⁴⁸ This broad definition would include toy dump trucks, baby carriages,

47. *READING LAW*, *supra* note 2, at xx. Examples include the "general/specific canon" (specific language trumps general language in cases of conflict) and the "omitted-case canon" (nothing is to be added to what a text states or reasonably implies).

48. *Id.* at 37.

skateboards, and other things that aren't colloquially considered "vehicles." The proper procedure, then, is to ask: what sorts of things would ordinary people call a "vehicle"? Answer: any *sizable* wheeled conveyance.⁴⁹ So small wheeled conveyances such as rollerblades, bicycles, and toy automobiles are permitted in the park, as are large non-wheeled conveyances such as attack helicopters, sea-planes, snowmobiles, and, presumably, *Star-Wars*-like Imperial Walkers.⁵⁰ Large wheeled conveyances such as golf carts, garbage trucks, and ambulances are *verboten*.

There is something highly instructive—even perverse—about this approach. For starters, it makes Scalia and Garner's "reasonable reader" distinctly *unreasonable* (a point I shall return to in a moment). But it also reveals something very interesting about how Scalia and Garner think language works. Clearly, they think that the "ordinary meaning" of a word can be determined simply by giving typical readers a kind of lengthy quiz—a quiz in which all the questions are of the form: "The word 'W' applies to object *O*. True or false?" The ordinary meaning of "W" is simply a function of these quiz results.

This curious approach to language explains many things that commentators have often found puzzling in Scalia's jurisprudence. Why, for instance, does he say that the *text* is what ultimately matters in constitutional interpretation, yet consistently construes broad constitutional language in ways that are far narrower and more specific than the words suggest?⁵¹ Why does he consistently say that it is the original textual meaning that matters, yet in practice, give decisive weight to lawmakers' "expectation intentions," even when these are discoverable only outside the four-corners of the text?⁵² Clearly because he thinks "ordinary meaning" is

49. *Id.*

50. *Id.* at xx. Only the first three of these examples are Scalia and Garner's; the others are mine.

51. In Scalia's view, for example, "free speech" protects only speech that the founding generation considered worthy of protection; "free exercise" does not protect religious exercise at all against neutral and generally applicable laws; the Equal Protection Clause does not bar sex discrimination; and the Eighth Amendment, as we have seen, prohibits only punishments that the founding generation would have considered as "cruel and unusual." On speech and the Eighth Amendment, see READING LAW, *supra* note 2, at 135-36 (speech) and 145 (Eighth Amendment). On religious accommodation, see *Emp't Div., Dep't. of Human Resources of Or. v. Smith*, 494 U.S. 872, 879 (1990). On sex discrimination, see Adam Cohen, *Justice Scalia Mouths Off On Sex Discrimination*, TIME (Sept. 22, 2010), <http://www.time.com/time/nation/article/0,8599,2020667,00.html>.

52. See, e.g., READING LAW, *supra* note 2, at 407 (claiming that the Eighth Amendment's prohibition of cruel and unusual punishments permits any manner of imposing the death penalty "that is less cruel than hanging, which was an accepted manner in 1791"); *Id.* at 400 (arguing that historical inquiry demonstrates that the Second Amendment was understood to guarantee a right to keep and bear arms for personal use, including self-defense).

simply a construct generated out of conventional application-expectations.

This is a serious mistake. People do not ordinarily suppose that the “meaning” of their words can be equated with, or extrapolated from, what they personally believe, or guess, those words denote. This is obvious in the case of scientific or technical words, such as “echidern” or “bill of attainder.”⁵³ But it is also true, as philosophers of language have shown, of many if not all ordinary terms, such as “toxic,” “justice,” and “death.”⁵⁴ Nobody thinks of himself as a walking dictionary, with an infallible grasp of correct definitions and applications. We realize we can make mistakes in our use of language, and so our dominant “semantic” intention in most cases is simply to use words “correctly,” whatever that turns out to be.⁵⁵ This is inconsistent with Scalia’s standard move of treating original public meaning as fixed and precise by constructing “meanings” out of expectation-intentions. Only because he does this can he blithely say, “[t]he death penalty? Give me a break. It’s easy. Abortion? Absolutely easy. Nobody ever thought the Constitution prevented restrictions on abortion. Homosexual sodomy? Come on. For 200 years, it was criminal in every state.”⁵⁶ In short, Scalia and Garner’s reversion to something like the old “specific intent” approach to textual meaning rests on a faulty view of language and is not an adequate response to the challenge posed by the new textualists.

There is a second problem with Scalia and Garner’s fair reading method that their discussion of “the no vehicles in the park” example makes plain—the striking literalism of their approach.

Recall that Scalia and Garner argue (implausibly) that the no-vehicle ordinance would prohibit ambulances entering the park to pick up sick or injured people, but would not ban roaring snowmobiles or Imperial Walkers. This perverse result follows partly from Scalia and Garner’s mistaken claim that the term “vehicle” properly applies only to “sizable wheeled conveyances” (snowmobiles, jet-powered bicycles, and unwheeled

53. See *READING LAW*, *supra* note 2, at 73, 441.

54. See generally *BASSHAM*, *supra* note 22, at 71-77. In philosophical parlance, our semantic intentions are ordinarily “realist” rather than “conventionalist.”

55. Scalia and Garner specifically deny that this is the case with constitutional language, claiming that the founding generation, which distrusted judicial activism and recognized that the “whole purpose” of a Constitution is to prevent change, would have wished to embed *their* values and specific understandings into the nation’s permanent charter of government. See *INTERPRETATION*, *supra* note 7, at 135-36, 146; *READING LAW*, *supra* note 2, at 404-05. For a response, see *BASSHAM*, *supra* note 22, at 163-67.

56. *Scalia: Abortion, Death Penalty “Easy” Cases*, CBS NEWS (Oct. 5, 2012), http://www.cbsnews.com/8301-250_162-57526578/scalia-abortion-death-penalty-easy-cases. Cf. *READING LAW*, *supra* note 2, at 401 (claiming that it is “entirely clear” that the Constitution does not guarantee a right to abortion, sodomy, or assisted suicide). Of course, these are easy cases only if one treats original meaning as dispositive and assumes that concrete expectations constitute, or are conclusive evidence of, original meaning.

tanks are clearly vehicles). But it also results from a formalistic literalism that is the Achilles heel of all textualist approaches.

