

**Affirmative Action in Law School Admissions:
What Do Racial Preferences Do?**

Jesse Rothstein and Albert H. Yoon*

Abstract

The Supreme Court has held repeatedly (*Bakke*, *Grutter*) that affirmative action in public university admissions is constitutional. But this has not settled the debate over its wisdom. Some opponents have argued that affirmative action is detrimental to minority students, that it places these students in environments that are too difficult for them and thereby hurts their academic and career outcomes.

This article examines the so-called “mismatch” hypothesis in the context of law school admissions. We discuss what sort of evidence might support or work against claims of mismatch effects. Using two data sources and our preferred approach, we find that claims of the mismatch hypothesis are significantly overstated, particularly with respect to employment outcomes. Nevertheless, the data are consistent with some mismatch, concentrated among the students with the lowest entering credentials.

To put these estimates in context, we simulate the elimination of affirmative action. This would lead to drastic reductions in the number of black law school matriculants, particularly at the most selective schools, without managing to eliminate mismatch between black and white students. This magnitude of the displacement dominates that of mismatch, so elimination of preferences would dramatically reduce the number of practicing black lawyers.

* Jesse Rothstein is Assistant Professor of Economics and Public Affairs at Princeton University; Albert Yoon is Professor of Law and Professor of Political Science (by courtesy) at Northwestern University. We are thankful for the comments from the American Bar Foundation Workshop participants, and special thanks to David Gerber, John Heinz, and Tracey Meares. We thank the Andrew W. Mellon Foundation for financial support. All errors are our own.

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Introduction

Despite great progress over the last half century toward the elimination of formal and informal discrimination against African Americans and other minorities, the legacy of slavery and Jim Crow lives on. African Americans continue to lag behind whites on a great many dimensions. On average, African Americans get less education than whites; earn lower test scores; have lower employment rates and, if employed, earn lower wages; are more likely to be imprisoned; accumulate less wealth; and have lower life expectancies.

In 1965, as the United States was moving quickly to eliminate formal, legal discrimination against African Americans, President Lyndon Johnson proposed taking an additional step:

[F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person, who, for years has been hobbled by chains liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity.¹

The result was affirmative action, preferences in educational admissions and hiring for African Americans. Over 30 years later, heated debate over the wisdom and constitutionality of these policies continues.² Opponents argue that formal consideration of race violates the Equal Protection Clause of the U.S. Constitution and, moreover, that it fosters a pathology of inferiority among minority beneficiaries.³ The Supreme Court has held (most recently in *Grutter v. Bollinger*) that equal protection concerns are overcome by a compelling state interest in

¹ President Lyndon B. Johnson, Commencement Address, To Fulfill These Rights (Howard U., June 4, 1965), in *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965*, vol. II, 635-40 (Government Printing Office 1966).

² A Gallup Poll issued on 6/26/2005, asking “Do you generally favor or oppose affirmative action programs for racial minorities?” 50.03% favored; 42.38% opposed; 7.14% did not know, and 0.56 refused.

³ See, e.g., Justice Thomas in *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas, J., concurring in part and dissenting in part); see also CAROL M. SWAIN, *THE NEW WHITE NATIONALISM IN AMERICA* __ (2002) (writing that “[a]ffirmative actions policies, I believe, can send a powerful message to whites and blacks alike that minorities are incapable of competing on their own, and it has contributed to the continued white denigration of genuine minority accomplishment”).

“diversity,” and that race-based preferences can be justified on these grounds. It has not, however, ratified the original basis for these preferences, the desire to remedy past discrimination.

Not surprisingly, much of the foundational scholarship on affirmative action addressed the constitutional and normative questions. But many of the open questions are positive. Does affirmative action contribute to the advancement of African Americans in our society? If so, how much? And how great is the cost, in terms of the whites who are inevitably displaced by these preferences?

These questions are extremely difficult to answer. We need to know what our society would look like if affirmative action policies were absent but everything else was the same. Scientists can isolate particular causes via randomized experiments, where experimental subjects are randomly assigned to receive or not receive some treatment of interest. Unfortunately, social science does not lend itself well to such experiments, and must proceed by observational studies of the world outside the laboratory. The introduction of affirmative action coincided with many other changes in our society, and isolating its impact is impossible.

If we cannot ever know what our society would look like without affirmative action, perhaps we can answer a narrower question: Are individual African Americans made better off by their access to preferences? Some opponents of affirmative action argue that the answer is no. One basis for this counterintuitive position is the hypothesized importance of what are called “mismatch effects:” The existence of preferences provides to (purported) beneficiaries entrée into competitive schools and difficult jobs for which they would not otherwise be thought qualified. The challenges that these schools and jobs provide prove too great for students and workers without the traditional qualifications, and they fail at higher rates than they would have at schools or jobs more in line with their credentials.

The existence and importance of mismatch effects can be assessed only through recourse to empirical evidence. Even for this limited question, unverified assumptions will be necessary—because affirmative action is pervasive, there is no comparison group of African Americans who are completely unaffected by preferences—but it is at least possible to imagine methodological strategies that could provide credible answers.

A recent study by Richard Sander has drawn attention for its conclusion that affirmative action in law school admissions has not only failed to benefit minority students, but indeed so

hurt them that it has reduced the number of successful black lawyers.⁴ He argues that mismatch effects are quite important for African American law students, and that the incidence of mismatch would be greatly reduced if affirmative action were eliminated. A key part of Sander's argument is that law school enrollment for minority students would remain roughly stable, so the increased success rates—during law school, on the bar exam, and in legal careers—that would be seen as a result of the reduction in mismatch would dominate the effect arising from the exclusion of potential lawyers from law school.

The potential implications of these claims are significant. As a policy matter, few would support affirmative action preferences if they were thought to harm the African Americans who—as President Johnson's proposal makes clear—are the intended beneficiaries, and if they moreover to do nothing to reduce the saliency of race in American life.

This article tests these claims in the legal education context that was the subject of Sander's article. We discuss strategies for estimation of mismatch effects, and present estimates from what we see as the most credible. We also attempt to assess how many students would be excluded from law school by the elimination of affirmative action. The net impact of affirmative action on the production of black lawyers combines the two effects.

We argue that the available evidence cannot support strong claims for large mismatch effects. What mismatch effects there may be are concentrated among the black students with the weakest academic credentials, not among the highly-qualified black students at elite law schools who are the focus of many discussions of mismatch. By contrast, the evidence indicates that race-based preferences are pervasive and large in law school admissions. Nearly two thirds of the black students attending law school – including nearly all of the less-qualified students who bear the brunt of any mismatch effects – would not do so without affirmative action. Preferences are even more important at the most selective law schools, which would lose 90% of their black students if they used race-blind admissions. Moreover, those few black students who would remain at selective law schools without affirmative action preferences would still be mismatched to a significant degree.

⁴ Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004); see also Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006) (arguing the longer-term consequences of affirmative action on blacks in the labor market).

The positive effects of race-based preferences on access to law schools dominate any negative effects of mismatch. Using methods that almost certainly overstate the importance of mismatch effects and the potential to eliminate them through a shift to race-blind admissions, we conclude that the net effect of eliminating affirmative action would be to reduce the production of new black lawyers by approximately 50 percent.

Before we proceed, it is important to mention several caveats. First, we focus exclusively on the positive analysis of affirmative action. While our estimates here are clearly relevant to any normative evaluation, the issue is sensitive enough to warrant a strict separation between the two. We attempt to focus on the facts, and to leave their implications for policy and for the law to others.

Second, we focus exclusively on the admissions and success rates of black and white law students. This does not reflect a lack of concern for Hispanic, Asian, or Native American students. Rather, there are simply too few students from these groups to support our empirical analysis. Moreover, we believe that the unique history of people of African descent in American society merits their separate treatment in discussions of affirmative action.

Third, we attempt to be precise in our terminology. We refer frequently to “black” students, rather than to “African Americans,” because this is the way that they are identified in the data that we study. In many cases, the African American label may be incorrect—an unknown fraction of the students that we examine are foreign-born, and while we assume that students who self-identify as “black” indeed have recent ancestors from the African continent we cannot tell which would identify as Americans. We similarly refer to students who are identified as “white” in our data by that term.⁵

Fourth, we focus exclusively on numeric academic measures (e.g., the undergraduate grade point average and the LSAT score) as predictors of admissions decisions and academic success. Other factors—essays and recommendation letters in admissions, student motivation and external support once in law school—are clearly important, but are quite difficult to measure with any reliability. Students with the same numerical credentials may differ systematically along other dimensions. Importantly, the general form of these differences is frequently

⁵ Many data sources distinguish between Hispanic and non-Hispanic whites. The survey from which our primary data set is drawn offers “White”; “Black”; “Mexican-American, Chicano”; “Puerto Rican”; and “Other Hispanic” (among others) as mutually exclusive options. We exclude respondents who gave any but the first two responses from all analyses.

predictable, and as we proceed we discuss their implications for our analysis. It is worth emphasizing at the outset, however, that for all their faults our numeric measures are strongly predictive of both admissions and academic success.⁶

Fifth, we do not attempt to sugarcoat the frequently dismaying facts that we discuss. The black underperformance on a variety of dimensions summarized above is a regrettable but undeniable fact. It creates many problems, and in many ways threatens to derail the American project. We believe that few things would do as much to better American society as the elimination of these gaps between black and white average outcomes. However, we cannot begin to solve the problem until we can describe it. Doing so requires discussion of sensitive facts—like the disappointing academic records of many black law school applicants—that are often left unstated. We make no apologies for this.

Sixth, we consider hypotheses that may be uncomfortable to many readers, and indeed are to us. The mismatch hypothesis is a serious claim, made by serious people who we take to have the best interests of all members of American society at heart. If it is true, those who support affirmative action have much to answer for. Moreover, the alternatives are no more palatable. The incontrovertible facts are that a disturbingly large fraction of the black students admitted to law school fail to complete it, and that many more are unsuccessful on the bar exam. The mismatch hypothesis offers one account of these facts. If black underperformance cannot be attributed to mismatch, however, it must have some other source. The most plausible candidate is the equally unappealing claim that law schools are admitting many black applicants who are simply not prepared for law school. It would be impossible to evaluate these hypotheses without a willingness to consider them, however uncomfortable they may be.

Seventh, our analysis is exclusively statistical. This means that we focus on average outcomes and on their distributions. Nothing that we say here should be interpreted to refer, positively or negatively, to the potential outcomes of any individual students. It is no insult to say that most humans will never run a four minute mile, the existence of counterexamples

⁶ On the shortcomings of standardized test scores, see Crouse and Trusheim (1988), Rooney (1998), and St. John et al. (2001). Sander (2004, p. 418-425) points out the important role of numerical measures in admissions and their predictive power for future success. Anthony and Liu (2003) and Wightman and Muller (1990) examine the predictive power of LSAT score for students of different races. Jencks (1998) summarizes the evidence on bias in testing and concludes that “the skill differences [between blacks and whites] that the tests measure are real, and these skills have real consequences both at school and at work” (p. 84).

notwithstanding. Similarly, while only a small fraction of law school applicants with very low LSAT scores will go on to become lawyers, there is no reason why an individual student with a low score cannot be successful.

Eighth, and finally, we attempt to provide answers to questions about counterfactual worlds. This requires assumptions, and even the best assumptions are likely to be wrong in at least some details. When we predict, for example, that the elimination of race-based preferences would lead to a 63% decline in the number of black law school matriculants, we do not mean to claim that the true effect might not be 62% or 64%. Our goal is to provide a reasonable, educated guess about what might happen in a counterfactual world. Readers may find many of our assumptions plausible, and we would not defend them long. We are open to other educated guesses that derive from the application of alternative assumptions. But debate over the issues taken up here must have some discipline, and it is our view that explicitly-stated assumptions taken to actual data are preferable to guesses plucked from thin air. We attempt to lay out here what a reasonable set of assumptions would imply.

While our primary analysis is of positive claims using data on entering law students, the judicial history of affirmative action is not irrelevant to the inquiry. Part II provides a brief review of this history, beginning with *Bakke* in 1979 and continuing at least to *Gratz* and *Grutter* in 2003. We focus on the not-particularly-close relationship between this judicial history and the policy debate.

Part III explains our focus on legal education, in particular why we believe it provides an analytically appropriate and important environment in which to study the effects of affirmative action. We describe basic facts about the law school application and legal training process that are relevant to our analysis, many of which are different in important ways from analogous aspects of undergraduate education.

Part IV discusses how affirmative action impacts law school admissions. We develop our methodology for simulating law school admissions as they would have occurred without affirmative action. We also present our simulations, which show that race-blind admissions would have yielded dramatically fewer black entering law students, particularly in the more selective schools.

Part V discusses the mismatch hypothesis in greater detail. We attempt to distinguish it from closely related hypotheses that have similar implications for observed patterns of student

success, and discuss the merits and demerits of alternative approaches for estimating mismatch. Part VI reports our analysis of mismatch, which is based on comparisons of black and white students with the same entering credentials. Part VII combines this analysis with our simulations of race-blind admissions, permitting us to assess the relative magnitudes of mismatch and displacement effects. We discuss the major implications of our findings. We draw an important distinction between two of our results: Affirmative action is responsible for a reasonable fraction of the black-white difference in observed success rates, but there is only weak evidence that any individual black law student would be helped by its elimination. Those looking to increase the number of new black lawyers will have to look elsewhere to accomplish this. We then briefly conclude.

Part II. A Brief Overview of Affirmative Action and University Admissions

Constitutional and policy debates over affirmative action policies have proceeded on largely separate tracks. The legal debate has focused primarily on public institutions, and the constitutionality of government-supported organizations to consider applicants' race when making admissions decisions. One side argues that affirmative action violates the "due process" clause of the 14th Amendment.⁷ The other side counters that affirmative action redresses unconstitutional past discrimination against minorities (and particularly against African Americans),⁸ benefits the broader society, and is constitutionally permissible.⁹ As we discuss below, the Supreme Court has found this diversity argument persuasive in *Grutter*.

The bulk of this paper focuses on an assessment of the effects of affirmative action in law school admissions on the black students who are the purported beneficiaries. We do not argue how our findings should inform the constitutional debate; we leave that issue for others to assess. Nevertheless, because the Supreme Court has dictated the rules governing affirmative action, we discuss the relevant caselaw briefly in the next subsection. Following that, we discuss the policy debate, though we defer a detailed consideration of the mismatch hypothesis to Part VI.

⁷ See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) (arguing against any discrimination on the basis of race on constitutional – and policy – grounds); Charles Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement*, 99 *YALE L.J.* 155 (1989) (arguing that race-based policies upset "a deep value of our constitutional polity" and should be limited to narrow remedial contexts based on the individual, not his or her race). The position is summed up by the claim that "the constitution is colorblind." *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980). (J. Potter, dissenting),

⁸ CORNEL WEST, *RACE MATTERS* 65 (1993) (claiming affirmative action is worth preserving to alleviate the "persistence of discriminatory practices."); GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* __ (2002) (arguing that fairness and individual freedom and dignity will remain unfulfilled without some forms of intervention based on race).

