

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

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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*, 509 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.

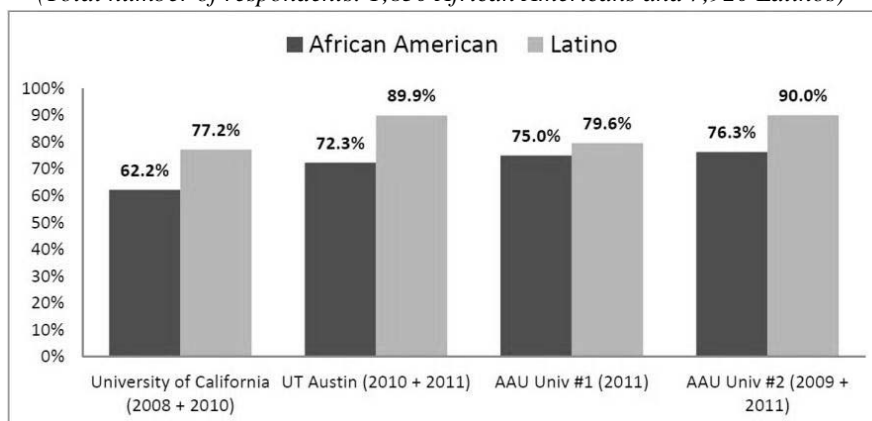
Looking at Chart 1, across the UC system 77.2% of Latinos feel that students of their ethnicity are respected, compared to 89.9% at UT Austin. At AAU University #1 79.6% of Latinos feel respected, and at AAU University #2's 90.0% of Latino students report feeling respected. UT and the two AAU universities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

**Chart 3: Head-to-Head Campus Comparisons of Latinos Reporting
"Students of my race/ethnicity are respected on this campus"**

	2011	2010	2009	2008
Latinos = 18-31% Enrollment	AAU #2: 91.1%	UCR: 92.9%		UCR: 90.5%
	UT Austin: 91.4%	UT Austin: 86.4%		UCSB: 75.6%
		UCSB: 79.7%		
		UCSC: 77.3%		
Latinos = 12-17% Enrollment	AAU #1: 79.6%	UCB: 73.7%	AAU #2: 89.0%	UCB: 67.9%
		UCD: 80.3%		UCD: 79.2%
		UCI: 79.3%		UCI: 77.7%
		UCLA: 75.6%		UCLA: 71.7%
		UCSD: 62.1%		UCSD: 72.1%
				UCSC: 77.4%

These data from leading research universities strongly support the modest conclusion that higher levels of racial diversity are generally better for the campus climate faced by African American and Latino students, whereas racial isolation in combination with an affirmative action ban is associated with a more inhospitable racial climate. Although these data are not proof of a causal role, the patterns are consistent with the conclusion that affirmative action bans and lower diversity (at least in combination) lead to African American and Latino students feeling that they are less respected by their peers. Regarding the assertion by UT Austin's lawyer at oral argument in *Fisher* that "critical mass" with respect to African Americans needs to be "well beyond" three percent, the comparative data in Charts 1 and 2 reinforce that the differences generally matter with respect to attending a research university where African Americans are two or three percent of the student body versus five percent or more, and the very highest levels of African American students perceiving that they are respected are found on the campuses where African Americans are 8-11 percent the student body.

Moreover, these data are highly inconsistent with the criticism that affirmative action is the source of material harm for Black and Latino students by supposedly worsening their stigmatized status (stigma is discussed in detail in Part II). These data also run contrary to the argument that ending affirmative action fosters a "warming effect" whereby underrepresented minorities feel more welcome (also discussed in Part II).

The racial climate surveys discussed above highlight an important feature of the *Fisher* case. In 2004 UT Austin's surveys revealed that its

related to improved attitudes toward Hispanics and Whites, and their interactions with Hispanics and Whites were both related to improved attitudes toward Asians. Hispanic students' interactions with Asians were associated with improved attitudes toward Blacks. . .").

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.”).