Very frequently, language is not meant to be understood literally. A thousand times a day we say things like, “drop everything and come right away,” without bothering to add, “unless you’re holding a baby over a bathtub, are lying paralyzed in bed, or have some other sufficient reason for not doing as I request.”⁵⁷ In law, of course, a higher standard of precision is ordinarily expected; though as we’ve seen, “law” is not limited to statutes and constitutions but also includes a vast amount of relatively informal, unenacted law, such as military commands (for example, “attack at dawn”). It remains undeniable, however, that legislation and legal method casebooks are chock-full of examples of laws that plainly weren’t intended to be interpreted literally and become far less sensible and just when they are.⁵⁸

To be fair, Scalia and Garner do offer a response of sorts to this obvious criticism. They deny that they are “hyperliteralists,” noting that “reasonable readers,” *qua* reasonable, will not read language literally if it would be obviously absurd or stupid to do.⁵⁹ This sounds reassuring until one realizes that by “hyperliteralism,” Scalia and Garner actually mean “hyper-hyperliteralism.” As in the no-vehicle case, they do not shy away from what most would consider perversely literalistic readings. And this, indeed, is where Scalia and Garner take their stand. In their eyes, a little perversity (perhaps even a lot?) is a reasonable price to pay for the greater certainty, predictability, objectivity, judicial deference, and so forth that textualism allegedly affords. Others, of course, will disagree. The “revolt against formalism”⁶⁰ runs deep in American legal culture. It is not a praxis noted for its high tolerance for perversity.

The final problem with Scalia and Garner’s fair reading method is the obvious tension that exists between their official interpretive touchstone (“ascertain and enforce the original public meaning”) and the canons (some

57. Adapted from WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION*, 225 (2000).

58. Often-discussed examples include *Church of the Holy Trinity v. U.S.*, 143 U.S. 457 (1892) (ruling that a church’s importation of a pastor did not violate a federal statute prohibiting payment of an alien’s transportation costs “to perform labor or service of any kind”); *U.S. v. Kirby*, 74 U. S. 482 (1868) (holding unanimously that arresting a mail carrier suspected of murder is not obstruction of the mail, as a literalistic approach would require); and *Riggs v. Palmer*, 115 N.Y. 506 (1889) (holding that a person may not inherit from a testator whom he has murdered in order to collect the inheritance, despite the fact that New York’s statute of wills contained no such exception). Scalia and Garner strongly criticized *Church of the Holy Trinity*. *READING LAW*, *supra* note 2, at 11-13. *Cf.* *INTERPRETATION*, *supra* note 7, at 18-23 (offering similar criticisms).

59. *READING LAW*, *supra* note 2, at 39-41.

60. See generally MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1976).

of which are clearly policy-based and can easily run counter to original public meaning). Scalia and Garner offer a fix for this disconnect, but the fix doesn't work.

The solution that Scalia and Garner propose is to build the canons right into the "meaning" of legal texts. Their hypothetical "reasonable reader" (blind to most aspects of context but godlike in other respects) knows, accepts, and flawlessly applies the canons in such a way that they become "inseparable from the meaning"⁶¹ of legal texts. Thus, there is no conflict between original meaning and the policy-based canons because the canons are part of the original meaning.

As legal fictions go, this is clearly a whopper. It is absurd to suppose that average readers in, say, 1787, were cognizant of canons that in many cases didn't even exist until years later. It is wildly implausible to suppose that presumptions such as the repealability canon ("a legislature cannot derogate from its own authority or the authority of its successors") are somehow part of the "meaning" of all laws, including the ordinance that bans vehicles in a public park: meanings are simply not that jam-packed. Moreover, as Scalia and Garner concede,⁶² the canons aren't completely consistent with one another; sometimes they pull in opposite or conflicting directions and have to be balanced against one another.⁶³ Building those crosscutting tensions into the very "meaning" of legal texts risks making those texts speak with conflicting voices. Finally, the very idea of building the canons into the meaning of laws exists in obvious tension with the reasons that Scalia and Garner give for treating "ordinary usage" as the standard for legal meaning. Such a standard is supposed to be fairer, clearer, and more consistent with lawmaking desiderata than, say, adverting to legislators' unenacted intentions or general purposes. But of course the *canons themselves* are unenacted and generally unknown to average citizens. Reading them into the "meaning" of ordinary laws does not serve the goals of fair notice and valid enactment; it conflicts with them.⁶⁴

61. *READING LAW*, *supra* note 2, at 31.

62. *Id.* at 59.

63. Thus: The Supremacy-of-Text Principle ("the words of a text are of paramount concern") may conflict with the Constitutional-Doubt Canon ("a statute should be interpreted in a way that avoids placing its constitutionality in doubt"); the Ordinary-Meaning Canon ("words are to be understood in their ordinary, everyday meanings") can conflict with the Artificial-Person Canon ("the word *person* includes corporations and other entities, but not the sovereign"); and the General-Term Canon ("general terms are to be given their general meaning") may conflict with the General/Specific Canon ("if there is a conflict between a general provision and a specific provision, the specific provision prevails"). *Id.* at xx-xx.

64. A lesser problem: As Scalia and Garner acknowledge, some of the canons imply that the meaning of laws can *change* over time. *Id.* at 254-55. For example, their claim that statutes dealing with the same subject should be interpreted together, as if they were one law, logically implies that the meaning of vague or ambiguous laws may change as later, related laws are enacted. This conflicts with their oft-repeated claim that "words must be given the meaning they had when the text was adopted." *Id.* at 78.

None of this suggests that textualists cannot embrace the canons. But they need to be transparent about how the canons, and the significant stare decisis qualifier, are used. In effect, Scalia and Garner adopt a kind of modified textualism in which they say: “Original public meaning is the usual norm, but there are pragmatic exceptions in cases X, Y, and Z.” They don’t want to say this openly, because “original meaning: sort of binding, sort of not” is not a slogan likely to rouse the troops. So instead they resort to the hokey fiction of the canons being determinants of original public meaning. Honesty would be the better policy.

I said earlier that I thought *Reading Law* might become a minor classic. In addition to being informative, entertaining, and highly readable, it provides a kind of test case of how well textualism can be defended against long-standard objections. *Reading Law* fails this test, but in a way that is particularly instructive. Given its scope and rhetorical power, the book may well mark the high-water mark of textualism. Its very failure is therefore significant.

Presumably, they would deal with this conflict by invoking the “principle of interrelating canons” (“no canon is absolute”). But it is clearly a tension they acknowledge only *sottovoce*.