⁹ See generally Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 *B.C. L. REV.* 521, 522-25 (2002) (discussing the primary rationales for affirmative action). Other constitutional scholars, most notably John Hart Ely, argue that affirmative action does not trigger constitutional scrutiny whenever a majority (e.g., white) elects to discriminate against itself. See John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 *U. CHI. L. REV.* 723, 727 (1974).

A. The Constitutional Landscape

The Supreme Court first addressed the constitutionality of affirmative action in university admissions in June of 1978, in *Regents of the University of California v. Bakke*.¹⁰ The University of California at Davis Medical School had established a quota of 16 positions (out of 100) in its entering medical class that were to go to minority applicants. The Court struck this policy down,¹¹ but in a complex decision consisting of six separate opinions validated the consideration of race in admissions, at least in principle.

Bakke reflected the Court's internal lack of consensus over affirmative action.¹² Four justices – Burger, Rehnquist, Stewart, and Stevens – supported the view that the Davis's affirmative action policy violated Title VI of the Civil Rights Act of 1964¹³ but declined to address the broader constitutional question. Another four justices – Brennan, White, Marshall, and Blackmun – supported the view that the Equal Protection Clause of the Fourteenth Amendment allowed the consideration of race in admissions, and that Davis's admissions policy was a valid means of doing so.¹⁴ Justice Powell took these competing views to cobble together majority view that held that the U.C. Davis admissions policy was unconstitutional as designed, but that universities could consider race in making admissions decisions.¹⁵ Another portion of Justice Powell's opinion stated that there was a compelling state interest in the achievement of a diverse learning environment and that this justified race-based preferences. No other justices signed on to this portion of Powell's opinion, however, and there was no single justification for preferences that commanded majority support.

¹⁰ See 438 U.S. 265 (1978).

¹¹ See *id.* at 271.

¹² Justice Thurgood Marshall remarked after *Bakke* was decided that he “ha[d] seen so many interpretations of our decision now that it is hard for me to distinguish what we actually wrote and what the press said we wrote.” Associate Justice T. Thurgood Marshall, Address at Annual Judicial Conference Second Judicial Court of the United States (Sept. 8, 1978), 82 F.R.D. 221, 224 (1978).

¹³ See *id.* at 416. Part 601 of Title VI provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d.

¹⁴ See *id.* at 325-26.

¹⁵ See *id.* at 320.

¹⁷ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. JA Croson, Co.*, 488 U.S. 469 (1989); *Johnson v. Transportation Agency, Santa Clara County, California*,

Affirmative action remained unpopular after *Bakke*. Legal wrangling shifted to the permissible role of race-based preferences in employment, which the Court generally upheld on grounds related to the remediation of past discrimination.¹⁷

The next big move in the education context came in 1996, when California voters amended their state constitution to prohibit state institutions, including the University of California, from discriminating on the basis of race, sex, or ethnicity.¹⁸ Most of the support for this came from white voters.¹⁹ That same year, the Fifth Circuit Court of Appeals ruled that affirmative action in university admissions was unconstitutional, in seeming contradiction to the *Bakke* holding.²⁰ In 2001, the Eleventh Circuit similarly struck down the University of Georgia affirmative action admissions policy.²¹ These decisions had the effect of eliminating public university affirmative

480 U.S. 616 (1987), *Wygant v. Jackson Bd. of Educ.*, 467 U.S. 267 (1986); *Local 28, Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Commission*, 478 U.S. 421 (1986); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986). *See also* Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1996) (writing that the Court has never “broken out of sin-based rationales to elaborate a paradigm that would look forward rather than back, justifying affirmative action as the architecture of a racially integrated future”).

¹⁸ The ballot proposition, number 209 on the 1996 California ballot, was known as the “California Civil Rights Initiative.” The Supreme Court declined to grant certiorari to decide the constitutionality of Proposition 209, *see Coalition for Econ. Equity v. Wilson*, 522 U.S. 963 (1997) (certiorari denied).

¹⁹ Proposition 209 garnered 63% of white voters. Other ethnicity groups drew only minority support: 39% of Asian voters, 26% of black voters, and 24% of Latino voters. *See Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 (N.D. Cal. 1996).

²⁰ *See Hopwood v. State of Texas*, 78 F.3d 932 (1996) (striking down the university admissions policies on equal protection grounds). *Hopwood* reflects the confusion *Bakke* created: the court wrote that “any consideration of race by the law school for the purpose of achieving diversity is not a compelling interest under the Fourteenth Amendment.” *Id.* at 944, *aff'd*, 236 F.3d 256 (5th Cir. 2000) (noting that “[n]one of the [concurring Justices in *Bakke*] would go the extra step proposed by Justice Powell and approve student body diversity as a justification for a race-based admissions criterion”). *See also Johnson v. Univ. of Ga.*, 263 F.3d 1234, 1249 (11th Cir. 2001) (writing “Justice Powell's opinion does not establish student body diversity as a compelling interest for the purpose of this case”); *but see Smith v. Univ. of Wash.*, 233 F.3d 1188, 1198 (9th Cir. 2000) (acknowledging that Justice Powell’s diversity rationale failed to garner majority support, but nonetheless upholding diversity as a compelling state interest).

²¹ *See Johnson v. Regents of Univ. of Georgia*, 263 F.3d 1234, 1249 (11th Cir. 2001) (noting that “Justice Powell's opinion does not establish student body diversity as a compelling interest for the purpose of this case”)

action across most of the Southern states. Perhaps in response to these measures, California, Florida, and Texas all enacted changes in the admissions policies of their state universities in the late-1990s or early 2000s. All began guaranteeing admissions based on students' class rank, irrespective of race, high school attended, or entrance exam score.²²

Exactly 25 years later after *Bakke*, in June of 2003, the Supreme Court revisited the issue of affirmative action in higher education. In *Gratz v Bollinger*, the Court struck down the University of Michigan's undergraduate admissions policy that allotted points towards acceptance based on the applicant's ethnicity.²⁴ In a companion case, *Grutter v. Bollinger*, the court upheld the University of Michigan Law School admissions policy, which expressly considered race in its admissions decisions.²⁵ Read jointly, these decisions effectively affirmed Justice Powell's holdings in *Bakke* that racial diversity is a compelling state interest, and that affirmative action is constitutionally permissible provided it does not use quotas to achieve these ends.²⁶

²² The California Board of Regents in 2001 voted in favor of the Eligibility in Local Context (ELC), which guaranteed admission to a University of California campus to the top 4 percent of each high school; Florida passed the Talented 20 Percent in 2000, part of its One Florida program, which guaranteed admission to the Florida State University System any high school graduate who finished in the top 20 percent of her high school class. The Texas Legislature passed the "Automatic Admission: All Institutions," Plan in 1998, which guaranteed automatic admission all students in the top 10 percent of their graduating class to any public university in Texas (irrespective of their performance on standardized tests).

²⁴ See 539 U.S. 244, 270 (2003) (stating that the policy was not narrowly tailored to achieve the university's interest in educational diversity).

²⁵ See 539 U.S. 306, 335 (2003) (stating that court may consider "race as a 'plus' factor in any given case while still ensuring that each candidate 'compete[s] with all other qualified applicants,'" quoting *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 638, (1987)).

²⁶ See *Grutter*, 539 U.S. at 335.

²⁸ O'Connor wrote that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. at 343. This has generated debate in the fields of both law and economics. See Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L. Q. 541, 543 (2003) (examining the implications of Justice O'Connor's statement on the diversity rationale) and Alan B. Krueger, Jesse Rothstein, and Sarah Turner, *Race, Income, and College in 25 Years; Evaluating Justice O'Connor's Conjecture*, 8 AMER. L. & ECON. REV. 282 (2006) (assessing the factual basis for Justice O'Connor's prediction).

Supporters of affirmative action, while buoyed by the Court's upholding the constitutionality of affirmative action in principle, were troubled by Justice O'Connor's intimation in her *Grutter* opinion that these preferences were permissible only if temporary and that they would have to be eliminated soon.²⁸ In so doing, O'Connor intimated that the future of affirmative action was finite. Moreover, the diversity rationale remained unpopular among affirmative action's defenders,²⁹ and some argued that it made for bad public policy.³⁰

Grutter, like *Bakke*, failed to provide closure to the constitutional or policy debate over affirmative action. The departure of Justice O'Connor, replaced by Justice Alito, suggests that the Court, if deciding affirmative action today, might rule differently. Also, in November 2006, Michigan passed by ballot initiative the *Michigan Civil Rights Initiative* (MCRI), prohibiting preferential treatment or discrimination on the basis of race or gender for any public employment, education, or contracting.³¹

Questions about the consideration of race remain on the Court's agenda even after *Grutter*. This term, the Court granted certiorari to a case concerning the permissible role of race in the assignment of elementary and secondary students to oversubscribed schools.³²

²⁹ See Melissa Cole, *The Color Blind Constitution, Civil Rights-Talk, and a Multicultural Discourse for a Post-Reparations World*, 25 N.Y.U. REV. L. & SOC. CHANGE 127, 151 (1999) (discussing the Court's emphasis on a "color-blind" Constitution placed it at odds with promoting diversity).

³⁰ See Peter H. Schuck, *Symposium: Assessing Peter Schuck's Diversity in America: Keeping Government at a Safe Distance*, 23 YALE L. & POL'Y REV. 75, 77 (2005) (expressing "serious doubts about the coherence and persuasiveness" of the diversity rationale in *Grutter*); see also Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2002) (stating that "[t]he diversity rationale has transformed a temporary, limited tactic into an almost theological orthodoxy that skin color per se confers diversity-value, an orthodoxy affirmed by many elites who should, and do, know better. This is not the first time that hard cases and wishful thinking made bad law and policy.")

³¹ If this ballot initiative is appealed, it is unlikely that the Court will grant certiorari. See *Coalition for Econ. Equity*, *supra* note 1 / 1.

³² See *Parents v. Seattle and Meredith v. Jefferson* (2006) (oral argument December 4, 2006). This case will likely test the Court's commitment to the diversity rationale stated in *Grutter*, since racial balance is the sole enrollment criteria for these schools, without consideration of the students' academic credentials. The court has repeatedly endorsed race-based assignment rules for remedial purposes. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973). At issue here is whether race may be considered by districts not under court supervision.

B. The Policy Debate

The policy debate has, for the most part, focused on the impacts of affirmative action on minority students rather than on whites. Proponents argue that affirmative action helps the students who are admitted to selective schools via preferences, and that this has spillover effects on other minorities and on American society at large.³³ The “spillover” argument can be seen in *amici* filed with the Supreme Court in the Grutter and Gratz cases by groups of military officers and businesspeople,³⁴ who argue that affirmative action preferences help to create a class of highly visible, successful minorities and that the existence of such role models promotes the continued integration of African Americans into the upper reaches of our society and economy.³⁵

Opponents counter that affirmative action stigmatizes its beneficiaries,³⁶ promotes a race-conscious rather than race-blind society,³⁷ and generates resentment between ethnic groups.³⁸

³³ See, e.g., Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986) (describing the benefits of affirmative action for African-Americans which include: “the accumulation of valuable experience, the expansion of a professional class able to pass its material advantages and elevated aspirations to subsequent generations, the eradication of debilitating stereotypes, and the inclusion of black participants in making consequential decisions affecting black interests”).

³⁴ See e.g., Brief of Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340 (2003) (2003 WL 399056); Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, *Grutter v. Bollinger*, 123 S. Ct. 2325, 2332-33 (2003) (2003 WL 399096); Consolidated Brief of Lt. General Julius W. Becton, Jr. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340 (2003) (2003 WL 1787554).

³⁵ This argument echoes the Court’s claim, in *Brown v. Board of Education*, that segregated schools send a message to young African Americans that they are inferior. See also Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1022-34 (1996) (discussing how affirmative action promotes a “functional theory of diversity,” which emphasizes the positive benefits of diversity in politics, schools, and the workplace);

³⁶ See Patricia Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 541 (1990). See also, STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY, 12 (1992) (writing, “I got into law school because I am black”).

³⁷ See STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 539 (1997) (“Race-conscious policies make for more race-consciousness; they carry American society backward”). This has been formalized by Steven Coate and Glenn Loury, who argue that affirmative action can promote what is known as “statistical discrimination” against academically successful minorities by reducing the value of this success as an indicator of ability. For an interesting treatment – and counterpoint – of the primary

They also dispute the premise that affirmative action can foster the creation of minority role models. Rather, some argue for what is called the *mismatch hypothesis*, which posits that affirmative action places minorities in academic environments for which they are unprepared and thereby causes them to perform less well than they would have if they had not received preferential treatment in the first place.

One implication of these claims is that affirmative action preferences may not, in fact, help their purported beneficiaries. Indeed, a strong form of the mismatch hypothesis holds that affirmative action serves to *reduce* blacks' (and other minorities') success rates in higher education. Richard Sander's analysis of law school admissions³⁹ is a recent example; he argues that the legal education system may turn out *fewer* black lawyers than it would if affirmative action were abandoned.⁴⁰

The implications of the mismatch hypothesis are far-reaching. If accepted, it implies that a shift to race-blind admissions could help to promote, rather than hinder, the goals of economic integration and African American progress that are cited in the Grutter and Gratz *amici*. Acceptance of the mismatch hypothesis need not directly impact the constitutional justification for affirmative action, which implicitly is based in part on the effect of these policies on *non-minority* students: It might simultaneously be the case that admitting black students with poor qualifications into elite schools hurts those students but, because it fosters a diverse learning

arguments against affirmative action, see Richard Delgado, *1998 Hugo L. Black Lecture: Ten Arguments Against Affirmative Action – How Valid?*, 50 ALA. L. REV. 135 (1998).

³⁸ See THOMAS SOWELL, CIVIL RIGHTS: RHETORIC TO REALITY? 118-19 (1984)

³⁹ Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 427 (2004) (arguing that the disparity in academic credentials cause black students to fare worse than white students during and after law school); see also Lino Graglia, *Affirmative Action, "Past, Present, and Future"*, 22 OHIO. N. U. L. REV. 1207, 1216 (1996) (stating that affirmative action results in black students systematically being placed in schools above the level at which they can fully compete).

⁴⁰ The Sander article generated significant reaction from other scholars, most of it critical, on both methodological and normative grounds. See Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L. J. ___ (2005); Michele L. Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2004); David B. Wilkins, *A Systemic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005); Kevin R. Johnson & Angela Onwauchi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools"*, 7 Afr.-Am. L. & Pol'y Rep. 1 (2005).

environment, helps other highly-qualified students. If so, by the Court's logic affirmative action might remain permissible. On the other hand, the Court might conclude that affirmative action fails its test of not "unduly harm[ing] members of any racial group."⁴¹

The constitutional debate aside, it is difficult to imagine that preferences for black students would survive for long if the factual claims of its opponents came to be generally accepted. Few would support a policy that they thought would inflict harm on underprivileged minority students for the purpose of helping already-advantaged white students, and it seems at least plausible that a demonstration of a deleterious effect of affirmative action would change some or all of the *Gratz* majority's thinking on the subject.