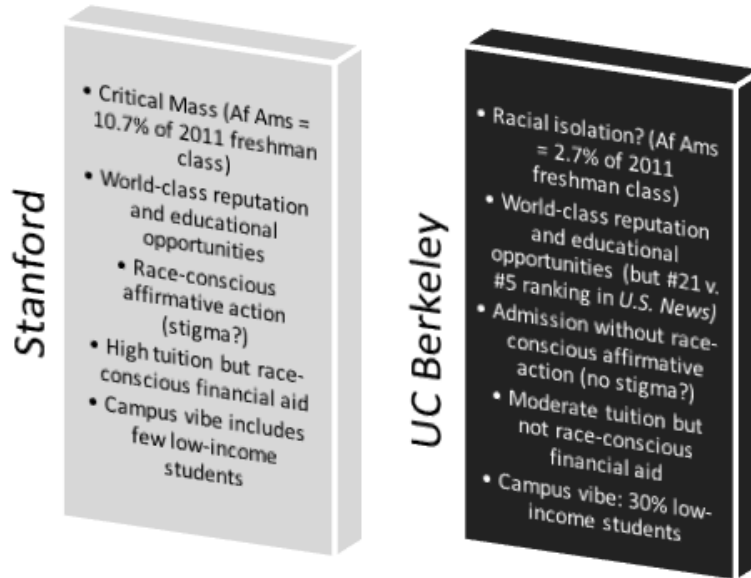
45. JIM SIDANIUS ET AL., *THE DIVERSITY CHALLENGE: SOCIAL IDENTITY AND INTERGROUP RELATIONS ON THE COLLEGE CAMPUS* 287–88 (2008).

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).

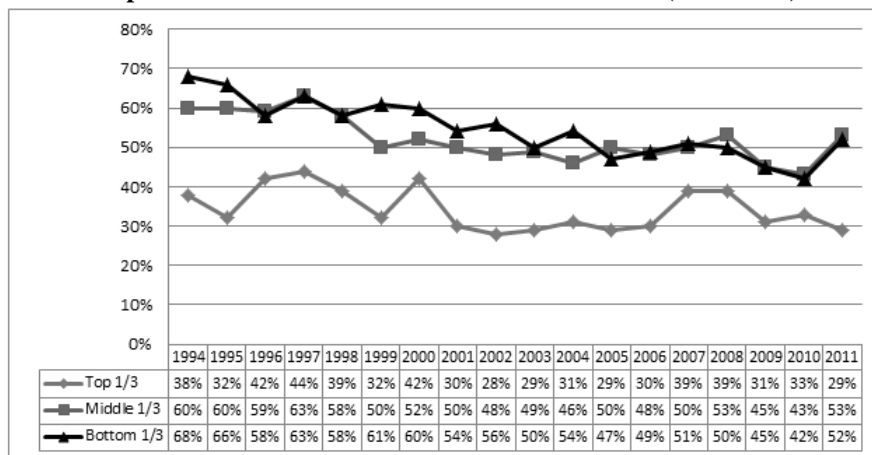
48. See discussion of the "mismatch" literature, *infra* Part 3 of this article.

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)



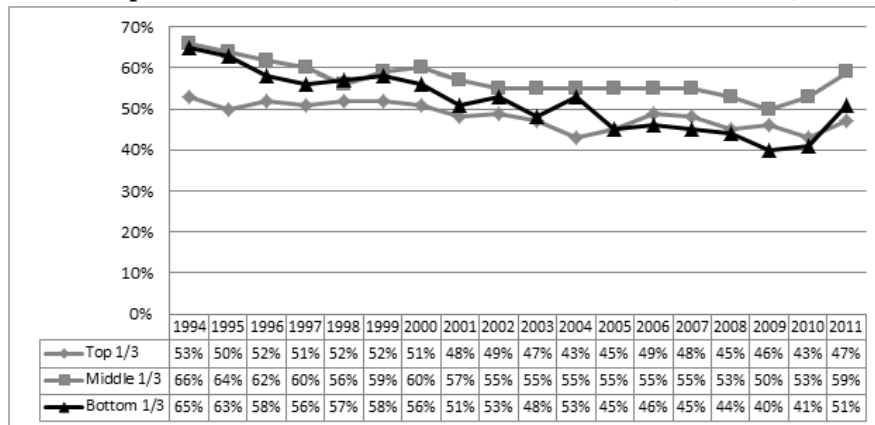
Turning to Latinos, Chart 6 confirms that Latinos in the top third of the UC admit pool had an average yield rate of 51.5% in the four years prior to Prop 209, and the overall post-209 yield rate declined to an average of

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's 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. 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.