DUKE LACROSSE, UNIVERSITIES, THE NEWS
MEDIA, AND THE LEGAL SYSTEM: A REVIEW
OF HOWARD M. WASSERMAN'S
INSTITUTIONAL FAILURES

BY MEREDITH BOLLHEIMER*

On March 13, 2006, the Duke men's lacrosse team hired two exotic dancers for an off-campus party. One of these exotic dancers claimed that she was raped at the house party by multiple assailants.¹ These accusations ignited a powder keg in Durham, North Carolina, and on Duke's campus. There was extensive national media coverage following the accusations combined with an overtly public handling of the investigation by the prosecutor's office.² There were swift and hard-felt consequences for many involved in the immediate aftermath of the accusations. The lacrosse team's head coach was fired and the season suspended less than three weeks after the party.³ Three lacrosse players were indicted for "first-degree rape, first-degree sex offense, and kidnapping."⁴ Two of the indicted players were suspended from the university.⁵

Nine months after the house party, at a hearing on a Motion to Compel, the head of the DNA lab that was responsible for testing the players' DNA admitted to withholding exculpatory DNA evidence in collusion with the District Attorney, Mike Nifong.⁶ The fall-out from these events continues

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1. Howard M. Wasserman, *An Institutional Perspective on the Duke Case*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 3, 6 (Howard M. Wasserman ed., 2011).

2. The District Attorney delivered over seventy press conferences and public statements on the case. *Id.* at 18.

3. *Id.*

4. Angela J. Davis, *When Good Prosecutors Go Bad: From Prosecutorial Discretion to Prosecutorial Misconduct*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 23, 24-25 (Howard M. Wasserman ed., 2011).

5. Wasserman, *supra* note 1, at 18.

6. *Id.* at 19.

today with several unresolved lawsuits still pending against some of the institutional actors in the case.⁷ While the lingering lawsuits are certainly one remaining facet of this story, perhaps more important lessons arise from studying the events in their entirety with the benefit of hindsight. In order to effectively explore what went wrong in the Duke case, one must spend part of that journey scrutinizing the institutional actors involved.

*Institutional Failures: Duke Lacrosse, Universities, the News Media, and the Legal System*⁸ is a collection of essays that takes a critical look at how “three powerful sociopolitical institutions—the legal system, Duke University and American higher education, and the news media”⁹ functioned throughout the infamous Duke Lacrosse sexual assault scandal of 2006. Howard M. Wasserman¹⁰ contributes to and edits this collection of essays, which are organized around each respective institution in order to study “the Duke lacrosse case in an institutional context.”¹¹

Wasserman begins the book with an overview chapter titled, *An Institutional Perspective on the Duke Lacrosse Case*,¹² where he provides a thorough overview of the events that transpired in the Duke scandal. This overview includes “A Basic Timeline of the Duke Lacrosse Controversy”¹³ and a brief summary of each respective institution’s role or failure in the case (each receive full treatment in subsequent essays). This chapter also successfully establishes a major theme of the work, namely, the importance of “identifying incentives and systemic rules” in place at each institution that contributed to their failures in order to “teach institutions (and those within them) to handle the next case better.”¹⁴ This chapter explains why viewing the failures through an “institutional lens,”¹⁵ is important and meaningful. As Wasserman states, “an institution is its people,” but these people or individuals act in ways that are incentivized by the institution.¹⁶ “We cannot evaluate or understand how any individual acted without understanding the institutional structures within which he acted and the incentives that motivate and explain individual and macro-level action.”¹⁷ It is postulated that an understanding of these institutional failures, and why they occurred, will assist future institutional actors to avoid a repeat of the

7. *Id.* at 8.

8. INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM (Howard M. Wasserman ed., 2011).

9. Wasserman, *supra* note 1, at 4.

10. Howard M. Wasserman, Associate Professor of Law, Florida International University College of Law.

11. Wasserman, *supra* note 1, at 5.

12. *Id.* at 3.

13. *Id.* at 18.

14. *Id.* at 5.

15. *Id.*

16. *Id.*

17. *Id.*

same mistakes,¹⁸ or perhaps “moderate future failures.”¹⁹

Another major theme of the work introduced in this chapter (that again receives comprehensive coverage in later chapters) revolves around how preconceived notions and beliefs about race, gender, and privilege created fertile grounds for the institutional failures that occurred in the Duke case.²⁰ Wasserman aptly describes the environment that surrounded the controversy as it unfolded as a “toxic soup of racial, gender, and socio-economic conflict.”²¹

Following the introductory chapter by Wasserman, the book is organized into three parts, each covering a respective institution, its failures, and occasionally its successes. The essays within these sections of the book elaborate on the major themes established by Wasserman. This review will attempt to highlight and summarize the most relevant points in each essay.

The *Legal System*²² is covered first and begins with an essay by Angela J. Davis.²³ Davis’ essay, *When Good Prosecutors Go Bad: From Prosecutorial Discretion to Prosecutorial Misconduct*,²⁴ focuses on the prosecutorial misconduct in this case and the realities of the system that allows for this type of misconduct to occur. For those readers not familiar with the facts as they relate to the prosecutorial aspects of the Duke case, a brief summary is warranted. Mike Nifong was serving as the District Attorney of Durham County in 2006²⁵ and was responsible for the decision to indict three lacrosse players, for “first-degree rape, first-degree sex offense, and kidnapping.”²⁶ After committing serious prosecutorial misconduct in the case, Nifong was disbarred, found in contempt of court, and subsequently spent one day in prison.²⁷ Nifong’s misconduct included “failing to provide exculpatory evidence to defense counsel and making misrepresentations to the court in violation of the rules of professional responsibility.”²⁸

Davis identifies and analyzes the systemic realities that allowed for this type of misbehavior, while illuminating the unfortunate and alarming frequency with which prosecutorial misconduct occurs. Davis provides a thoughtful analysis of the case law, civil rules, and Model Rules of

18. *Id.*

19. *Id.* at 15.

20. *Id.* at 14–15.

21. *Id.* at 7.

22. *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM*, *supra* note 8, at 21.

23. Angela J. Davis, Professor of Law, American University, Washington College of Law.

24. Davis, *supra* note 4, at 23.

25. *Id.* at 23.

26. *Id.* at 24–25.

27. *Id.* at 27.

28. *Id.* at 26.

Professional Conduct as they relate to Nifong's misconduct and punishment.²⁹ This analysis highlights how the case law on prosecutorial immunity affects the occurrence of misconduct and illustrates how existing case law is inadequate when it comes to eliminating systemic prosecutorial failure to turn over exculpatory evidence.³⁰ Davis argues that the practice of holding elections for chief local prosecutors has actually increased "prosecutorial power, independence, and discretion."³¹ While acknowledging the harm done to the innocent indicted students in the case, Davis points out that the harm they experienced pales in comparison with the harm done to those wrongly accused defendants who spend years in prison after being the victims of prosecutorial misconduct.³² "Innocence projects across the country have revealed the prevalence of wrongful convictions, and prosecutorial misconduct is cited as one of the main causes of these injustices."³³ Davis states that:

There is little question that African Americans and Latinos fare much worse in the criminal justice system than whites, and that the poor fare much worse than the middle class or wealthy. Not surprisingly, most victims of prosecutorial misconduct are poor, and a disproportionate number of them are African American or Latino.³⁴

Davis argues that in the Duke case, the defendants had access to "first

29. *Id.* at 27–35.