Because the mismatch hypothesis is a positive claim, it can only be evaluated by recourse to empirical evidence. Unfortunately, this has been difficult to assemble. As we discuss in this article, mismatch effects are often inferred from evidence that is at least equally consistent with minority underperformance (well documented gaps in achievement between similarly qualified minority and white students that would arise regardless of the admissions criteria) or selection effects (comparisons between groups that are not really alike, as when black and white students at the same school are compared despite having been selected quite differently from the pool of potential applicants). Although it is relatively easy to highlight these misunderstandings, as we do in this paper, measuring the true effect of mismatch is a challenging task. How much of the observed performance (e.g., grades, jobs) of minorities attributable to affirmative action? To answer this question requires one to determine the counterfactual. Who can we look at to learn about how minority students would do without affirmative action? At an even more basic level, how many minority students would be admitted to law school, and which schools would they attend?

Other scholars have adopted strategies to determine the counterfactual world of admissions without affirmative action. For reasons we discuss below, we do not believe that these strategies provide credible answers. Nevertheless, we do think that something can be learned from observed patterns of student admissions and performance. We discuss our strategy for doing so

⁴¹ *Grutter*, 539 U.S. at 341. Although the Court wrote this in the context of protecting non-minorities, it would likely also apply it to minority groups.

in Section 4. Before doing so, we provide in Chapter 3 some background on the law school admissions process.

Part III. The Law School Admissions Landscape

Although many debates about affirmative action treat its use in college and graduate admissions as interchangeable,⁴² there are differences in the selection and educational processes at each level that affect our analysis. As we focus in this article on the role of affirmative action in legal education, it is important to understand the features of law school admissions and legal pedagogy that distinguish it from undergraduate education.

A. Why Focus on Law Schools?

Beyond the inherent interest in legal education,⁴³ law schools are an analytically attractive setting in which to examine policy arguments for and against affirmative action. One barrier to the quantitative examination of any admissions policy is that schools' admissions practices are generally proprietary and closely guarded.⁴⁴ Selective colleges boast how their admissions decisions consider "the whole person" via "holistic assessments," making it difficult to predict admissions decisions or to understand the role of any single factor in those decisions. Although law schools sometimes make similar boasts, in practice law school admissions decisions depend much more heavily on applicants' easily-observed numerical qualifications—i.e., their LSAT scores and undergraduate GPAs—than do undergraduate admissions.⁴⁵ This makes it feasible to simulate admissions under alternative rules reasonably accurately.

⁴² See, e.g., the Court's discussion of affirmative action in *Grutter* and *Gratz*.

⁴³ Aside from the numerous articles published in law reviews on legal education each year, the American Association of Law Schools (AALS) publishes the *Journal of Legal Education*, designed "to foster a rich interchange of ideas and information about legal education and related matters, including but not limited to the legal profession, legal theory, and legal scholarship." <http://www.law.georgetown.edu/jle/>

⁴⁴ This is perhaps explained by the confusing jurisprudence about affirmative action. Schools have been told that race can be a "plus factor" but that it should not be decisive. These two guidelines are logically inconsistent: Admissions decisions are either the same as they would be under race-blind rules or they are not. If the latter, there must necessarily be some students admitted who would have been rejected but for their race, and others rejected who would have been admitted had they had access to preferences. One way out of this morass is for schools to deny to potential plaintiffs the information that would permit them to demonstrate that they are in the latter category.

⁴⁵ The Princeton Review contends that the law school index number, comprised of undergraduate GPA and LSAT score, is "the first thing most law schools will look at when evaluating your application." The Princeton Review, *The Admissions Index*, at <http://>

A second analytical benefit of legal education comes in developing outcome measures. Researchers often use college graduation rates or grade point averages to measure college students' outcomes. But the wide variation in course of study and post-college pursuits limit the effectiveness of either measure. Moreover, Mansfield⁴⁶ argues that colleges inflate grades and lower graduation standards to avoid reporting large black-white gaps in each. Even graduate entrance exams are unsatisfactory: They are taken by only a subset of students, and the differences between the various exams (e.g. the LSAT for law school versus the MCAT for medical school) frustrate comparisons.

By contrast, legal education offers much greater uniformity in both experience and outcome measures. The overall curriculum is similar across law schools, particularly in the first year. Moreover, nearly all law graduates take the bar exam, and blind grading assures that exams are evaluated independent of race, school, or any other individual characteristic. While the bar provides only a dichotomous measure of performance – actual scores are rarely reported, only whether the exam was passed or failed – this is nevertheless a reasonably objective measure of students' accomplishment early in their post-school careers. If one group of students has lower achievement than another during law school, this should appear as lower rates of bar exam passage after graduation.⁴⁷

www.princetonreview.com/law/apply/articles/admission/admissionsindex.asp (last visited Jan. 29, 2007); See also Nancy B. Rapoport, *Ratings, Not Rankings: Why U.S. News & World Report Shouldn't Want to Be Compared to Time and Newsweek--Or the New Yorker*, 60 OHIO ST. L.J. 1097, 1098 (1999); See also Editors, *Rankings Reflect How the World Works*, U.S. News & World Report, Vol. 124, p.8 (1998) (stating that “law schools rely heavily on grade-point comparisons and LSAT scores when choosing students for admission”). A statistical analysis law school and undergraduate admissions indicated that test scores and grade point averages are 3 and 7.5 times as important, respectively, in law school admissions as in undergraduate admissions. See Rothstein and Yoon, *supra note* //; Thomas J. Kane, *Misconceptions in the Debate over Affirmative Action in College Admissions*, in GARY ORFIELD AND EDWARD MILLER (EDS.) CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES (CAMBRIDGE, MA: HARVARD EDUCATION PUBLISHING GROUP (1998).

⁴⁶ See, Mansfield, Harvey C. *Grade Inflation: Its Time to Face the Facts*, CHRONICLE REV., April 6, 2001: B24.

⁴⁷ This ignores two complications: The difficulty of the bar exam varies across states, and schools' curricula differ in the degree to which they prepare students for the content of the exam. We discuss the second complication below. Unfortunately, we are unable to do much about the first, as in the data that we the state in which the exam was taken is suppressed. It may be that weaker students migrate toward states with easier bar exams, attenuating the relationship between achievement and bar passage. This will tend to lead analyses that treat the bar exam as

Law school admissions differ from undergraduate admissions in many respects. First, there are not enough spaces for all of the applicants who would like to become lawyers, and therefore no completely unselective law schools. Any student can attend college if she wishes, and the admissions policies of selective colleges affect only *which* schools she can select among. By contrast, law schools' admissions policies determine not just which school a student will attend but whether she will have the opportunity to become a lawyer at all.⁴⁸ This both raises the stakes for admissions policy and complicates analyses of mismatch: Many black students who attend law school would be forced to make other career choices in a counterfactual world without race-based preferences, and some white students who are presently unable to gain admission to any law school would in the counterfactual world be able to attend. A full evaluation of mismatch would require measurement of the consequences of these shifts, necessitating information about the alternative career paths chosen by students who would like to become lawyers but are denied the opportunity.

Lastly, the entry-level legal labor market is narrower than the post-college labor market. The universe of jobs for law graduates is easily identifiable, and the relative desirability of different jobs is fairly consistent across students and schools. This makes it easier to assess a starting lawyer's success on the job market. Relatedly, because high-prestige employers often focus their recruiting efforts on particular schools, there may be particular advantages to attending a selective school that do not apply at the undergraduate level.

Beyond the analytical attractiveness of legal education, questions concerning the role of admissions preferences and mismatch are particularly important in legal education. Many law graduates become prominent in government, business, and of course, law.⁴⁹ Given this impact,

a uniform standard to understate achievement differences between groups, potentially disguising mismatch effects. On the other hand, to the extent that law schools' goal is to train practicing lawyers, bar passage is the outcome of interest and the state in which a student is admitted is of secondary importance. Nationally, only 83% of students pass the exam on the first try (authors' calculations from National Conference of Bar Examiners, 1995).

⁴⁸ Fully 44% of students who applied to law school in 1990-1991, for example, failed to gain admission at a single school (Barnes and Carr memo). By contrast, 21.6% of colleges and universities have "open admissions," and only 68% use admissions test scores for admissions. Digest of Education Statistics 2000, Table 309, p. 341.

⁴⁹ For example, the 110th Congress has 46 senators, and 153 representatives with a legal background. See www.congressmerge.com, which allows a search of members of Congress for, among other things, previous profession.

“role model” arguments for affirmative action therefore are particularly relevant here. Finally, several observers have argued that diversity is especially important to the legal learning experience.^{50 51}

B. The Mismatch Hypothesis in Law School

Confusion abounds on the exact meaning of the mismatch hypothesis. We take it to claim that certain minority students, as purported beneficiaries of affirmative action, achieve worse outcomes than had such policies not existed. This harm occurs because selective schools are good only for highly qualified students and have negative effects on students who are inadequately prepared. To the extent that preferences draw in minority students who fall so far short of the usual admissions requirements that they cannot keep up with their courses and classmates, these students might be better off if the preferences were eliminated.

It is worth elaborating on the mismatch hypothesis by walking through the story often presented about how mismatch effects arise. Consider a black student who would prefer to attend School X and whose second choice is the lower-ranked school Y. Students at School X are more likely to graduate and to pass the bar exam, and tend to have better placements into internships, clerkships, and post-graduation jobs. This reflects, at least in part, the better caliber of students at School X: Our hypothetical applicant’s LSAT score places her near the bottom of the School-X distribution but near the top of the school-Y distribution.

With race-blind admissions, our student might be denied admission to School X but accepted to School Y. She attends School Y, where she discovers herself to be well prepared for the first-year courses relative to her classmates. She attains good grades, is invited to serve on the law review, and graduates near the top of her class.

With affirmative action preferences, however, our student might also be admitted to School X. There, she is a small fish in a big pond⁵²: Most of her classmates enter law school

⁵⁰ See *Grutter*, 539 U.S. at 328-30 (holding that diversity yields substantial educational benefits); Kent Syverud, 5 Mich. J. Race & L. 451, 452, Expert Report *Grutter, et al. v. Bollinger, et al.*, No. 97-75928 (E.D. Mich.) (noting that “It has been my experience that racial diversity in the Socratic classroom strongly fosters the kind of thinking that the best lawyers need to be able to do”).

⁵¹ Cite to other amicus briefs?

with stronger academic credentials, more experience with legal concepts, and stronger writing skills. She works hard, but the expectations at School X are much higher than at school Y, and by the end of the first year she finds herself near the bottom of her class. She will not make law review, and will graduate—if she does—without academic distinction.

We can accept, *arguendo*, that this is (an exaggerated version of) the consequence of affirmative action for our student's prospects. If so, the mismatch hypothesis is certainly plausible: The second scenario is likely to demoralize her and lead her to doubt her own abilities. She may decide to drop out after her first year. If she remains she may be so busy trying to keep up with her courses that she is unable to focus on the bigger picture, misses key concepts, and ultimately struggle to pass the bar exam. Finally, her transcript, while from the more-prestigious school X, will not show a record of strong performance, potentially hurting her job prospects.

A central assumption of this story is that a student cannot predict the deleterious effects that School X will have on her. If she could, she would simply decline any admission offer from School X, and the availability of race-based preferences there would have no effect on her. There are more complex models of the education process, however, in which the availability of preferences can hurt students who do not themselves take advantage of them. To take one example, if *other* black students take advantage of preferences at School X, this will accentuate the black-white gap in admissions qualifications within schools. This could lead students and professors at School Y to assume that our hypothetical student is less qualified than she in fact is.⁵³ Alternatively, the prevalence of black underperformance at School Y could lead our student to draw negative inferences about her own ability.⁵⁴ In either case, our hypothetical student

⁵² Indeed, the mismatch hypothesis is sometimes referred to as the “Frog Pond” hypothesis, following from the reasoning that it is better to be a big fish (or, apparently, frog) in a small pond than a small fish in a large pond. See T.J. Espenshade, L.E. Hale, and C.Y. Chung, *The Frog Pond Revisited: High School Academic Context, Class Rank, and Elite College Admission*, 78 *SOCIOLOGY OF EDUC.* 269-293 (2005)

⁵³ This is referred to as “statistical discrimination.” See Stephen Coate and Glenn Loury, *Will Affirmative Action Policies Eliminate Negative Stereotypes?* 83 *AMER. ECON. REV.* 1220 (1993).

⁵⁴ Steele and Aronson's analyses of “stereotype threat” suggest such a possibility. *Stereotype Threat and the Intellectual Test Performance of African Americans* 69 *J. PERSONALITY & SOC. Psych.* 797 (1997).

might be worse off for the existence of preferences even if she does not herself take advantage of them.

Mismatch effects might occur anywhere that admissions decisions incorporate information other than pure academic qualifications. Recipients of preferences given to athletes, legacies, in-state residents, good citizens, or tuba players will in general be less academically qualified than their classmates, potentially harming them if selective schools have negative effects on academically underqualified students. Moreover, the logic of mismatch extends beyond the recipients of preferential admissions. Consider a student who, on academic merit, just clears the threshold for admission to a selective school, and is therefore at the lower end of the academic distribution of matriculating students. This student is mismatched relative to her classmates, and if mismatch effects are important she would perhaps have fared better attending a less competitive school instead.

We return to the definition of mismatch below, and discuss in Part V several forms of evidence that appear to bear on the mismatch hypothesis but are in fact irrelevant to it. For the moment, however, it is worth noting several aspects of legal education and admissions that might be expected to accentuate mismatch effects.

The first is the importance of the bar exam threshold to the career prospects of law graduates. If attending a selective school reduces a student's chances of being able to pass the bar exam, this can be taken as a *prima facie* harm to that student.⁵⁵ It is well known, however, that highly-ranked, selective law schools devote relatively little of their curricula to exam preparation, often replacing it with more theoretical or interdisciplinary topics.⁵⁶ Although students at these schools can supplement their law school curricula with post-graduation bar review courses, the shortage of bar relevant material in their coursework may reduce their

⁵⁵ Attending a selective school might raise or lower a student's probability of *taking* the bar exam, if it affects her propensity to pursue a career other than the practice of law. This is a separate issue.

⁵⁶ See, e.g., Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1245 n.59 (1991) (contending that elite law schools do not prepare their students for the bar). See also ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S* (1983) (describing how law schools previously emphasized the importance of practical training during law school). See also Edwards, 1992; White, 1993

probabilities of passing the bar exam below what they would be with curricula that more closely hews to the material on the bar exam.

Second, law students' employment outcomes depend heavily on their performance relative to their classmates, particularly in the first year of law school when courses are typically exam-based and graded on strict curves. Even in the absence of mismatch effects on students' actual achievement, any measure that is computed in relation to others in the class will tend to penalize students whose entering credentials are relatively low, and a given student will tend to achieve a lower class rank when she attends a more selective school.⁵⁷ This will hurt her chances of making the law review—which has traditionally been based largely on class rank—and, if employers do not take full account of the stiffness of the competition within the school, of getting desirable summer internships, clerkships, and post-graduation jobs.⁵⁸

Finally, the style of instruction in law school may promote mismatch effects.⁵⁹ Law school instruction is more interactive than what many students experienced during college. Many professors, particularly during required classes, call on students randomly to analyze cases or otherwise demonstrate their knowledge, which requires students to engage in a repeated question and answer exchange.⁶⁰ This style of teaching may have the effect of drawing attention to underprepared students who have difficulty with the course material. It seems natural to expect that this pedagogical approach will reinforce the demoralization that tends to follow from being underprepared.⁶¹ It might further have a racial dimension: If black students in the class

⁵⁷ Wightman documents a strong relationship between LSAT scores and grade point averages within specific law schools. See Linda F. Wightman, *Beyond FYA: Analysis of the Utility of LSAT Scores and UGPA for Predicting Academic Success in Law School*. Law School Admission Council: Research Report 99-05, Newtown, PA, p.15-17 (1990).