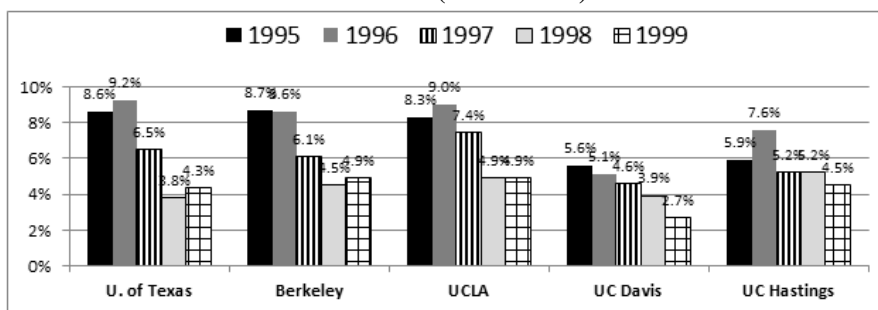
79. *See, e.g.*, ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION (2002).

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 4: 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.

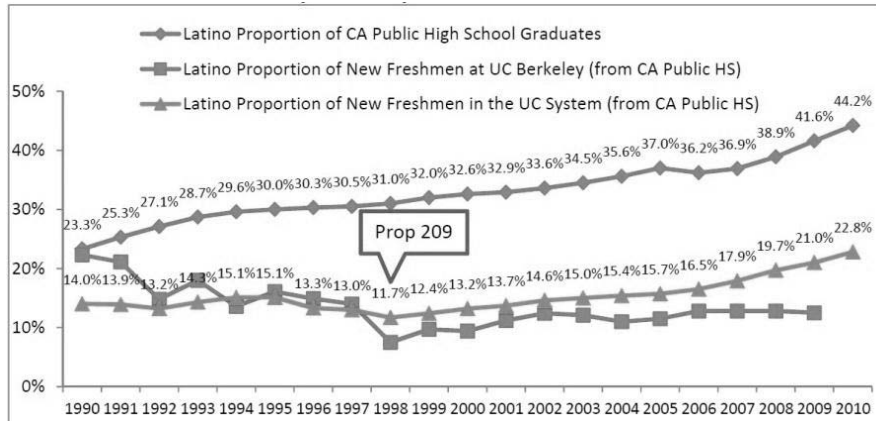
Chart 8: Latinos as a Percentage of California Public High School Graduates and New UC Berkeley and UC System Freshmen, Fall 1990 to 2010⁹⁶

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 5: 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.*

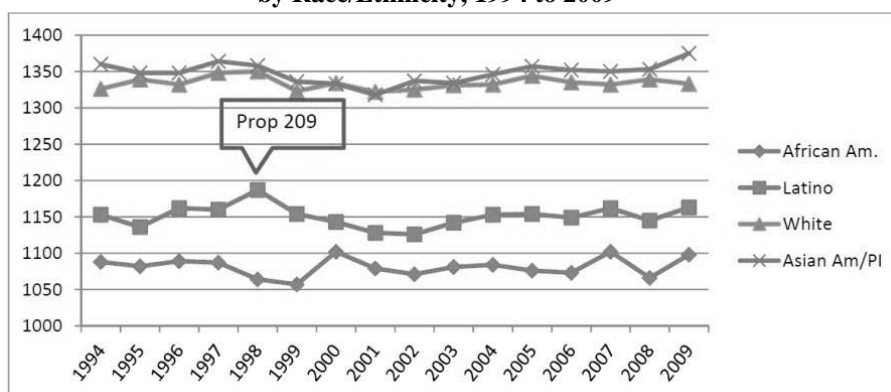
109. See, e.g., Stephen B. Robbins et al., *Do Psychosocial and Study Skill Factors Predict College Outcomes? A Meta-Analysis*, 130 PSYCHOL. BULL. 261 (2004).