30. *Id.* at 28–31. The author summarizes the Supreme Court decision in *Brady v. Maryland*, 373 U.S. 83 (1963), where the Court held that a prosecutor violates a defendant's constitutional due process rights by failing to disclose to the defendant evidence that is favorable when the defendant has requested such information. *Id.* at 87. This rule was further expanded in *United States v. Agurs*, 427 U.S. 97 (1976), where the Court held that prosecutors must "turn over exculpatory information to the defense even in the absence of a request if such information is clearly supportive of a claim of innocence." See Davis, *supra* note 4, at 29 (citing *Agurs*, 427 U.S. at 107). It is worth noting that since the publication of this book, the Supreme Court has decided two *Brady* violation cases. In *Connick v. Thompson*, 131 S. Ct. 1350 (2011), the Court held that a municipality was not liable under § 1983 for a conceded *Brady* violation committed by one of its assistant district attorneys who failed to turn over exculpatory evidence. Then, in *Smith v. Cain*, 132 S. Ct. 627 (2012), the Court, in an eight to one decision, reversed and remanded a first-degree murder conviction based on a *Brady* violation committed by the prosecution when they failed to disclose statements from the lead investigator's notes which indicated contradictory testimony from the only eyewitness to identify the defendant as the assailant. The eyewitness testimony was the only evidence linking the defendant to the crime. *Id.* at 630. The Court in *Smith* held that under *Brady* "evidence is 'material' . . . when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id.* (quoting *Cone v. Bell*, 556 U.S. 449, 469–70 (2009)).

31. Davis, *supra* note 4, at 39.

32. *Id.* at 36.

33. *Id.*

34. *Id.* at 37 (citation omitted).

class representation.”³⁵ This “top-notch”³⁶ defense team was able to command the attention of the national media, which was a very valuable commodity. The defense team was also able to spend significant time researching and preparing. “One attorney spent 60 to 100 hours reviewing almost 2,000 pages of laboratory data and educating himself about DNA.”³⁷ Access to national media and wealth to pay “first class”³⁸ attorneys are not typically enjoyed by the poor minority defendant who has to rely on a public defender who has fewer resources.³⁹ Davis effectively describes how the case law, civil rules, and Model Rules of Professional Conduct affect prosecutorial misconduct and uses the prosecutorial misconduct seen in the Duke Lacrosse case to make a larger point about how this type of misconduct regularly and severely effects wrongfully accused defendants. Those individuals may in the author’s words “reap unintended benefits” from the national and international attention garnered in this case as prosecutors, judges, and policymakers consider the ramifications of the prosecutorial misconduct in the Duke case.⁴⁰

*Duke Lacrosse, Prosecutorial Misconduct, and the Limits of the Civil Justice System*⁴¹ by Sam Kamin⁴² is the second and final essay on the *Legal System* in the collection. This essay focuses on how the Duke lacrosse players sought a legal remedy for the harm they suffered as a result of the rape allegations and investigation. At the heart of the complaints brought by three separate groups of Duke lacrosse players “is the alleged deprivation of their civil and constitutional rights under color of law in the investigation and prosecution of the events at the lacrosse-team party. The constitutional claims were brought pursuant to 42 U.S.C. § 1983, the principal mechanism for seeking civil remedies for constitutional violations.”⁴³ Kamin provides a careful and concise history of § 1983⁴⁴ and then moves on to a thorough analysis of the complexities of the law, describing it as a “maze of interlocking doctrines and defenses that make recovery very difficult, even for the most deserving of plaintiffs.”⁴⁵

Kamin analyzes the reasons why the three groups of plaintiffs are

35. *Id.* at 38.

36. *Id.* at 37.

37. *Id.* at 38.

38. *Id.*

39. *Id.*

40. *Id.* at 41–42.

41. Sam Kamin, *Duke Lacrosse, Prosecutorial Misconduct, and the Limits of the Civil Justice System*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 43, 43 (Howard M. Wasserman ed., 2011).

42. Sam Kamin, Associate Professor of Law, University of Denver, Sturm College of Law.

43. Kamin, *supra* note 41, at 47 (citations omitted).

44. *Id.* at 52–54.

45. *Id.* at 54.

unlikely to succeed in their § 1983 suits. Section 1983 and the attending case law require that “each plaintiff must allege and prove that the defendant’s conduct violated his constitutional rights in a way that a court has the capacity to remedy through damages, prospective relief, or some other means.”⁴⁶ The majority of plaintiffs in this case were never even indicted let alone brought to trial and convicted. Moreover, the three plaintiffs who were indicted were never brought to trial or convicted. Without ever having been brought to trial, there is no “personal constitutional injury”⁴⁷ which is required in a § 1983 case. Kamin argues that this lack of a “personal constitutional injury”⁴⁸ is “fatal to the prosecutorial misconduct claims in the Duke lawsuits.”⁴⁹

Kamin then analyzes the issue of the state action claim, which was required to bring the private defendants, including Duke University and the DNA laboratory, into the § 1983 lawsuit of the unindicted players.⁵⁰ Even though these players may have a strong case that there was the exact type of conduct that would bring private actors into a § 1983 suit,⁵¹ Kamin argues they will likely fail in this regard as well because of their inability to show any type of harm that would be recognized by a federal court.⁵²

Kamin provides a detailed breakdown of the “common law of immunities” and how it in essence serves to legally protect District Attorney Nifong’s misconduct in the case.⁵³ He also establishes why the municipal entity, the City of Durham, is unlikely to be held liable in any of these suits, despite being a named defendant.⁵⁴ Kamin argues that the final reason why the § 1983 lawsuits are likely to fail is that the prospective relief requested by the plaintiffs cannot be awarded by the court under § 1983 because the plaintiffs cannot show how the requested relief⁵⁵ would prevent any future personal harm to the plaintiffs.⁵⁶ In conclusion, Kamin,

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 55.

50. The three indicted players had already settled with Duke University. *Id.* at 43.

51. “[P]rivate organizations and individuals can be liable under § 1983 if they operate in concert with public officials to deny constitutional rights, such as by conspiring with public officials to commit obviously unconstitutional conduct . . .” *Id.* at 57.

52. *Id.* at 58.

53. *Id.* at 58–61.

54. *Id.* at 62–63 (“states are not ‘persons’ subject to suit under § 1983” and “[t]he Court of Appeals for the Fourth Circuit (which includes North Carolina) has held that prosecutors are state, rather than local or county, officials”) (citations omitted).

55. The complaint requested “judicial imposition of an elaborate framework for overseeing and revising the policies of the Durham police department and DA’s office. The proposed structural reforms included appointment of an independent monitor for the police department, a ban on press releases during ongoing investigations, and a plan of remedial training for the department.” *Id.* at 63.