⁵⁸ On the other hand, there is a relatively strict hierarchy of law schools, and some employers may consider job candidates only from highly-ranked schools. This could create a selective-school *premium* that is unrelated to achievement.

⁵⁹ (Guinier et al., 1994)

⁶⁰ See Lawrence M. Grosberg, *Standardized Clients: A Possible Improvement for the Bar Exam*, 20 GA. ST. U. L. REV. 841, 852 (2004) (noting that “The vast majority of teachers of [first year courses] use standard casebooks and some variation of the Socratic method”).

⁶¹ For example, Morrison Torrey contends that the Socratic method is harmful to women and minorities. Morrison Torrey, *You Call That Education?*, 19 WIS. WOMEN'S L.J. 93, 105 (2004); see also Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 4 (1994) (claiming the Socratic method is disproportionately harmful to women).

are generally less prepared than whites, others in the class may form negative stereotypes about all black students,⁶² and the black students themselves may internalize this and come to consider themselves as representatives of their race, rather than simply as students, when participating in class.⁶³ Because blacks will tend to have lower qualifications than whites at the same schools even without preferences—a point we elaborate on below—a toxic interaction of the Socratic method with “stereotype threat”⁶⁴ may depress black students’ performance even without mismatch. But affirmative action will expand the black-white qualifications gap within any school, accentuating these tendencies and perhaps making the selective school effect more negative for black students.

C. The Law School Applicant Pool

Before we explore the operation of affirmative action preferences in law school admissions in the next section, it is important to establish some basic facts about the law school applicant pool. In this and subsequent sections, we draw heavily on two sources of information about the experiences of the cohort that entered law school in 1991. The first is a tabulation created by the Law School Admissions Council, which every year categorizes law school applicants by race, LSAT score range, and undergraduate GPA range. We thus know, for example, that in the 1990-1991 admissions cycle, there were 3,105 white students and 40 black students with LSAT scores between 38 and 41⁶⁵ and GPAs between 3.25 and 3.49 who applied

⁶² Coate and Loury, *supra* note / /, at ___.

⁶³ See SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* (1990); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape the Intellectual Identities and Performance of Women and African Americans*, ___ AMER. PSYCH. ___ (1997); Charles Murray, *Affirmative Racism*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* (1994); THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY*, (2004). Justice Thomas writes in his *Grutter* dissent (539 U.S. 306, 373) that “The majority of blacks are admitted to the [University of Michigan] Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the ‘beneficiaries’ of racial discrimination.”

⁶⁴ See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in C. JENCKS & M. PHILLIPS (EDS.), *BLACK-WHITE TEST SCORE GAP* (1998)

⁶⁵ The LSAT was graded on a 10-48 scale until 1991, when it changed to the 120-180 scale in use today. 38 and 41 were the 79th and 91st percentiles, respectively, of the 1990-1991

to law school.⁶⁶ The tabulation, which we refer to as the “grid data” also reports the number of students in each cell who were admitted to at least one school and who ultimately matriculated.

Our second primary data source is the Bar Passage Study (BPS), a survey conducted by the Law School Admissions Council of students who entered law schools in 1991. Approximately 62% of entering students at accredited law schools responded to the survey, which collected information about students’ entering credentials, law school grades, graduation, and bar passage.⁶⁷ We describe this survey in greater detail below. Although it, like the grid data, is limited in ways that we describe below, in combination the two data sets permit a reasonably comprehensive understanding of the admissions process and of law school outcomes.

While each of these datasets has its limitations, also described below, they collectively provide objective measures of the law school process from beginning to end: admissions, exams, the bar exam, and employment after graduation. No comparable data are available for any other admissions process. Thus, although the world has certainly changed in important ways since 1991, most of our analysis focuses on this cohort. We do use the grid data for more recent cohorts, however, to examine the relevance of our analysis to more recent law school applicants.

We begin with a brief discussion of black-white gaps in educational outcomes prior to college admissions. Law school admissions stand at the top of a long educational ladder, and blacks underperform on average at each step of this ladder. We do not intend to enter into the long and contentious debates over the sources of these gaps⁶⁸ or over the history of legal and

distribution (#Leubke memo#). In 2003-2004, these percentiles corresponded to scores of approximately 159 and 163 (#Stillwell memo#).

⁶⁶ #Barnes and Carr memo#.

⁶⁷ Wightman (1999), *supra* note //, at 2. Wightman (1998), *supra* note //, discusses the BPS in great detail. By comparing the distribution of entering credentials among BPS respondents with those among all matriculants included in the LSAC grid data, we can compute response rates in each race-LSAT-GPA cell. BPS respondents appear to be generally representative, with perhaps slight overrepresentation of high-scoring students. All of our analyses of the BPS data weight them to match the LSAT-undergraduate GPA distributions seen in the grid data.

⁶⁸ See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1994); STEPHEN J. GOULD, *THE MISMEASURE OF MAN* (1996); James Heckman, *Lessons From The Bell Curve*, 103 J. POL ECONOMY, 1091 (1995).

extra-legal discrimination against African Americans,⁶⁹ but merely to outline today's landscape and its implications for law school admissions.

Large black-white gaps in achievement arise in kindergarten or even earlier.⁷⁰ By fourth grade, the time of the earliest administration of the National Assessment of Educational Progress (NAEP), 41 percent of white students read at a "proficient" level and 76 percent meet a "basic" standard, while only 13 percent of black students are proficient and 42 percent basic.⁷¹ Gaps are similar in eighth grade.

The educational structure is a pyramid, and each successive level culls a substantial fraction of the student population. Not all students graduate high school; of those that do, not all enter college; and of those that enter college not all will graduate. At each point, black students are less likely to proceed than white students, and those who do have on average lower qualifications than do their white counterparts. Blacks are 16.1% of elementary and secondary school students⁷², 15.6% of high school graduates, 14.7% of entering college students,⁷³ and 8.3% of college graduates.⁷⁴ The black share of graduates from selective colleges—the source of most law students—is even lower, 5.7%⁷⁵.

Finally, only a small fraction of graduates apply to law school. While 1,094,538⁷⁶ students were granted four year college degrees in 1991, only 92,648 applied to ABA-approved law schools in 1990-1991.⁷⁷ 7.9% of these were black⁷⁸, a higher share than among all graduates

⁶⁹ For an excellent historical account of racial discrimination in America, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004).

⁷⁰ Fryer and Levitt (2004), Phillips, Crouse, and Ralph (1998), Phillips et al. (1998)

⁷¹ Perie, M., Grigg, W., and Donahue, P. (2005). *The Nation's Report Card: Reading 2005* (NCES 2006-451). U.S. Department of Education, National Center for Education Statistics. Washington, D.C.: U.S. Government Printing Office. P.4.

⁷² Digest of Education Statistics 2000, Table 44, p. 58.

⁷³ Digest of Education Statistics 2000, Table 184, p. 214.

⁷⁴ Digest of Education Statistics 2000, Table 265, p. 312.

⁷⁵ Source: Online extract from the 1999/2001 Baccalaureate and Beyond Survey, accessed at <http://www.nces.ed.gov/dasol/tables/mainpage.asp?mode=NEW&fileNumber=16> on Jan. 31, 2007. In this sample, 8.1% of graduates from all colleges are black.

⁷⁶ Digest of Education Statistics 2000, Table 265, p. 312.

⁷⁷ Memorandum of Law School Admissions Services, January 1991 [hereafter referred to as LSAS Memorandum].

⁷⁸ See Barnes and Carr, *supra* note //, at ___.

(6.0%⁷⁹), indicating that black graduates are somewhat *more* likely to consider attending law school than are whites.

Of course, not all students who apply to law school are qualified for selective schools. LSAT scores form a useful, if limited, measure of the relative qualifications of black and white applicants. 55% of all black law school applicants in 1990-1991 had LSAT scores below 25, as compared with 8% of whites; 32% of whites and only 5% of blacks had scores above 34.⁸⁰ An important consequence of the large differences in the distribution of test scores is that black students are severely underrepresented among students who earn the high LSAT scores typical of students admitted to the most selective law schools. Figure 3.2 shows the fraction of LSAT-takers who were black at each score level.⁸¹ 89% of students admitted to Yale Law School in the 1990-1991 admissions cycle had LSAT scores of 41 or higher.⁸² Blacks comprised only 1.5% of applicants with LSATs at or above 38; 1.1% of those with scores at or above 42; and 0.8% of those with scores at or above 46.⁸³

[Insert Figure 3.1 here]

Of course, the LSAT is not the only important admission qualification. The second important variable considered in admissions is the undergraduate GPA, perhaps adjusted for the quality of the college. The grid data show that in each LSAT range the GPA distribution among black applicants is lower than that among whites. Table 3.1, for example, shows the portion of the grid describing the aforementioned applicants with LSAT scores between 38 and 41. Of applicants with LSAT scores in this range, half of whites and only 30% of blacks have GPAs above 3.0 (corresponding to a “B” average).

⁷⁹ Digest of Education Statistics 2000, Table 265, p. 312.

⁸⁰ Memo from Beverly Barnes and Robert Carr, LSAS, January 1991 (sic; most likely dated January 1992).

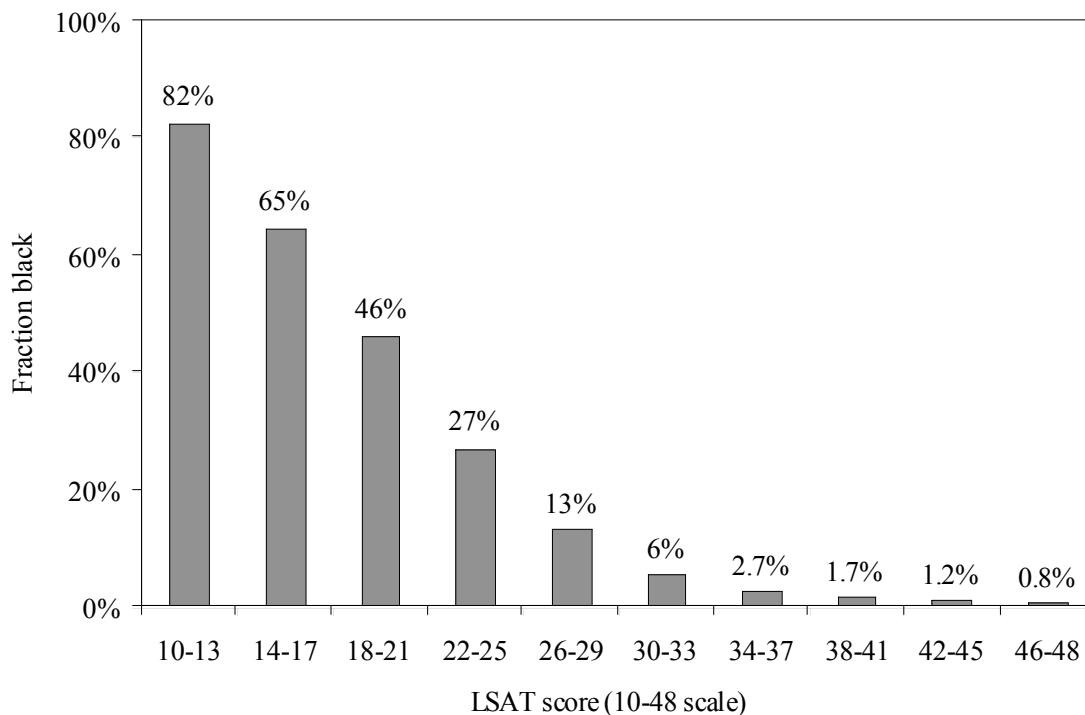
⁸¹ Figure created with data from the Barnes and Carr memo.

⁸² The Official Guide to U.S. Law Schools, 1992-1993, p. 411 indicates that 364 of 407 admitted students were at the 91st percentile or above in 1990-1991. The 91st percentile of scores given in 1990-1991 was 41 (Luebke memo, April 29, 1991).

⁸³ Barnes and Carr memo.

Figure 3.1

Black share of 1990-91 Black and White Law School Applicants, by LSAT Score Range



Source: Barnes and Carr Memo

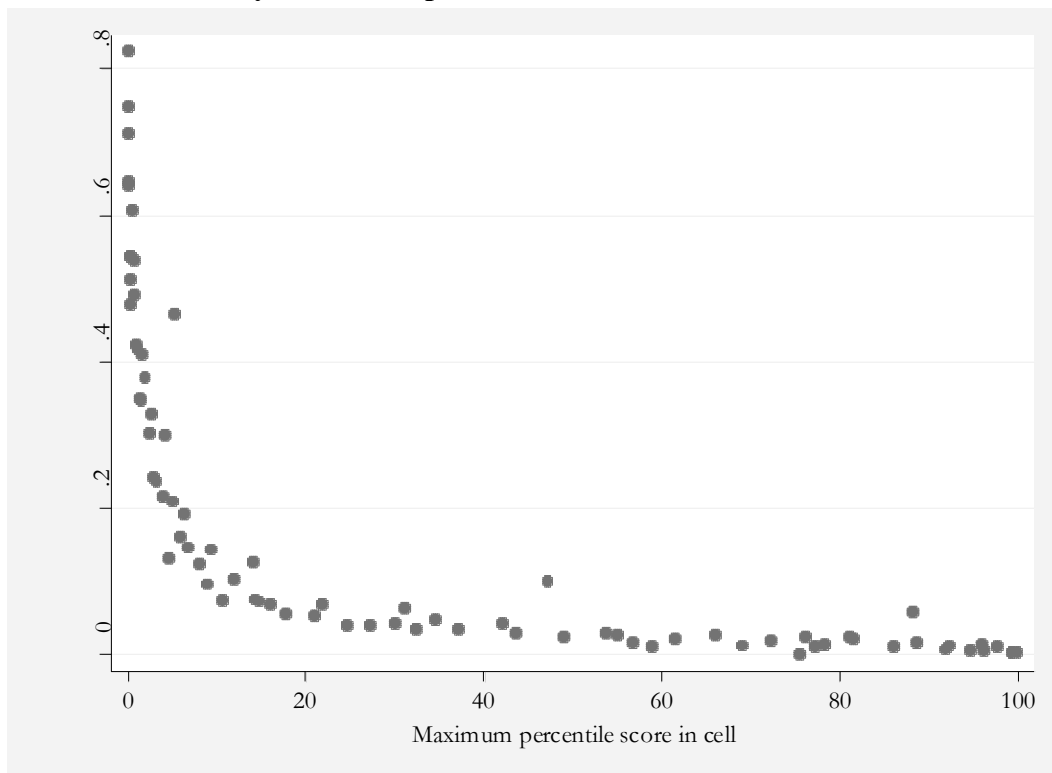
Sander proposes combining the LSAT and undergraduate GPA into a single weighted average, using weights that correspond roughly to those used in many law schools' admissions.⁸⁴ We refer to this index as the "Sander Index." Because the units of this index are difficult to interpret, it is convenient to convert it to a percentile score, using the index distribution for matriculating law students. Because applicants with low LSAT scores and GPAs are unlikely to be admitted, the index distribution for applicants is below that of matriculants: Somewhere between 62% and 79% of applicants have percentile scores below 50,⁸⁵ meaning that half or more of matriculants have higher index scores, and at least 23% have percentile scores below 10.