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



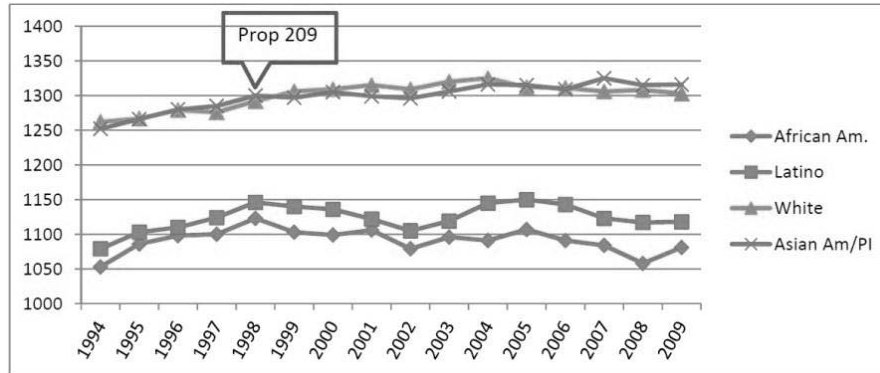
111. For a comparison of SAT score gaps and high school grade/rank differences by race/ethnicity, *see infra* notes 90–97 and accompanying text. *See also* Chacon, *supra* note 105, at 1252–53 (chronicling responses to reform of UC admissions by several affirmative action critics, including Gail Heriot 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

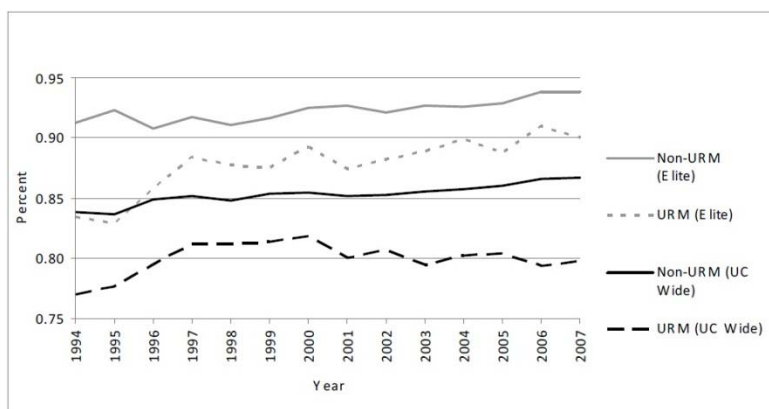
148. This is a corollary of the research findings in *Crossing the Finish Line* and other works cited earlier in this section about African American and Latino graduation rates at the most selective universities—but note that as applied to UC it is attenuated somewhat by the fact that growth noted herein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

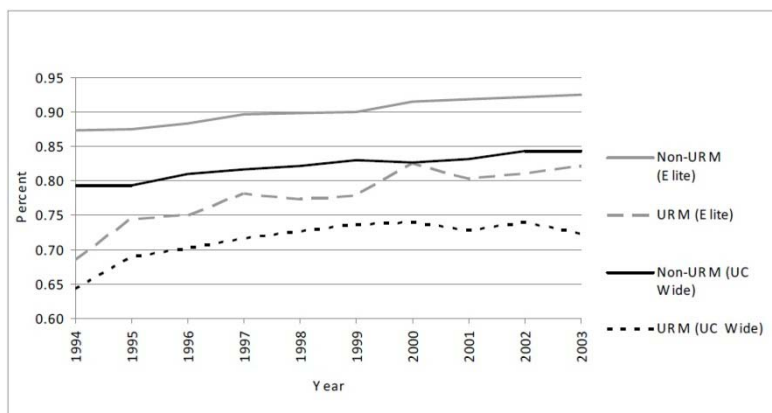
Relative to the pre-Prop 209 baseline of 1997, the gap in graduation rates compared to other groups since Prop 209 took effect worsened a little in 1998 and 1999, they were flat in 2001-02 and they were improved in 2000 and 2003. Again these underwhelming data are not what one would expect to see if 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.