56. Kamin notes, “Not even the most creative of lawyers would have been able to

like Davis before him, argues that the lessons on prosecutorial misconduct learned in the Duke case are far more meaningful as they relate to the other countless victims of this type of misconduct who spend years in prison where the misconduct is never discovered or discovered years later.⁵⁷ Kamin's essay illustrates how the obstacles in § 1983 make civil recovery difficult not only for the Duke lacrosse players, but more profoundly in the "run-of-the-mill prosecutorial misconduct case."⁵⁸ He argues, in closing, that where the system fails to provide an adequate means to deter prosecutorial misconduct through vehicles such as § 1983 suits, that misconduct will flourish.⁵⁹

The next section of essays entitled, *Duke University and American Higher Education*, delves into the institutional failures witnessed throughout the controversy. KC Johnson⁶⁰ contributes an essay titled, *The Perils of Academic Groupthink*,⁶¹ which takes the reader through a less than complimentary review of the Duke faculty and administration's response to the crisis. Johnson states:

The Duke lacrosse case illustrates three major points about contemporary academic culture. First, the case shows how faculty groupthink, oriented around principles of race, class, and gender, has diminished support among the professoriate for due process. Second, the case introduces a difficult issue in higher education law—whether university policies apply when professors publicly target their own students to advance the faculty members' pedagogical or academic agendas through public expression. Finally, the corruption of the academic ideal of dispassionate evaluation of evidence in pursuit of truth exhibited by activist faculty in the case was hardly confined to professors at Duke.⁶²

Johnson discusses how preconceived notions related to specific "pedagogical pedigrees,"⁶³ in particular those "oriented around themes of

argue that the Duke lacrosse players were likely to be framed by the City of Durham at some particular time in the future for a crime that they did not commit." *Id.* at 63–64.

57. *Id.* at 64.

58. *Id.*

59. *Id.*

60. KC Johnson, Professor of History at Brooklyn College, has written extensively on the subject. See generally KC Johnson, DURHAM IN WONDERLAND, <http://durhamwonderland.blogspot.com/> (last visited Sept. 13, 2012); STUART TAYLOR & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2007).

61. KC Johnson, *The Perils of Academic Groupthink*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 67, 67 (Howard M. Wasserman ed., 2011).

62. *Id.* at 67–68.

63. *Id.* at 74.

race, class, or gender”⁶⁴ paved the way for some of the more intense reactions by segments of the faculty. The essay analyzes these reactions including the editorial statement in Duke’s *Chronicle*, which was signed by a group of eighty-eight faculty members who came to be known as the “Group of 88.”⁶⁵ The statement was laden with language that seemed to condemn the lacrosse players and assumed their guilt.⁶⁶ This faculty-sponsored editorial ad formulated the blueprint for what the “socially conscious” faculty response would look like.⁶⁷ It would come out strong and unmistakably against the players and would not tolerate much room for a belief in presumed innocence.⁶⁸ In hindsight, with the knowledge of the players’ innocence, the details of some of those responses laid out by Johnson are, at times, unpalatable.

Johnson highlights some of the most egregious and noteworthy faculty reactions which came in the form of letters to the President of Duke, interviews with local and national media, op-eds, and protests saturated with messages of presumed guilt (and at times outright contempt and hatred for the players). Johnson makes a particularly interesting point about this conduct as it relates to the intersection of freedom of speech and academic freedom.⁶⁹ Duke’s anti-harassment code prohibits harassment based on “race, class, or gender.” The players in their suit against Duke University used this policy language as the basis for their tort claim, to which the university responded in part that its “policies [such as those against harassment] must be balanced against principles of academic freedom.”⁷⁰ Johnson argues that:

[T]his comes close to arguing that if professors engaged in race/class/gender pedagogy chose to harass white male students

64. *Id.*

65. *Id.* at 68, 73, 84.

66. “The ad opened by asserting unequivocally that something had ‘happened’ to Mangum [the accuser]. The signatories . . . committed themselves to ‘turning up the volume,’ regardless of ‘what the police say or the court decides.’ Moreover, to the ‘protestors making collective noise,’ the Group had a direct message: ‘Thank you for not waiting and for making yourselves heard.’” *Id.* at 73.

67. *Id.* at 74.

68. Twelve days after the infamous lacrosse house party, “dozens of Durham residents assembled outside the lacrosse captains’ house, holding candles and singing ‘This Little Light of Mine.’ The group included Duke history professor Timothy Tyson, whose scholarship focuses on race and the South.” *Id.* at 69. Sixteen days after the party, Houston Baker, a professor of English at Duke, “published a 15-paragraph open letter (addressed to Duke Provost Peter Lange)” that stated in part, “‘How soon will confidence be restored to our university as a place where minds, souls, and bodies can feel safe from agents, perpetrators, and abettors of white privilege, irresponsibility, debauchery and violence?’” *Id.* at 70.

69. *Id.* at 83–84.

70. *Id.* at 84 (quoting Brief in Support of Duke University Defendants’ Motion to Dismiss Complaint at 12, *Carrington v. Duke Univ.*, No.1:08-cv-119, (M.D.N.C. filed May 30, 2008)).

through statements or actions that reflect the professors' academic worldview, such harassment is fair game. In an academy where humanities departments are dominated by devotees of the race/class/gender approach, such an academic freedom exception could affect far more than Duke University or its lacrosse players.⁷¹

Johnson's essay provides great insight into how faculty might react when faced with a crisis that collided so perfectly with their pedagogical realm.⁷² Robert M. O'Neil⁷³ picks up on a similar theme in his essay, *The Duke Lacrosse Saga: Administration versus Students and Faculty, among Others*.⁷⁴ This essay focuses on "the role of the university's administration in facing and handling [the] unprecedented challenges"⁷⁵ that it encountered with the Duke lacrosse case. O'Neil begins his essay with a succinct synopsis of the evolution and development that occurred at Duke University from the mid-1980's through the mid-2000's in areas of faculty hiring,⁷⁶ department building,⁷⁷ student recruitment,⁷⁸ and athletics.⁷⁹ He identifies how the confluence and types of growth in each of these areas created the "perfect storm"⁸⁰ when the Duke lacrosse scandal happened in 2006. O'Neil argues that one "prime ingredient"⁸¹ in the "perfectly

71. *Id.*

72. "Eighty-five percent of the full-time faculty signers [of the Group of 88 editorial] described their research interests as oriented around themes of race, class, or gender—sometimes all three. These pedagogical pedigrees could not resist the narrative that Nifong spun—wealthy white males sexually assaulting a poor African-American woman." *Id.* at 74.