⁸⁴ See Sander (2004), *supra* note //, at 393.

⁸⁵ Each cell in the grid data spans a range of percentile scores. Because we do not know the distribution of qualifications among applicants within each cell, when a cell spans the 50th percentile we cannot compute the fraction of applicants in the cell with scores below 50. The

Figure 3.2 shows the fraction black among applicants in each grid cell, arrayed against the percentile score of the best-qualified student in the cell. Black applicants are heavily concentrated in the cells containing the lowest LSATs and GPAs, and are severely underrepresented among those corresponding to the best qualifications. With one exception, every grid cell that contains any student with percentile scores above 50 has a black share of less than 3%.⁸⁶

Figure 3.2
Black share of applicants in each grid cell,
by maximum percentile score included in cell, 1990-1991



Source: Authors' analysis of grid and BPS data

It is again instructive to consider the qualifications needed to gain admission to an extremely selective law school. Yale Law School reported to the LSAC the fraction of

statistics reported here are computed by assigning none and all, respectively, of applicants in such cells to the "below 50" category.

⁸⁶ The sole exception is the cell containing applicants with LSAT scores of 46 and above but undergraduate GPAs of 2.5-2.75. There were only 87 applicants in this cell, as compared with 604 in the median cell.

applicants who were admitted in each of 30 LSAT-GPA cells.⁸⁷ The only cells for which admissions rates exceeded 4% were those corresponding to GPAs of 3.5 and above and LSAT scores of 38 or higher.⁸⁸ Black students comprise only 0.6% of law school applicants with credentials above these thresholds.

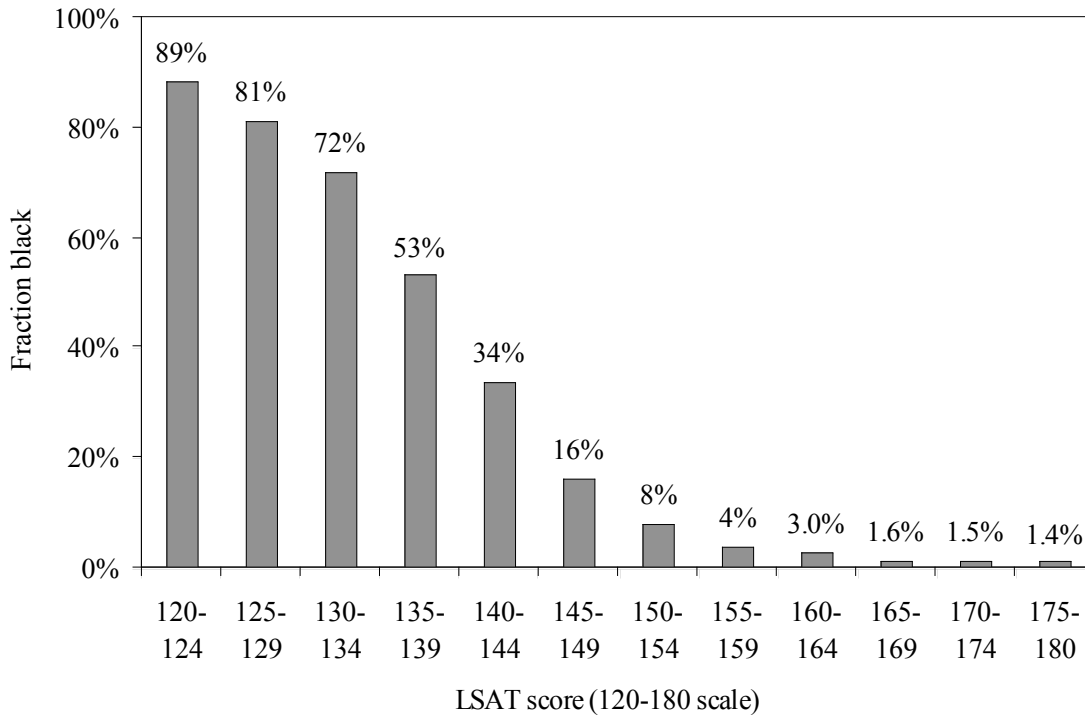
All of these statistics pertain to the class of 1991. There are somewhat more highly qualified blacks in more recent cohorts: Where the median black LSAT score in the 1991 cohort was around 25, roughly the 20th percentile of the overall distribution, the 2003-2004 median black applicant's LSAT of 144 placed her at the 23rd percentile of that year's distribution. Figure 3.3 shows the fraction black in each of 12 LSAT bins for 2003-2004 applicants. The black share has risen throughout the distribution. Approximately 2% of LSAT takers in 1990-1991 scored 46 or above; in 2003-2004, the 2% scored 170 or above. The black share at this rarified level nearly doubled, from 0.8% in 1990-1991 to 1.5% in 2003-2004. Still, the black-white gap in admissions qualifications remains extremely large: Black students represent 10.6% of all applicants but only 3.2% of applicants in the upper third of the LSAT distribution (i.e. with scores of 155 and above).⁸⁹

⁸⁷ The Official Guide to U.S. Law Schools, 1992-1993, p. 411.

⁸⁸ Cell LSAT ranges are reported according to their percentile ranks. The cells in question have percentile ranks of 81 or above, which correspond approximately to a score of 38 (#the Luebke memo#)

⁸⁹ Calculations in this paragraph combine information from several sources: The National Statistical Report (for LSAT distributions of black and white applicants in 2003-2004), the Stilwell memo (for converting 2003-2004 LSAT scores to percentiles; Barnes and Carr memo (for LSAT distributions of black and white applicants in 1990-1991); and the Luebke memo (for converting 1990-1991 LSATs to percentiles).

Figure 3.3
Black share of 2003-2004 black and white law school applicants, by LSAT score range



Source: National statistical report

We do not have information about other aspects of students' applications. It is possible that black applicants have better unobserved credentials—recommendation letters, essays, etc.—than do white applicants with the same scores and grades. If so, the statistics presented here may overstate the gap in the number of qualified white and black applicants. They are unlikely to overstate it much, however, both because any black advantage on these unobserved dimensions is likely to be small⁹⁰ and because the LSAT score and GPA are the overwhelming determinants of law school admissions.

Debates about admissions policy and the role of affirmative action occur in the shadow of the large, persistent gaps in the credentials of applicants. It is apparent from the data presented

⁹⁰ If black students had better unobserved qualifications than white students with the same observed credentials, we should expect them to earn higher grades in law school than their observably-similar white classmates. Wightman (2000, p. 21-22) finds that the opposite is the case. This is a common result in analyses of undergraduate performance; see Rothstein (2004).

here that admissions preferences are essential, given current applicants, to the maintainance of diversity in law schools, and that without sizable preferences the number of black students at selective law schools would fall to nearly zero.

Sander argues that this is true only of the most selective schools, and that the elimination of preferences would not substantially impact the black share at less selective schools.⁹¹ This the result of what he calls the “cascade effect”: Black students who, in the absence of racial preferences, would be admitted to second-tier schools are today snapped up by the top-tier schools, so that the second tier schools would not enroll any black students if they did not themselves use racial preferences to admit black students who would not otherwise meet their admissions standards. This, in turn, exhausts the supply of black students with credentials of those who would, in the absence of racial preference, attend third-tier schools, and the process cascades. By Sander’s logic, if preferences were eliminated, each school would enroll a representative fraction of students from its slice of the “true” credentials distribution, leaving all but the most selective with approximately the same black representation that they have today.

Figure 3.3 provides a reason for skepticism about at least the final part of Sander’s argument. In 1991, blacks represented less than 5% of applicants in nearly every cell above the 35th percentile of the distribution of matriculating students.⁹² It is thus not just the most selective law schools that would have to settle for very low black shares in a race-blind admissions process: Even a school that enrolled students with qualifications equal to the median among all matriculants would obtain a black share of less than 3%. While the cascade effect is undoubtedly real, the sheer size of the black-white gap in entering qualifications would appear to overwhelm it for all but the least selective schools. The next Part treats this question in more detail.

⁹¹ Sander, *Affirmative Action in Law School*, *supra* note / /, at ___.

⁹² There are only two exceptions, both very small cells that together contain only 0.3% of applicants.

Part IV. How Affirmative Action Impacts Law School Admissions Outcomes

The statistics presented in Part III paint a sobering picture of the law school applicant pool. Black applicants have substantially lower academic credentials, on average, than do white applicants, and there are extremely few black students with credentials resembling those of typical students at the most selective law schools.

In this part, we examine the implications of these facts for admissions outcomes. We begin by describing actual outcomes, examining the distribution of black applicants in 1991 across various admissions results. We then attempt to quantify the role that affirmative action preferences play in generating this distribution. To do so, we simulate the distribution of outcomes that would arise under race blind admissions, treating admissions outcomes as (probabilistic) functions of the LSAT score and undergraduate GPA. Similar methods have been used by to examine undergraduate admissions by Krueger, Rothstein, and Turner, among others.⁹³

Our analysis indicates that affirmative action is responsible for nearly all of the diversity currently seen in the law student population generally, and at every law school of even moderate selectivity. In the absence of preferences, fewer than half as many black students would be admitted to law school. Many of those who would be admitted would be pushed several steps down the selectivity rankings, to which some would likely respond by foregoing law school and choosing another career path. Depending on the assumptions made about matriculation decisions, the number of beginning black law students would fall by between 60 and 80 percent. The impact on selective law schools would be even more dramatic: The number of black students enrolling at the most selective group of law schools would fall by over 90 percent to a trivial level: with race-blind admissions, only 0.7 percent of students at these schools would be black. Because of the cascade effect, the impact would be slightly smaller at lower-ranked schools, but we estimate that black enrollment would fall by more than half in *every* school selectivity category, with the possible exception of historically black law schools (for which our method is not particularly applicable).

⁹³ Our analysis here also resembles Linda Wightman's (1997; 2003) "grid model," though we take this somewhat further than does Wightman.

A. What is the status quo?

Before developing the simulation of race-blind admissions, it is useful to the distribution of admissions outcomes for the black applicants in a world with affirmative action, described in the previous section. We use two data sets for this purpose. First, we use the “grid” data discussed earlier, in which black and white law school applicants, admitted students, and matriculants are categorized into 90 cells based on their LSAT scores and undergraduate GPAs. By comparing the numbers in the three grids, we can compute admission and matriculation rates. For example, there were 293 black students with LSAT scores between 26 and 29 and undergraduate GPAs between 2.75 and 2.99 who applied to law schools in 1991. 191 (65 percent) students were admitted were admitted to at least one school, and 172 (59 percent of applicants and 90 percent of admitted students) matriculated.⁹⁴

Adding across all cells in the grid data, 7,312 black students applied to law schools in 1991, comprising 7.9 percent of the applicant pool. Hereafter, we confine our attention to black and white applicants; blacks were 9.0 percent of this subset.

While 57 percent of white applicants were admitted to at least one school, only 47 percent of black applicants were. Admitted black students matriculated at a slightly higher average rate than admitted white students (85 percent vs. 79 percent), however. This may reflect different alternatives: In the grid data, we know only that a student was admitted to at least one school, not the identity of the school or schools, and black students may be admitted to better or worse schools on average than are white students.

At each point in the distribution of credentials, black applicants are admitted at higher rates than whites. Thus, among applicants with LSAT scores of 26-29, 26 percent of whites and 61 percent of blacks were admitted to at least one school; for scores of 38-41, these figures were 81 and 94 percent, respectively. This tends to magnify the black-white gap in entering credentials among admitted students. As a result, while the median black applicant has a percentile score 27.5 points below that of the median white applicant, the gap in the same statistic calculated over admitted students is 44.6 points. Students who matriculate into law school (those who gained admittance and decide to attend) have stronger credentials than non-

⁹⁴ Source: Memo from Beverly Barnes and Robert Carr (Law School Admission Services) to “Admission Officers,” dated January 1991 (but this may be a typo—it should probably be 1992).

matriculants (those who gain admittance but elect not to attend), but the degree of selection on entering credentials is much smaller.⁹⁵ The black-white gap in entering credentials is similar among matriculants as among admitted students.

Not all admissions are the same; a high black share at a historically black law school like Howard University School of Law has different implications than the same black share at, say, Harvard Law School. Unfortunately, the grid data are missing key pieces of information about the application process: We do not know how many applications a student submitted or to which schools, nor how many admissions offers she received. There is presumably important heterogeneity in each, accounting for some of the variation in outcomes: A student who submits only a single application to a highly selective school is much less likely to be categorized in the grid data as “admitted” than one with the same credentials who applies more broadly. Just as important, there are almost certainly differences between black and white students in their typical application behavior. Although we cannot measure this for law applicants, others have found that black college applicants submit more applications to highly selective schools than do white students with the same SAT scores.⁹⁶ This is a plausible consequence of the availability of admissions preferences for black students. To the extent that law school applicants display similar patterns, estimates that focus only on whether students are admitted anywhere will understate the degree of preferences.⁹⁷

To partially fill the holes in our understanding left by the grid data, we turn to the Bar Passage Study. The BPS contains limited information about the students’ application processes—we know how many applications a student submitted and how many schools offered admission, but nothing about which schools were included in either set—and nothing about students who are not admitted to any law school or choose not to matriculate. Moreover, for confidentiality reasons, the BPS does not report the specific schools that students attend. Instead, 163 law schools are categorized into 6 “clusters”: “Elite,” “Public Ivy,” “2nd Tier

⁹⁵ The average matriculant comes from a cell with mean percentile score equal to 49. This figure is 38 for admitted non-matriculants and only 9 for applicants who were not admitted.

⁹⁶ See Krueger, Rothstein, Turner, *supra* note //, at ___.

⁹⁷ Consider, for example, a student who has decided to submit only a single application. Without preferences, she might apply to a mid-ranked school, but because she knows that she will receive preferential treatment, she is likely to choose a more selective school. There is some chance that she will be rejected there—and will therefore show up as “admitted nowhere”—even though she would have been admitted to the less selective school had she applied there.

Public,” “2nd Tier Private,” “3rd Tier,” and “Minority,” with the final category referring to historically black schools and others with high minority shares and, typically, very low selectivity.⁹⁸ As we shall see, the “Minority” cluster differs in important ways from the other five. Despite these limitations, the BPS data can be used to summarize the end results of the application process, combining unobserved decisions about applications, admissions, and matriculation.

Table 4.1 lists the mean LSAT score, 25th and 75th percentile scores, and fraction black at schools in each of the six BPS clusters. The cluster labeled “minority” has, not surprisingly, a much larger black share than do the others; it also has by far the lowest test score distribution. Of the other five clusters, the Elite schools have the highest LSAT scores and the highest black shares; the two groups with the lowest LSAT scores also have the lowest black shares.