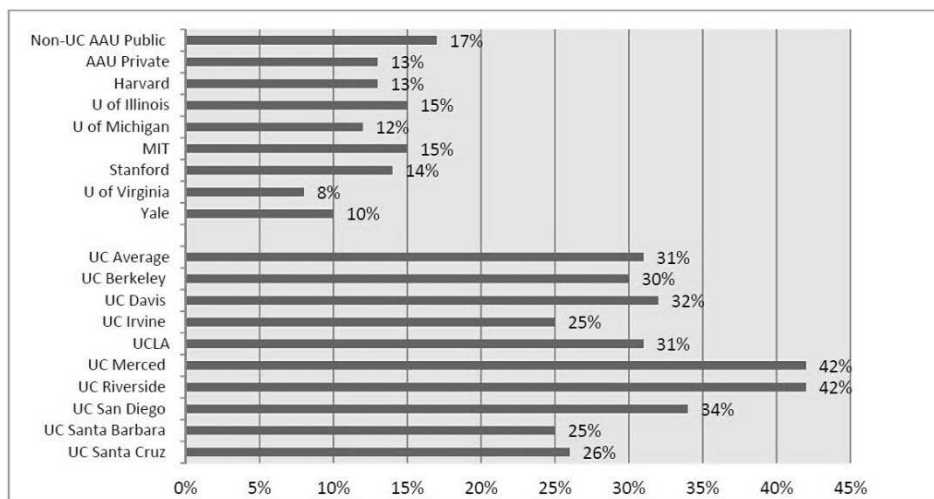
As the chart below indicates, at UC over 30% of the undergraduates are recipients of federal Pell Grants (i.e., they qualify as “low-income” students by the widely accepted federal definition), which is double the rate at UC’s peer institutions that are members of the prestigious Association of American 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.

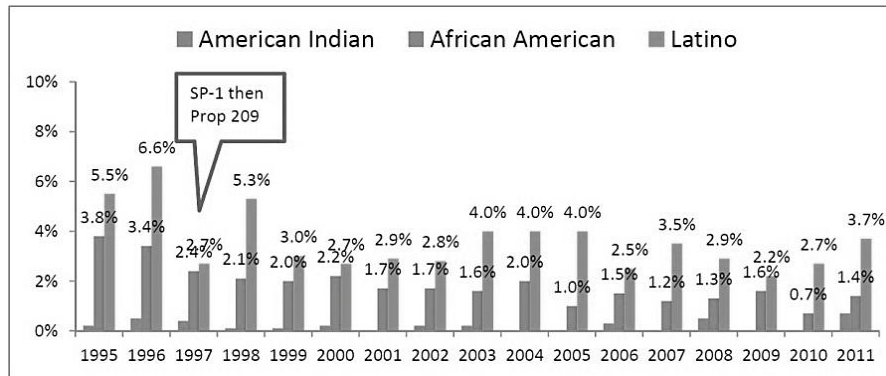
191. See, e.g., SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS AND SOCIETIES* (2007); Orlando Richard et al., *Employing an Innovation Strategy in Racially Diverse Workforces: Effects On Firm Performance*, 28 GROUP & ORG. MGMT. 107, 120 fig. 1 (2003) (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.

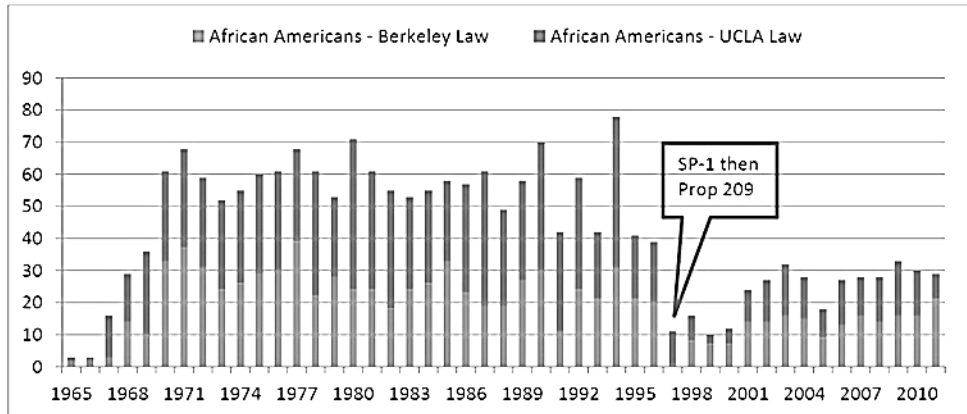
Chart 15: Entering African Americans at the UC Berkeley and UCLA Law Schools, 1965-2011²⁰⁹

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.



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 "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

210. The question presented in the petition for the U.S. Supreme Court to review *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.*

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 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.