73. Robert M. O'Neil, Professor of Law Emeritus at the University of Virginia School of Law.

74. Robert M. O'Neil, *The Duke Lacrosse Saga: Administration versus Students and Faculty, among Others*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 89, 89 (Howard M. Wasserman ed., 2011).

75. *Id.*

76. "Recruitment of minority scholars had become a special priority [at Duke University from the mid-1980's to the mid-2000's] . . . The results were most impressive . . . [f]rom 1994–2004, Duke doubled the number of African-Americans on its faculty to a total of 80, at least 3.5 percent of the faculty." *Id.* at 90–91.

77. O'Neil describes the addition of "extraordinary," "internationally renowned," "Pulitzer-prize winning" faculty that helped to build "academic eminence and visibility" in the liberal arts and in Duke's professional schools of medicine, law, theology, and business. *Id.* at 90.

78. In 1984 more than 90 percent of the entering class was white. Two decades later more than one third of the entering class were minority students. *Id.* at 91.

79. "During these years, Duke achieved prominence in one other significant area—the athletic field, or more precisely, the basketball court. While competing with the Ivy League in scholarship, Duke . . . also matched the major state universities when it came to sports, leaving the prestigious New England and New York institutions in the dust." *Id.*

80. *Id.*

81. *Id.* at 92.

brewing storm”⁸² was the uneasy or ambivalent⁸³ nature of the relationship between academia and athletics that existed at Duke.⁸⁴ He argues that comparable state institutions with “successful sports programs,”⁸⁵ enjoy a more comfortable⁸⁶ relationship between academics and athletics for several reasons including tradition, the difference in size and complexity between Duke and other “huge top-tier”⁸⁷ colleges and universities, the higher cost of subsidizing a student-athlete at Duke, and the lack of academic programs available to “scholastically challenged athletes” at Duke.⁸⁸ He argues that “[f]or these reasons and others, a typical Michigan or Berkeley or Texas professor is readier than his or her Duke colleague to tolerate aberrations in the athletic program. The contrast is especially pronounced among those quintessentially intellectual scholars who had most recently arrived in Durham during its two-decade rise.”⁸⁹

O’Neil revisits the issue of faculty academic freedom introduced in an earlier essay by KC Johnson,⁹⁰ and posits an interesting question regarding the boundaries of academic freedom. Arthur Butz is a professor of Engineering at Northwestern University who openly and publicly denies the Holocaust.⁹¹ “Northwestern steadfastly refuses to curb or silence Butz so long as he continues to fulfill his professorial duties and keeps Holocaust denial out of his classes.”⁹² O’Neil argues that if Butz were a professor of modern European history, academic freedom would no longer protect these views.⁹³ “The conventional wisdom is that, rather like a geologist or geographer who insists that the earth’s surface is flat (a heresy that would not be tolerated from teachers in the field), so clearly erroneous a view within one’s own academic discipline would not and need not be tolerated.”⁹⁴ None of the professors comprising the Group of 88 taught in the fields of law or criminal justice. Had they, “the situation might have called for closer scrutiny.”⁹⁵ O’Neil offers that while this concept has no direct application to the Duke case, it does “generate a cautionary tale” for future faculty and administrators.⁹⁶

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. JOHNSON, *supra* note 611, at 83–84.

91. O’Neil, *supra* note 74, at 97.

92. *Id.* at 97 (citing Jodi S. Cohen, *NU Rips Holocaust Denial; President Calls Prof. an Embarrassment but Plans No Penalty*, CHICAGO TRIBUNE, Feb. 7, 2006, at 1).

93. O’Neil, *supra* note 74, at 97.

94. *Id.* at 97–98.

95. *Id.* at 98.

96. *Id.*

The essay goes on to examine the response of the administration, focusing on the actions of the president and the provost of Duke.⁹⁷ He concludes that, “while accusations of administrative overreaction understandably persisted in some quarters, and faculty-administrative relations surely were not enhanced . . . no charge of undermining academic freedom could fairly have been lodged.”⁹⁸ In addition to examining whether the administration improperly infringed on academic freedom, the essay also explores whether the administration went far enough in protecting its faculty when they came under intense fire for their overreaction and abandonment of presumption of innocence principles.⁹⁹

Some other topics covered in this essay include academic freedom as it relates to grade appeals,¹⁰⁰ and the misunderstanding surrounding “faculty-student privilege.”¹⁰¹ O’Neil offers additional insight as to why the thirty-eight unindicted players who are suing Duke University, including President Brodhead and other senior officials, will likely fail on their claims.¹⁰²

In conclusion, the essay offers some *Lessons Learned—and Shared* relating to how the structure of athletics and the relationship of athletics to academics at an institution can affect how an institutional crisis unfolds.¹⁰³ The conclusion also notes that in times of crisis on campus, a functioning and developed relationship between faculty and the other campus offices is important.¹⁰⁴

The final essay in the section on *Duke and American Higher Education* is written by Ellen J. Staurowsky.¹⁰⁵ *In the Shadow of Duke: College Sport and the Academy Divided*,¹⁰⁶ provides an overview of the relationship between collegiate sports and higher education. This essay examines the perennial problem of finding the proper balance between sports and study in higher education. Staurowsky argues that:

97. *Id.* at 98–101.

98. *Id.* at 101.

99. *Id.* at 107–108.

100. One student sued Duke and his professor for the issuance of a failing grade attributed to a month of missed classes because of meetings with lawyers. The dispute was settled with a “P.” *Id.* at 101–102.

101. At a meeting with co-captains of the lacrosse team, university officials assured the co-captains that “‘faculty-student privilege’” would protect that communication. “As appealing as it may sound to a lay person’s ear, ‘faculty-student privilege’ is nowhere recognized by statute, rule, or judicial ruling.” *Id.* at 102–103.

102. *Id.* at 104–106.

103. *Id.* at 109–110.

104. *Id.* at 110.

105. Ellen J. Staurowsky, Professor and Chair of Graduate Studies, Ithaca College Department of Sports Management and Media.

106. Ellen J. Staurowsky, *In the Shadow of Duke: College Sport and the Academy Divided*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 111, 111 (Howard M. Wasserman ed., 2011).

The Duke lacrosse controversy reflects studied ignorance, willful neglect, political impotence, and unconscious denial by higher education officials and the general public about what it means to run a large college athletic program in the twenty-first century. With increased public scrutiny comes increased awareness of the need for institutional accountability and the current lack of effective accountability mechanisms. If college campuses remain divided and if disconnects between college sport and the values of higher education become more pronounced, colleges and universities will no longer be able to assert moral authority, prepare our leaders for tomorrow, or be viewed as contributing to the public good.