Table 4.1.
Characterizing the six clusters

Cluster	LSAT		Fraction black	
	Mean (1)	25-75 range (2)	Actual (3)	If representative (4)
Elite	41.9	39 - 45	8.7%	2.4%
Public Ivy	38.9	35.5 - 43	7.9%	4.7%
2nd tier public	37.8	35 - 41	8.5%	6.3%
2nd tier private	35.5	33 - 39	5.2%	8.2%
3rd tier	32.5	30 - 35	4.9%	14.5%
Minority	28.7	24 - 33	48.0%	34.0%
All law schools	36.7	33 - 41	8.0%	

Source: BPS data

The patterns here—particularly the positive correlation between the LSAT scores in a cluster and its black share—stand in sharp contrast to those seen in Part III, where it was shown that the black share is quite low among students with high LSAT scores. This is a clear indication that race plays an important role in the allocation of admitted students to schools. To

⁹⁸ The clusters are meant to group similar schools on a variety of dimensions, including selectivity, public/private control, minority share, etc. No such exercise can produce groups that are homogenous in each dimension, and the cluster labels are not always accurate. For example, perhaps 40% of the schools in the “Public Ivy” cluster are in fact private. See Wightman (1993), *supra* note //, at __; Wightman (1998), *supra* note //, at 8-9, for a description of the clusters.

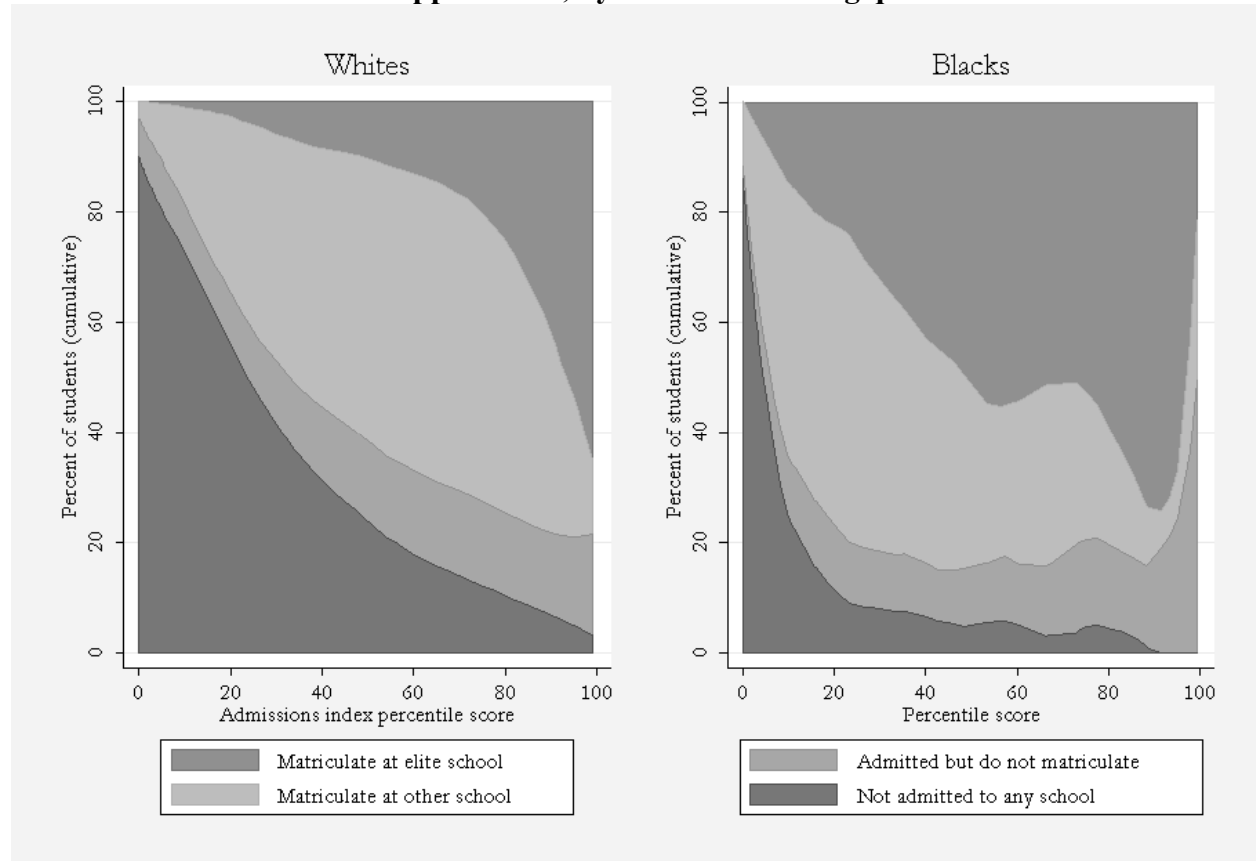
illustrate this, Column 4 of Table 4.1 shows the black share among all matriculants with LSAT scores like those seen among students at each cluster. That is, if each school were assigned its observed LSAT distribution and then admitted and enrolled a representative sample of matriculants from that distribution, it would have the black share shown in Column 4. In the three most selective clusters, simulated black shares are much lower than are actually observed. The same is true for the least selective cluster, “Minority,” which attracts more black students than would be expected just on the basis of its students’ LSAT scores. By contrast, the 2nd tier private and 3rd tier clusters, each drawing from the lower portion of the applicant pool in a world with affirmative action, would have higher black shares if relatively low-scoring black students were not disproportionately admitted to more selective schools.

Another way to express these patterns is to examine particular points in the distribution. Consider the cell containing LSAT scores between 38 and 41 and GPAs between 3.5 and 3.75. Students in this cell possess strong academic qualifications; their percentile scores for the Sander index—discussed in Part III—range from 67 to 87. There were 2,602 black and white applicants from this cell, of whom 1,917 matriculated and 1,538 appear in the BPS data (implying an 80% response rate in this cell); The BPS sample indicates that 10 percent of the white matriculants from this cell enrolled at schools in the “Elite” cluster, 22 percent in the “Public Ivy” cluster, and 68 percent in the remaining four clusters. The distribution for the black matriculants is quite different: 54 percent Elite, 23 percent Public Ivy, and 23 percent in the other four. This pattern is universal: At every point in the admissions index distribution, a larger fraction of black than white BPS respondents is enrolled at an “Elite” school.

We can bring the grid and BPS data together to summarize the distribution of admissions outcomes for white and black applicants with different admissions credentials. For simplicity, we collapse the six BPS clusters into two categories, highly selective (the Elite and Public Ivy clusters) and less selective (the remaining four clusters). There are four possible outcomes for each applicant: rejection at every school; admittance to at least one law school but a decision not to matriculate; matriculation at a selective school; and matriculation at a less selective school.

Figure 4.1 shows the distribution of students at each percentile score across each of the four outcomes, separately for whites (Panel A) and blacks (Panel B).⁹⁹

Figure 4.1
Outcomes of applications, by race and entering qualifications



Source: Authors' analysis of grid and BPS data.

We can see that low scoring black applicants are much more likely to be admitted than are white applicants with the same credentials. This difference shrinks but does not vanish at higher scores. Matriculation rates for admitted white and black students are generally similar, with two exceptions: At the very bottom of the pool, nearly all admitted black students matriculate while a notable minority of admitted white students do not, and at the very top of the

⁹⁹ To create this graph, we compute the distribution of outcomes in each grid cell, then assign each the mean percentile score of BPS respondents in that cell. We smooth the data across cells for legibility. Details are available from the authors. Note that the number of applicants at each percentile score varies substantially with both the score and race, as indicated by Figure #--there are few black applicants with high percentile scores and relatively few whites with low scores.

pool the black matriculation rate declines sharply. The latter effect is most likely noise, due to the very small number of black applicants with qualifications in this range; the former plausibly reflects preferences that give black applicants better sets of schools to choose among than those available to whites with similar scores. Consistent with these findings, notably larger shares of black than white matriculants enroll at highly selective schools at nearly every point in the distribution.

B. What Would Race-Blind Admissions Look Like? Methodology

The status-quo admissions system described yields the representation shown in column 3 of Table 4.1: 7.6 percent of matriculants are black, with similar black shares in the more selective clusters, a much higher black share in the cluster containing the historically black law schools, and lower black representation in the other two less-selective clusters. A central question for our investigation concerns the role of race-based preferences in producing these figures. What would the pool of law school matriculants look like if all law schools switched to race blind admissions? And how would the black students in this pool be distributed between more- and less-selective schools? A complete answer would require re-running the admissions process, asking admissions officers to review every application again with a race-blind eye. While this is not within our power, we attempt in this section to provide a partial answer to these questions by focusing on the two most important admissions credentials, the LSAT and GPA.

We simulate admissions as they would happen if black and white applicants with the same credentials were admitted at the same rates. We emphasize that this does not mean that we assume that admissions decisions would be made solely on the basis of the numeric credentials available to us. There is substantial variation in admissions outcomes among students with the same observed credentials, presumably because some students have strong unobserved qualifications—essays, recommendations, etc.—while others do not. We do not assume that this heterogeneity would disappear with race-blind admissions. Instead, we assume that the *distribution* of admissions outcomes for black students would match that of white students with the same credentials.

Implicitly, then, we assume that black students' unobserved application materials have the same distribution as those of white students, and that observed differences in their admissions

outcomes reflect the availability of preferences for black students. We believe that this assumption is most likely overoptimistic: Just as black students have lower average GPAs than white students with the same LSAT scores, it seems likely that when we match black students and white students on the basis of both LSATs and GPAs, the black students' other qualifications will be worse, on average, than those of the white students. If so, we will overstate black admissions outcomes by assuming that they will match those of whites with the same observed qualifications, and accordingly we will understate the role of affirmative action.

We make another important simplifying assumption: We assume that the standards applied to white students' applications will not change with the elimination of affirmative action. This is almost certainly incorrect: Without preferences, some admissions slots currently given to black students would become available to white students who currently fall just short of admission. Still, the number of slots so freed will be small—since black students today comprise only 7 percent of all law school enrollment—and the change in the white admissions standard would therefore be negligible.¹⁰⁰ Thus, our assumption seems like a reasonable approximation.

An important issue to note is that applicants' decisions about whether to apply to law school, how many applications to submit (and to which schools), and, if admitted, whether to matriculate might all be affected by their perceived admissions probabilities. In a similar study of college admissions, Krueger, Rothstein, and Turner find that black high school students with moderately good SAT scores are much more likely to apply to the most selective colleges than are white students with the same SAT scores.¹⁰¹ Krueger et al. argue that this gap is probably due to the availability of affirmative action, and that black students' application behavior would likely resemble that of whites if the two groups of students faced equal admissions probabilities.

¹⁰⁰ Tom Kane makes an analogy to handicapped parking spaces. "Suppose that one parking space in front of a popular restaurant is reserved for disabled drivers. Many of the nondisabled drivers who pass by the space while circling the parking lot in search of a place to park may be tempted to think that they would have an easier time finding a space if the space had not been reserved. Although eliminating the space would have only a minuscule effect on the average parking search for nondisabled drivers, the cumulative cost perceived by each passing driver is likely to exceed the true cost simply because people have a difficult time thinking about small probability events." See Kane, *supra* note //, at 453.

¹⁰¹ Alan B. Krueger, Jesse Rothstein, and Sarah E. Turner, *Race, Income, and College in 25 Years: The Continuing Legacy of Segregation and Discrimination*, 8 AMER. L. & ECON. REV. 282 (2006).

We follow Krueger et al. in assuming that application and matriculation behavior would converge with race-blind admissions.¹⁰² We do not assume convergence in every dimension, however: We assume that the same students who currently apply to law school would continue to do so in the race-blind regime. That is, we assume that reduced admissions probabilities will not dissuade any black students from applying to law school in the first place. This is unlikely. As we demonstrate below, many of today's applicants would not be admitted anywhere under race-blind rules. Many potential applicants would anticipate low probabilities of acceptance and would decide not to bother. Because a fraction of these discouraged applicants would be admitted if they did apply, our assumption will lead us to overstate the number of black students who would be admitted, particularly at low qualifications levels. We expect that this bias is larger than that arising from less-than-full convergence of application patterns among students who submit at least one application. If so, our simulations should overstate the number of black students who would be admitted under race-blind rules.

Taken together, we believe that our assumptions are reasonable, and sufficiently cautious. To the extent that they diverge with how application patterns would actually develop in a world without affirmative action, our findings understate the impact of eliminating affirmative action. The true effect on black students would be even greater.

C. What Would Race-Blind Admissions Look Like? Simulation Results

The first step of our simulation is to model the overall law school student pool, without regard to the specific school attended, under counterfactual rules. We use the grid data, and, as stated above, assume that with race-blind admissions the admission rate for black applicants in each cell would come to resemble that seen among whites.

The first column of Table 4.2 shows observed outcomes in the 1990-1991 cohort. 7,312 black students applied to law school. Of these, 3,429 were admitted to at least one school and 2,928 matriculated. Blacks represented 9.0% of black and white applicants, 7.5% of admitted students, and 8.0% of matriculants. The second column shows what would happen if black

¹⁰² This is unavoidable given our data. To the extent that application patterns would not converge completely, we will somewhat overstate black admissions under race-blind admissions, but may understate their representation among matriculants at selective schools.

admissions rates came to resemble those of white students in the same grid cells. The number of black students admitted to at least one school would fall to 1,615, down 53% (column 4) from the status quo. This corresponds to a black share among admitted students of 3.7%. Because white matriculation rates are lower than those of blacks—presumably reflecting, in part, differences in the quality of the admissions offers—the number of black matriculants would fall even more precipitously to 1,077. Black students would comprise only 3.1% of (black and white) law students.

Table 4.2
Grid model simulation of the impact of eliminating preferences on black representation in law school

	Actual 1990- 1991 data	With race-blind admissions	Effect of eliminating preferences	
	(1)	(2)	(3)	As % of current (4)
Number of black students				
Applicants	7,312	7,312	--	--
Admitted students	3,429	1,615	-1,814	-53%
Matriculants	2,928	1,077	-1,851	-63%
Black share				
Applicants	9.0%	9.0%	--	
Admitted students	7.5%	3.7%	-3.8%	
Matriculants	8.0%	3.1%	-4.9%	

Source: Authors' analysis of grid data

The 1,077 black law students would be distributed across schools quite differently than are the 2,928 who actually enrolled. Figure 4.3 indicates that even among matriculants, black students are more likely to enroll at schools in the two most selective clusters than are white students with the same credentials. Our grid model simulation thus shows the black share at these clusters falling by even more than does the overall black share. Table 4.3 presents the estimated black share at each cluster under status quo (column 1) and race-blind (column 2) admissions.