If these divisions are left unaddressed, the academy cannot stand.¹⁰⁷

The essay describes the myriad of factors that have contributed to the “uneasy”¹⁰⁸ relationship that exists between collegiate sports and higher education. Among these factors, Staurowsky discusses the role of the NCAA and how its governance model has contributed to the increased “dysfunction”¹⁰⁹ at all levels of collegiate sports.¹¹⁰ She also discusses the way in which introduction of big money through high profile sports has reduced the power of the faculty and administration to make decisions related to athletics.¹¹¹ The author cites a study where it was “reported that the reliance on external sources of funding, such as large TV contracts, has undermined presidents’ ability to exert authority over athletics on individual campuses or to affect changes that might bring athletics more in line with the academic mission.”¹¹² This point is substantiated as facts continue to pour out from the Penn State scandal, including recent information from the Freeh report¹¹³ that condemns high level officials at Penn State accused of intentionally covering up the sexual abuse of children to protect the image of the football program.¹¹⁴ The essay

107. *See id.* at 127–128.

108. *Id.* at 113.

109. *Id.* at 126.

110. *Id.* at 125–126.

111. *Id.* at 126.

112. *Id.* (discussing 2009 Knight Commission on Intercollegiate Athletics study of the FBS programs).

113. Freeh, Spokin, & Sullivan LLP, *Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky* (2012) http://www.washingtonpost.com/wp-srv/sports/penn-state-freeh-report/REPORT_FINAL_071212.pdf?hpid=z2.

114. *Id.* at 14–17. “Taking into account the available witness statements and evidence, the Special Investigative Counsel finds that it is more reasonable to conclude that, in order to avoid the consequences of bad publicity, the most powerful leaders at the University—Spanier, Schultz, Paterno and Curley—repeatedly concealed critical

suggests that the “level of rancor” displayed on the Duke campus after the allegations was reflective of a “brewing tension” related in part to the frustrations felt by members of the community about the division and dysfunction found in the relationship between athletics and academics.¹¹⁵ The author highlights the importance of increased faculty involvement and oversight in order to move towards a better balance between athletics and academics.¹¹⁶ “Faculty members are expected to serve as primary guardians of academic integrity, yet they have been largely peripheral in scrutinizing athletics on their own campuses. If there is to be legitimate faculty oversight of athletic programs, faculty must be at the center of leadership . . . rather than on the margins.”¹¹⁷ This essay provides a candid look at some of the challenging realities surrounding collegiate sports programs and how those realities threaten the legitimacy of the academic mission of higher education in America. Further, this essay takes on particular relevance as the Penn State scandal unfolds and the gravity of those challenging realities, related to who controls the institution, are exposed and examined.

The final section of essays in the collection entitled, *News Media*, focuses on the media response to the Duke lacrosse case. The first essay in this section is written by Rachel Smolkin.¹¹⁸ The essay titled *Justice Delayed*¹¹⁹ focuses on the media’s rush to judgment in their coverage of the Duke case. “The lessons of the media’s rush to judgment and their affair with a sensational, simplistic storyline rank among journalism’s most basic tenets: Be fair; stick to the facts; question authorities; don’t assume; pay attention to alternative explanations.”¹²⁰ This essay takes the reader through the myriad of ways in which journalists did not stick to these basic tenets when covering the Duke case. Smolkin gives examples of the sensational and over-the-top coverage that came with the Duke case such as when Nancy Grace asserted the following statement on a national broadcast, “I’m so glad they didn’t miss a lacrosse game over a little thing like gang rape!”¹²¹ Much of the media, including Grace, failed to answer for their mistakes during the coverage once the players were exonerated, but rather chose to move on without addressing their failures and certainly

facts relating to Sandusky’s child abuse from the authorities, the University’s Board of Trustees, the Penn State community, and the public at large.” *Id.* at 16.

115. Staurowsky, *supra* note 106, at 121.

116. *Id.* at 124.

117. *See id.* (citations omitted).

118. Rachel Smolkin, Assignment Editor, *USA Today*; Former Managing Editor, *American Journalism Review*.

119. Rachel Smolkin, *Justice Delayed*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 131, 131 (Howard M. Wasserman ed., 2011).

120. *See id.* at 132.

121. *Id.*

without apologizing for them.¹²² However, there were some who published corrective accounts¹²³ and even apologies¹²⁴ in their columns. Smolkin believes there are important lessons for journalists that come out of the Duke case about not rushing to judgment and exercising “prudence and skepticism”¹²⁵ even when covering a “lurid crime story.”¹²⁶ However, the author doubts those lessons will be applied by a media that operates under intense “competitive pressures”¹²⁷ and has a “notoriously short memory.”¹²⁸

The next essay in the collection, written by Jane E. Kirtley,¹²⁹ *Not Just Sloppy Journalism, but a Profound Ethical Failure: Media Coverage of the Duke Lacrosse Case*,¹³⁰ thoroughly examines the role of ethical guidelines in the “profession”¹³¹ of journalism. Kirtley provides an in-depth look at the ethical framework that is typically applied in the “profession” of journalism and how this framework was abandoned by many news media outlets during their coverage of the Duke case. In addition to providing examples of the least ethical coverage of the case, the author also points out some of the best coverage of the case such as that done by bloggers:

Bloggers exposed poor reporting by the mainstream media and offered information unavailable to or ignored by the mainstream press. By relying heavily on documents rather than on cultivating government sources, blog coverage both contrasted with and complemented conventional reporting. Bloggers fact-checked mainstream-media stories. Bloggers and online sites posted legal filings and documents from both sides, allowing visitors to read, learn details, and draw conclusions for

122. *Id.* at 144–145.

123. David Brooks, New York Times Op-Ed columnist stated in a corrective account, “Witch hunts go in stages . . . [b]ut now that we know more about the Duke lacrosse team, simple decency requires that we return to that scandal, if only to correct the slurs that were uttered by millions of people, including me.” *Id.* at 144.

124. Ruth Sheehan, *News and Observer* columnist wrote the following after penning numerous anti-player pieces: “Members of the men’s Duke lacrosse team: I am sorry.” *Id.* at 145.

125. *Id.* at 146.

126. *Id.* at 145.

127. *Id.*

128. *Id.* at 146.

129. Jane E. Kirtley, Silha Professor of Media Ethics and Law, School of Journalism and Mass Communication, University of Minnesota; Director, Silha Center for the Study of Media Ethics and Law, University of Minnesota.

130. Jane E. Kirtley, *Not Just Sloppy Journalism, but a Profound Ethical Failure: Media Coverage of the Duke Lacrosse Case*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 147, 147 (Howard M. Wasserman ed., 2011).