Table 4.3
Grid model simulation of the impact of eliminating preferences on black representation in various clusters

	Actual 1990-1991 data	With race-blind admissions	Effect of eliminating preferences	
	(1)	(2)	(3)	As % of current (4)
Number of students				
Total matriculants	2,928	1,077	-1,851	-63%
Elite	242	24	-218	-90%
Public Ivy	460	103	-357	-78%
2nd Tier Public	842	196	-646	-77%
2nd Tier Private	698	473	-225	-32%
3rd Tier	165	196	31	19%
Minority	521	85	-436	-84%
Black share				
Total matriculants	8.0%	3.1%	-4.9%	
Elite	8.7%	0.9%	-7.7%	
Public Ivy	7.9%	1.9%	-6.0%	
2nd Tier Public	8.5%	2.1%	-6.4%	
2nd Tier Private	5.2%	3.6%	-1.6%	
3rd Tier	4.9%	5.7%	0.8%	
Minority	48.0%	13.0%	-35.0%	

Source: Authors' analysis of BPS and grid data

The effect would be catastrophic at the most elite cluster: Only 24 black students would enroll at the 16 schools in this cluster, 90% fewer than are seen there now and representing only 1 percent of total (black and white) enrollment in the cluster. Effects would be nearly as dramatic in the “Public Ivy” and “2nd Tier Public” clusters: Cascade effects notwithstanding, each cluster would lose more than three quarters of its black students, and would wind up with a black share around 2% of total enrollment. Even the “2nd Tier Private” cluster would see its black enrollment decline by a third. Only the “3rd tier” cluster would see an increase in black enrollment—the cascade effect at work—and this effect would be small in comparison.

The final cluster, “Minority,” deserves an additional word. Our estimates indicate that black enrollment in this cluster would fall from 521 to 85, an 84 percent decline. Recall, however, that we have assumed that black students will, with race-blind admissions, have the same propensity to enroll in this cluster as do white students with the same credentials. This is a particularly poor assumption for this cluster, which seems to include several historically black law schools. Black students admitted to these schools may be more likely to choose them over

more selective alternatives than are white students facing the same choices. A more realistic simulation that incorporated this effect would indicate higher black enrollment at the “minority” cluster under the race-blind admissions, at least some of which would come at the expense of the more selective clusters.

Our simulation of admissions under race-blind rules indicates that affirmative action preferences are responsible for much of the observed representation of black students in law school, particularly at the most selective schools. Were these preferences eliminated, the number of black students beginning law school would fall by nearly two thirds. The three most selective clusters—containing approximately 1/3 of schools and enrolling 51% of law students—would see their collective black enrollment fall by 79% and their black share fall from 8.3% to 1.9%.

D. Mismatch and Race-Based Preferences

Our simulation indicates that race-based preferences are responsible for the fact that black students have more than token representation at elite law schools. They also serve to widen the qualifications gap between black students and their white classmates, however. This is the essence of the argument relating the mismatch hypothesis to affirmative action: The availability of preferences means that black students can be admitted to selective schools with lower qualifications than their erstwhile white classmates, creating a mismatch between the qualifications of black and white students in these schools.

Even with race-blind admissions, the black-white gap in entering credentials within law schools would not disappear. This is a simple fact about statistical distributions, and reflects two characteristics of the law school admissions process. First, the distribution of credentials is lower for black applicants than for whites, and second, no law school enrolls a purely homogenous class of students. So long as there is any variation in credentials within each school, the average black student who falls within a school’s range will have lower credentials than the average white student, at least on the numerical dimensions that we consider here.

Consider, for example, a hypothetical school that enrolls only students with LSAT scores between 38 and 41 and GPAs between 3.0 and 3.24. Even in this narrow range, there are differences between the qualifications of black and white students: The average LSAT score of blacks lags those of whites by 0.07 and the GPA gap is 0.004. A more heterogeneous school

would show even larger gaps. A school that enrolls a random sample of students with LSATs above 38 and GPAs above 3.0 will have black-white LSAT and GPA gaps of 1.7 and 0.14, respectively. Actual law schools are quite homogenous. Yale, for example, admitted 12 students with LSATs below 38 in 1991-1992. We should thus expect that sizable racial gaps in entering students' qualifications will persist even with race-blind admissions.

Table 4.4 shows several measures of black mismatch in each of the six BPS clusters, both in the observed data and in our race-blind simulation. Columns 3 and 4, for example, show black-white gaps in LSAT scores. Among students in the elite cluster, the mean black LSAT score trails that of the mean white by 6.8 points. The gap would shrink by more than half in our simulation, to 3.0 points, but would not disappear. Gaps are even larger in the other clusters, and all persist at fairly high levels in the race-blind simulation. Columns 5 and 6 repeat this calculation for the admission index, a weighted average of the LSAT and GPA scaled to have a standard deviation of 100 among white BPS respondents. Gaps are even larger here, 155 points in the Elite cluster.¹⁰³ They would decline with the elimination of affirmative action, but would remain at about half their current level in five of the six clusters.

¹⁰³ By way of comparison, the standard deviation of LSAT scores is about 5 points among white BPS respondents. The black-white gap within the elite cluster is therefore 1.5 standard deviations in the admissions index and 1.3 in the LSAT; these would shrink to 0.8 and 0.6 standard deviations with race-blind admissions.

Table 4.4
Black-white gaps in admissions qualifications, current rules and in race-blind simulation

	Number of black students		Black-white gaps				Avg. black student's rank	
	Actual	Simulated	LSAT score		Admissions index		Actual	Simulated
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
All matriculants	2,928	1,077	-8.1	-5.4	-174	-116	16%	27%
By cluster								
Elite	242	24	-6.8	-3.0	-155	-76	14%	26%
Public Ivy	460	103	-7.5	-4.4	-160	-95	16%	26%
2nd Tier Public	842	196	-8.9	-4.4	-197	-93	10%	28%
2nd Tier Private	698	473	-8.1	-4.0	-163	-84	11%	27%
3rd Tier	165	196	-8.2	-3.0	-169	-66	9%	29%
Minority	521	85	-5.3	-6.0	-104	-120	37%	24%

Note: Standard deviations of LSAT scores and admissions index among white matriculants are 5.0 and 100, respectively

Source: Authors' analysis of BPS data

The final columns of the table offer an indication of what this might mean for black students' class ranks. We rank the students in each cluster by their admissions index values and compute the mean class rank of black students, in both the actual and simulated matriculation pools. Table 4.4 thus indicates that the mean black student in the elite cluster had entering credentials that placed her at the 14th percentile of her class. Black students were similarly mismatched in the other clusters, with the average black rank ranging between the 9th and 16th percentiles in all clusters except the “minority” cluster. These would improve with a shift to race-blind admissions but would remain at fairly high levels, ranging between the 26th and 29th percentiles (again excepting the minority cluster). Although this overstates the size of the gap at any individual school—clusters are more heterogeneous than the schools they contain—it seems likely to approximate the effect of a shift to race-blind admissions.

The analysis here thus demonstrates several important facts:

- 1) Affirmative action preferences are an important part of the law school admissions landscape;
- 2) In the absence of preferences, the number of black law school matriculants would fall by nearly 2/3. In the most selective cluster of schools, declines would be even larger, and there would be fewer than two black students in each school's entering class;

- 3) Black students are quite significantly “mismatched” in terms of their entering academic credentials, with LSAT scores and GPAs that place most of them near the bottom of their entering classes.
- 4) This mismatch would decline but not disappear if race-based preferences were eliminated. Even without preferences, the average black student’s entering credentials would place her around the 25th percentile of her class.

The next Part describes the mismatch hypothesis in more detail, and discusses alternative strategies for its estimation. Part # presents our estimates of mismatch effects on black students. It is worth remembering, however, that on the evidence of Table # black students would continue to be mismatched even with race-blind admissions, so even this drastic shift would not eliminate whatever mismatch effects may exist. In Part #, we attempt to calibrate the net effect of admissions preferences on the number of black law graduates and admittees to the bar, combining the effects discussed in this Part with estimates of mismatch developed in Part V. This calibration assumes that mismatch effects *would* disappear without preferences, so almost certainly *overstates* the harmful effects of affirmative action.

Part V. Mismatch hypothesis

A. Types of Mismatch

Discussions of mismatch—including our own to this point—have often conflated two forms of the hypothesis. We call these the “individual” and the “group” versions of mismatch. In the individual version, mismatch arises because selective schools are simply too hard for students with inadequate backgrounds. A poorly prepared student would perform poorly if she attended such a school, and would be advised to turn down an admissions offer from a selective school in favor of one from a less selective school, *regardless of what other students in similar situations do*.

In this version of mismatch, white students who are unprepared for selective schools are generally denied admission. By virtue of affirmative action preferences, however, some unprepared black students are admitted to these schools. The hypothesis claims that to the extent that some of these students accept the admissions offer they receive, affirmative action harms them. Of course, a student well informed about the mismatch effect will simply decline an admissions offer from an overly-selective school. Arguments that affirmative action is harmful to its purported beneficiaries because of individual mismatch effects therefore depend on the claim that black students are unaware of the negative effects of mismatch, or are aware but for some reason choose poorly.

The “group” version of mismatch operates differently. In this version, the availability and use of affirmative action preferences harms *all* black students, even those who do not themselves take advantage of preferences. The mechanism usually proposed is straightforward: Law faculty typically do not know their students’ LSAT scores, but can easily distinguish black vs white students. As discussed earlier, affirmative action preferences lead to larger gaps in LSAT scores and other entering credentials between black and white students at a particular school. Professors (and other students) who are not know any individual student’s credentials but are aware of a large gap in credentials between black and white students at the school may infer the student’s credential from her race. This is known in the economics literature as

“statistical discrimination.”¹⁰⁴ Statistical discriminators will attribute to the black students that they encounter worse credentials than they do to white students at the same school, and will perhaps treat the two types of students differently as a result.

In contrast to “individual” mismatch, a black student cannot escape the invidious effects of “group” mismatch by attending a school where her LSAT score will put her near the top of the distribution: Even a black student whose credentials are in fact high relative to her white classmates is tarred by the low credentials of the average black student at her school.

At first blush, affirmative action worsens statistical discrimination by enhancing black-white gaps in qualifications at both selective and unselective schools. The evidence in the previous chapter, however, suggests that this effect is likely to be relatively small: Black-white gaps in entering credentials at particular schools would persist even without race-conscious admissions, so observers inclined to statistically discriminate will continue to do so.

We therefore focus in the remainder of this section on the individual version of the hypothesis, whereby an individual student would achieve better outcomes by attending a less selective school regardless of what other students do. Our main estimates of mismatch effects—presented in the next part—should capture both types, however.

The (individual) mismatch hypothesis is a claim about the causal effect of attending a highly selective school on a student’s outcomes. To understand this causal effect, we need to know the counterfactual: what would have happened to the student had she instead attended a less selective school. As we do not observe the same student in both cases, we cannot know the true counterfactual, and instead must compare *different* students who attend the two sorts of schools. These can be informative about the causal effect of interest, but only if the comparison is between students who would have achieved the same outcomes, on average, had they attended the same schools.

¹⁰⁴ See Coate and Loury, *supra* note //, at ___ the discussion in Holzer and Neumark, p. 518-522. The concept has also been applied to explain racial differences in traffic stops (**).

B. What is *not* evidence of mismatch?

Before discussing the strategies that researchers have used to estimate mismatch effects, we discuss several types of evidence that, while germane to a discussion about admissions, in fact tell us nothing about mismatch and affirmative action.

First, it is incontrovertible that average outcomes for black law students are worse than those for white law students. 92% of white matriculants graduate from law school, but only 81% of black matriculants do so. Among graduates, 87 percent of whites and 64 percent of blacks pass the bar exam within one year; 89 percent and 70 percent, respectively, pass within two years. It may be tempting to conclude that affirmative action is severely harming black students' probabilities of graduating from law school or passing the bar.

Black-white gaps in average outcomes do not support this conclusion, however. First, the comparison is between different subsets of potential white and black law students: We observe graduation rates only for those white applicants who are admitted to law school without the benefit of preferences, but the black graduation rate is an average of two groups: those black students who would have been admitted under race-blind admissions and those who would not have received any admissions offers but for the availability of preferences. The latter group—we estimate in Part III that 53% of black students admitted to law school in 1992 would not have been admitted without preferences—plausibly has lower graduation and bar passage rates than the former, depressing the black average relative to that which would be obtained from a group selected by the mechanism used to select white law students.

Even more important, there is no reason to think that average outcomes would be the same for black and white students selected by the same mechanism. Our estimates indicate that even the black students who would attend law school without preferences would have mean LSAT and admissions index scores 5.4 and 116 points, respectively, below the averages for white matriculants. If these entering credentials are at all predictive of future success, substantial gaps in average outcomes would persist even with race-blind admissions.

A second invalid comparison is between black and white students at a particular law school. As shown above, there are large gaps in entering credentials between black and white students in each cluster, and this certainly carries over to individual schools. Again, if these credentials are predictive of success, it is unsurprising that success rates should be lower for

black than for white students at a school. Elimination of affirmative action would shrink the gaps in entering credentials but by no means eliminate them.

More importantly, the effect of affirmative action on the gap in outcomes within a particular school does not measure mismatch, which has to do with effects on students rather than on schools. A simple example shows the importance of this distinction. Suppose that the actual school attended has no effects on student outcomes, so there are no mismatch effects. Consider School X that enrolls white students with LSAT scores of 42 but, because it and its competing schools give preferences, enrolls a carefully selected group of black students with scores of 38. If preferences were eliminated, the black students with 38 scores would no longer be admitted to school X and would instead go to a less selective school Y. School X would replace them with black students scoring 42, who previously attended the more-selective Z but are no longer admitted there.¹⁰⁵ Average outcomes for black students at school X would likely rise, simply because a better-prepared group of students has replaced a less qualified group, and the black-white gap at school X would shrink. But by our assumption that schools do not matter, this shift would have no effect on the outcome of any individual student.

A third sort of evidence that might be seen to indicate mismatch concerns the performance of black students relative to white students with the same entering credentials at the same schools.¹⁰⁶ That is, by controlling for entering credentials, one might hope to take account of the “shifting students” problem that bedevils the within-school comparison. Even with detailed controls, it will be difficult to form a valid comparison: If the “credentials” measures are incomplete, there are likely to be differences between the average *unobserved* characteristics

¹⁰⁵ Note that in this example, the black-white gap in LSATs at school X disappears with race-blind admissions. This arises only because we assume that there is no variation in LSAT scores at school X; if X enrolled students with 42s and 43s, a gap would remain because a higher fraction of blacks than whites with scores in this range have scores of 42.

¹⁰⁶ Analyses that attempt to take account of differences in college admissions regimes and compare like to like typically find evidence of black “underperformance.” Black students have worse outcomes than do whites with the same credentials at the same schools. See Alon and Tienda (2004); Kane (1998); Bowen and Bok (p. 76-78, and 383). Rothstein (2004) argues that “underperformance” is an artifact of the SAT’s sensitivity to differences in students’ family backgrounds. Estimates for law schools are more mixed, but there is at least some evidence pointing in the same direction here (Wightman and Muller, 1990; Wightman, 2000; Anthony and Liu, 2003). Note that the law school studies do not address the differences in admissions regimes applied to black and white students, so are not necessarily comparing similarly-selected groups from each race.

of blacks and whites with the same observed credentials.¹⁰⁷ But suppose that the researcher solves this problem. Doing so by definition removes precisely the variation that could potentially indicate mismatch: With the exact same observed and unobserved credentials, black and white students at the same schools are equally mismatched, so any negative selectivity effects deriving from mismatch should apply to both equally.

C. Credible strategies for estimating mismatch

As this discussion indicates, to properly identify mismatch effects one must focus solely on the *causal* effects of schools of different types on their students. It is particularly important to maintain the distinction between effects on schools and effects on students: As we have seen, even if there are no mismatch effects on students, affirmative action will tend to reduce the average outcomes of black students at individual schools. This may present difficulties for the schools—it means, for example, that U.S. News-type rankings penalize schools for “taking chances” on students—but is not informative about the topic at hand.