131. Kirtley notes that journalists are not like other more typical “professions” such as law and medicine. “Whether journalism constitutes a ‘profession’ is hotly debated, even in media circles.” *Id.* at 147.

themselves.¹³²

Kirtley provides thoughtful discussion on the topic of whether the codified ethical goal of “minimizing harm”¹³³ is achieved when the practice of the mainstream media is to name the accused from the outset in sexual assault cases while generally not naming the accuser.¹³⁴ The author also makes some keen insights regarding the effect that statements from the “pundits and commentators”¹³⁵ in the news media (whose opining is constitutionally protected)¹³⁶ have on a story.¹³⁷ The bad journalistic behavior was not reserved for pundits and commentators though, many mainstream sources in their actual news reporting failed as well:

Journalists disseminated factual errors: some because of inadequate or sloppy reporting, others because of blind acceptance of misinformation deliberately leaked or presented by government officials. Journalists’ willingness to take official pronouncements at face value, to buy into a narrative of race and class, and to propagate stereotypes produced inaccurate news accounts. These accounts, in turn, fueled irresponsible commentary. The result was a rush to judgment that turned out to be wrong that disserved not only the defendants in the case, but the public.¹³⁸

Kirtley states in closing, “The Duke lacrosse case is a sobering reminder that no one is immune from error. But if the news media own up to and learn from those errors, perhaps they will not repeat them.”¹³⁹

The final essay in the collection is a substantial piece by Craig L. LaMay¹⁴⁰ titled, *Covering the Notorious Case: Narrative and the Need for Sensationalism Done Well*.¹⁴¹ This essay dissects the “narrative frame”¹⁴²

132. *See id.* at 154.

133. Society of Professional Journalists promulgates a code of media ethics, which includes the principle of “minimizing harm.” “Minimize harm: Ethical journalists treat sources, subjects and colleagues as human beings deserving of respect.” *Id.* at 149 (citing SOC’Y PROF’L JOURNALISTS, CODE OF ETHICS (1996)).

134. *Id.* at 158–159.

135. *Id.* at 160.

136. “The Supreme Court has recognized that ‘there is no such thing as a false idea,’ and pure opinion is absolutely protected under the First Amendment and cannot form the basis for a libel suit.” Kirtley, *supra* note 130, at 160 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

137. *Id.* at 160–161.

138. *See id.* at 163–164.

139. *See id.* at 165.

140. Craig LaMay, Associate Professor of Journalism, Northwestern University, Medill School of Journalism.

141. Craig LaMay, *Covering the Notorious Case: Narrative and the Need for Sensationalism Done Well*, in *INSTITUTIONAL FAILURES: DUKE LACROSSE, UNIVERSITIES, THE NEWS MEDIA, AND THE LEGAL SYSTEM* 167, 167 (Howard M.

that propelled the Duke story through the media with such historically “bad reporting.”¹⁴³ LaMay proffers that “two cornerstones of American journalism—crime and sports—individually and at their intersection”¹⁴⁴ framed and drove the narrative in the Duke case. He analyzes how existing “narratives are embedded in Americans’ understanding of the role [of] sport[s]”¹⁴⁵ and how that affected the coverage in the case:

One [of these narratives] is essentially functional, a conception of sport as an embodiment of Judeo-Christian values—hard work, perseverance, and respect for authority . . . the ultimate meritocracy, rewarding achievement and blind to class, race, or ethnicity. . . .

The other major narrative in sociology (and with predictable regularity in sports journalism) sees sport as a tool of social control . . . driven by self-interest and characterized by manipulation and coercion. . . . At its most competitive levels—professional and Division I college athletics—sport converts athletes into commodities, tools for generating revenues for owners, including universities and their athletic departments.¹⁴⁶

Throughout this analysis, LaMay provides a comprehensive yet concise historical overview of how we arrived at modern day, big time college athletics¹⁴⁷ (and all the troubles that have come with it). He also addresses the culture in American higher education as it relates to athletes and violence on campus.¹⁴⁸ He criticizes the news media¹⁴⁹ and their predictably unsophisticated coverage of all things related to higher education, including athletics:

The central news story in college sports today is the same story as in the late nineteenth century—who is responsible for student games? To the extent the Duke story is part of a larger tale about the role of the modern university, it is complex and of interest only to a small audience; news organizations rarely cover higher education, except in terms that exaggerate petty conflicts and

Wasserman ed., 2011).

142. *Id.* at 169.

143. *Id.* at 167.

144. *Id.* at 169.

145. *Id.* at 174.

146. *See id.*

147. *Id.* at 175–178.

148. LaMay cites a 2003 study of attitudes on campus related to athletes and sex crimes and another study that examined twenty colleges and universities with Division I athletic programs which found that male athletes made up 19 percent of those charged with sexual assault, despite making up only 3.7 percent of the student population. LaMay criticizes the results of the study based on the study sample and other factors. *Id.* at 181–182.

149. LaMay referred to the media generally though excluded the *Chronicle of Higher Education* from his criticism. *Id.* at 183.

ignore serious ones. Many of the caricatures that carried the Duke lacrosse story for so long were the same caricatures that appear in reporting about higher education generally. There is no better way to become a quotable expert on higher education than to play to character.¹⁵⁰

Another highlight in this essay includes LaMay's exploration of how current trends in the demand for and consumption of sensational stories over "serious policy"¹⁵¹ news contributed to the poor coverage in the case.¹⁵² In conclusion, LaMay opines that:

The Duke story is . . . about what universities are for and who runs them, though that part of the incident will never interest the general public or the news media. It is also about the privilege enjoyed by student-athletes for whom normal rules often do not apply in the modern American university, especially in a private, academically and athletically competitive institution such as Duke. The story was also undeniably about race, although most of that narrative was cynical and unproductive.

The journalistic failure in the Duke case was the failure to verify, to meet the obligation that separates journalists from entertainers and propagandists. Whatever the medium, journalists' moral and professional obligation is to discover and present evidence. That means journalists must do more than find facts consistent with their hypotheses; proof requires them to find, wherever possible, evidence that disproves other explanations or points of view.¹⁵³

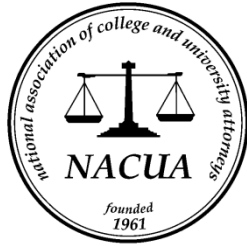
This collection of essays is a must read for any college or university administrator who finds themselves embroiled in a high profile controversy. It allows the reader to consider the totality of the events that transpired at Duke with the benefit of hindsight and expert analysis. There are important lessons in this book not only for senior college and university administrators, but also for faculty members, college and university public relations/communications personnel, government prosecutors, the media, and perhaps most importantly, consumers of media. The essays are presented in a highly digestible way, and there is cohesiveness to the book as it relates to the major theme of institutional failures. The legal analysis in the book is precise and thorough, but accessible to non-lawyers as well.

150. *Id.* at 183–184.

151. *Id.* at 170.

152. *Id.*

153. *See id.* at 184.



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The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 3,000 attorneys who represent more than 1,400 campuses and 660 institutions.

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