Researchers have proposed several strategies that do, under certain assumptions, identify the effects of selective schools on their students. Each involves a different specification of the counterfactual, the group that tells us how black students admitted to selective schools via affirmative action preferences would have performed without these preferences. It is not easy to identify a valid counterfactual, and each of the proposed strategies relies on a plausible – but ultimately untestable – assumption that the chosen counterfactual is valid.

The most straightforward comparison is between students of the same race and with the same admissions credentials who are observed attending schools of differing selectivity.¹⁰⁸ If these students are assumed to be identical but for their choice of schools, it follows that the group attending less-selective schools serves as a valid counterfactual for those attending more selective schools. Daniel Ho, for example, uses comparisons of this sort to test the mismatch

¹⁰⁷ We noted above that black students tend to have lower GPAs than white students with the same LSAT scores. This is likely to hold more generally, by a simple statistical argument usually referred to as “regression to the mean”: If the black distribution is lower than the white distribution on each dimension when considered independently, and if the various dimensions of credentials are positively correlated across students, then conditional on one set of credentials the black mean on the remaining credentials will tend to be lower than that of whites.

¹⁰⁸ Bowen and Bok (pp. 59-68) perform this sort of analysis for college students.

hypothesis.¹⁰⁹ He concludes that when other student characteristics are held constant, there is no effect of school selectivity on bar passage rates.

Although we present selective-unselective comparisons below, we find this approach unpersuasive. As we have noted, the Bar Passage Study – like most research data sets – lacks information about non-numerical aspects of students’ applications. Law schools may consider essays and recommendations in making decisions; if so, these account for a portion of the variability in admissions outcomes even among students matched on race and on observed numerical qualifications. Consider, for example, law school applicants with LSAT scores between 30 and 33 and undergraduate GPAs between 3 and 3.25. Credentials in this range correspond to admissions indices in the bottom quarter of matriculants, so students in this group are typically underqualified for the most selective schools. In our 1992 law school applicant data, 11 percent of the black applicants in this cell were not admitted to any law school at all. Despite this, 6 percent of applicants from this group matriculated at schools in the “elite” cluster.¹¹⁰ Differences of this magnitude in admissions outcomes seem unlikely to be attributable to chance, and more likely to reflect unobserved differences between the two groups of students. These would violate the counterfactual assumption for this strategy, and bias the resulting estimates. Most likely, those students who are admitted to elite schools despite poor numerical credentials are strong on other dimensions, and would have done relatively well if they had attended less-selective schools. If so, the selective-unselective comparison will indicate an overly-positive effect of selective schools on their students, potentially masking true mismatch effects.

In a study of college applications, Stacy Berg Dale and Alan Krueger propose an innovative strategy to avoid this problem. Using data on students’ application outcomes at several colleges, they compare students attending highly selective schools with students who

¹⁰⁹ Ho, Daniel E., “Why Affirmative Action Does Not Cause Black Students to Fail the Bar,” YALE L. J. (2005) Scholarship Comment; Ho, Daniel E., “Evaluating Affirmative Action in American Law Schools: Does Attending a Better Law School Cause Black Students to Fail the Bar?,” manuscript, March 9, 2005.

¹¹⁰ Grid data give fraction admitted nowhere. BPS data give number matriculating at elite schools; at least this many must have been admitted to these schools. The discussion based on the grid data is merely illustrative; in our analyses in Part #, we use more fine-grained comparisons, not within relatively wide LSAT-UGPA grid cells but between students with identical admissions indices.

were admitted to those schools but chose instead to attend less-selective schools. The unobserved qualifications of students in the latter group are likely similar to those of the former group; after all, both were admitted to the highly selective school.¹¹¹ While this comparison still relies on untestable assumptions—e.g., that a student’s decision to attend a less-selective school is uninformative about her ambition or drive—the required assumptions are far more plausible than for the full selective-unselective comparison.

Sander endorses this strategy.¹¹² Ayres and Brooks attempt to implement a strategy “similar in spirit” to Dale and Krueger’s, but note important differences between the analyses.¹¹³ As it turns out, the limitations of the BPS data render Ayres and Brooks’ analysis unconvincing. Dale and Krueger could observe the outcomes of several applications for each student, and could thereby match students admitted to the same set of schools. The BPS data, on which Ayres and Brooks rely, do not report where a student applied, nor the outcome of any of her applications save the one to the school where she ultimately matriculates.¹¹⁴

Ayres and Brooks thus compare students attending their “first choice” schools with those who did not, limiting both samples to students admitted to at least two schools and dropping from the latter group students who say they were not admitted to their first choice.¹¹⁵ This strategy is problematic. The BPS data does not make clear what “first choice” means in the eyes

¹¹¹ Dale and Krueger (2002). Dale and Krueger are not concerned specifically with mismatch but more generally with the effect of selective schools on their students. They find that the selective school effect on post-college wages is positive but small, and that it is larger for more disadvantaged students.

¹¹² He describes the strategy, however, as follows: “the most conclusive way [to test the mismatch hypothesis] would be an experiment comparing matched pairs of blacks admitted to multiple schools, with the ‘experimental’ black student attending the most elite school admitting them and the ‘control’ black student attending a significantly less elite school.” P. 453. The Dale and Krueger study uses this design only under an unusual use of the word “experiment.” Students in the Dale and Krueger study are not randomly assigned to attend their most selective option or another one, but make their own choices between them. As noted in the text, the Dale and Krueger strategy is vulnerable to bias if students choosing a more selective school differ systematically from those choosing less selective schools; a true randomized experiment ensures that there are no such differences.

¹¹³ P. 1831.

¹¹⁴ For example, the BPS survey has only a few relevant questions: Students are asked how many applications they submitted and how many admissions offers they received; whether they are attending their first choice school; and if not, why not.

¹¹⁵ They note that they drop students who seem not to understand the question, but do not elaborate on this.

of the BPS respondents: it is not clear whether the decision was based on academics, geography, or some other factor.

More significantly, the BPS data offer no information whatsoever about which school was the student's first choice. There is thus no way to know whether the first choice was more or less selective than the second choice. While the BPS does ask why the student did not attend the first choice, the answers do not seem informative on this matter. 73% of the "second choice" sample report that their first choice was "too expensive given the financial aid available to me."¹¹⁶ Of anything, we would expect that more selective schools would be more generous with financial aid,¹¹⁷ suggesting that these students may have opted for a more selective second choice in order to obtain more aid. 42 percent -- students could provide multiple responses -- say that the first choice was "too distant from my family or personal responsibilities or attachments." It isn't clear how to interpret this, except perhaps as an indication that the "first choice" school was not, in fact, the student's first choice.

Given these limitations, the "second choice" strategy in the BPS cannot be taken as an implementation of the Dale and Krueger strategy. Indeed, there is good reason to suspect that the "second choice" students would have achieved worse outcomes than "first choice" students even if both attended the same schools. Students from wealthier backgrounds typically do better in school than do those from less-well-off backgrounds.¹¹⁸ Even under a very broad definition only 21 percent of "first choice" students receive financial aid, suggesting that most come from backgrounds that are more advantaged than those of the 73 percent of "second choice" students who turned down their first choice school for lack of financial aid.¹¹⁹

¹¹⁶ This and the following figures come from our attempt to reproduce Ayres and Brooks' "second choice" sample in the BPS data. We have not reproduced their precise sample, though we believe we have come close.

¹¹⁷ The U.S. News and World Reports annual graduate school rankings reveal that more selective schools are, on average, provide higher average financial aid awards than their less academically competitive peers. But, for both private and public law schools, the most generous schools include those viewed by the U.S. News as third and fourth-tier law schools. See http://www.usnews.com/usnews/edu/grad/webextras/brief/sb_law_finaid_public_brief.php (last viewed January 29, 2007).

¹¹⁸ See, e.g., Rothstein and Rouse (#to be written#).

¹¹⁹ We count a "first choice" student as receiving aid if she says that any part of her first year cost will be paid from grants or tuition reimbursement or from need-based scholarships. Further

Although only suggestive, these figures cast substantial doubt on the validity of the “second choice” comparison. Absent better data than are currently available for law students, we conclude that the second choice strategy is not particularly informative.¹²⁰

A final strategy that has been proposed is to compare black students with white students with the same credentials, irrespective of the school that they attend. The availability of affirmative action preferences for black students means that they have the opportunity to attend much more selective schools than do whites with the same credentials. To the extent that this opportunity is harmful, we should expect to see depressed performance among black students relative to a comparison group of white students. The key assumption of this strategy is that the black sample would have posted the same performance as the white comparison group had the two been treated identically in admissions. Sander describes the strategy:

[T]he vast majority of whites are admitted to law schools primarily on the basis of their quantifiable academic credentials (UGPA and LSAT), while blacks are admitted on essentially the same basis, but with a very large boost assigned to them based on race. These racial preferences for blacks have the effect of elevating them to much more elite schools, so that if we compare two students with similar credentials, one white and one black, the black student will usually be at a significantly more elite school than the white one, and the black student will usually have much lower credentials than most of his classmates.

The premise of the white-black comparison is that three things are true when we compare white law students with black law students: First, blacks tend to perform about the same in law school as do whites with similar entering credentials and are about as likely to graduate and pass the bar as are whites with similar grades from the same schools. Second, racial preferences tend to place blacks at much more elite schools than whites with similar credentials, creating

evidence on differences in circumstances comes from analyses of family background variables: 64% of first-choicers and 59% of second-choicers report that their fathers have college degrees.

¹²⁰ In his “Reply to Critics,” Sander argues for a different version of the second choice analysis. He compares Ayres and Brooks’ second choicers with *all other* black law students. This bears little resemblance to the Dale and Krueger comparison -- there is no reason to expect that the “all other” group is comparable in its unobserved characteristics to the “second choice” students – and has little to recommend it.

the “credentials gap” between blacks and their classmates. Third, this credentials gap causes blacks to get dramatically lower grades, on average, than do their white counterparts at less elite schools, and these low grades seriously undermine their chances of graduating and passing the bar.¹²¹

We generally agree with Sander’s characterization but differ on two points. The first concerns his first premise, which he states as: “black students tend to perform about the same in law school as do whites with similar entering credentials and are about as likely to graduate and pass the bar as are whites with similar grades from the same schools.” This is an assumption about what would happen in a counterfactual world where black students do not receive preferences, not a statement about what we should see in the observed data. In the actual world of affirmative action, the selection process that determines which students attend which schools is dramatically different for black and white students, so comparisons between students of the two races seen attending the same schools are inapposite. Among students with moderately low academic credentials, for example, only an otherwise exceptional white student will gain admission to a second-tier school, whereas admission may be routine for black students with similar credentials. Outcomes may differ for these two types of students, even if in the counterfactual world similarly-selected black and white students would attain similar outcomes.

Second, Sander’s final “premise” is not a premise at all, but rather the conclusion of his analysis. Given the first two premises, the strategy would correctly estimate the mismatch effect even if it were zero, that is, if school selectivity did not depress students’ grades or their chances of graduating or passing the bar. Indeed, we demonstrate below that the first part of this does seem well supported by the data: Black students earn much lower class ranks (based on first year grades) than do white students with the same entering credentials, a difference that is plausibly attributable in part to the more selective schools that the black students attend. Differences in graduation rates or bar passage, however, are less clearly supported—there is at best limited evidence that selectivity has negative effects on these outcomes.

We think the strategy of comparing black to white students is preferable to the previous two, and indeed we rely on it in our analysis below. To be clear, it too has its limitations: assumptions about what would happen in a counterfactual world are necessarily untestable.

¹²¹ Reply to Critics, p. 1967.

Because we can match black and white students only on the basis of numerical credentials and not on all other potentially relevant characteristics, there are good reasons to believe that black students would underperform relative to whites with the same observed entering credentials even if the admissions process treated both identically. It is likely that black students' unobserved credentials are worse, on average, than those of whites with the same observed LSAT scores and undergraduate GPAs. Perhaps as a consequence of this, in a variety of contexts black students have been found to "underperform" white students at the same schools even after differences in credentials and in selection are taken into account.¹²² To the extent that this holds in law school (see the discussion in footnote #), the strategy of comparing blacks to whites will indicate an overly negative effect of selective schools on their students, potentially revealing mismatch effects where there are none.

D. Implementing the black-white comparison

Several important issues arise in implementing the black-white comparison. One is selection into the sample of law school matriculants: Comparisons of law school graduation rates between black and white law students exclude potential law students who were unable to gain admission to any law school. As we have shown, many applicants fall into this category, but white applicants are much less likely to receive an admissions offer than black applicants with the same (observable) credentials. While one might be willing to assume that the average white college graduate who applies to law school has comparable potential (conditional on observable credentials) to the average black college graduate, this is less plausible when the comparison is restricted to the 70% of black applicants and only 24% of white applicants who were admitted to at least one law school, as is seen among applicants with LSAT scores between 26 and 29 and GPAs between 3.25 and 3.49. One worries that the white students with in this cell needed exceptionally strong recommendation letters, essays, or other application materials to gain admission while the bar was not set so high for black students in the same cell. This will

¹²² See, for example, Rothstein 2004, which uses the location of students' homes relative to the various campuses of the University of California system to generate variation in the college attended that is plausibly independent of students' observed or unobserved qualifications. Rothstein finds that black students, and more generally students from high schools with high black shares, underperform during their first year of college at the University of California.

create spurious black underperformance that has nothing to do with mismatch. We should thus exercise caution in implementing the black-white comparison strategy at credentials levels where law school admissions rates of black and white applicants differ dramatically.

A second, more technical, issue concerns the specification of the statistical model. Recall the logic of the black-white comparison, and let us walk through the implications of this logic for a pair of college roommates, one white and one black, with identical admissions credentials. On average, the black student will be admitted to more selective schools than her roommate. Where her white roommate will have credentials that resemble those of her new classmates, the black student— if she chooses to attend a selective school – will be in a more rarified pool and will be relatively less prepared. This may depress her performance during her first year. Even if it does not, simply because the competition is stiffer we may presume that she will attain a lower first year class rank than does her old roommate. If the mismatch hypothesis holds, the black student will struggle during law school and learn less than does her less-overmatched white college roommate, possibly dropping out or failing the bar exam.

One strategy for implementing the black-white comparison is to model each step of this process. This is what Sander does. First, he studies the degree of preferences given to black students, estimating the difference in “eliteness” between the schools that similarly-credentialed black and white students attend. Label this difference as “W”. Second, he estimates the effect of the law school’s eliteness on the grades earned during law school, “X”. Third, he estimates the simultaneous effects of eliteness (“Y”) and the law school GPA (“Z”) on outcomes like graduation, bar passage, and quality of the first job. The net effect of affirmative action on outcomes combines these three steps. The total effect of eliteness is the sum of its direct effect on outcomes and its indirect effect operating through the law school GPA, $Y + X*Z$; the total effect of having access to preferences is $W*(Y + X*Z)$.

Ho criticizes Sander’s three-step strategy, arguing that it creates “posttreatment bias.” We believe that this criticism misunderstands Sander’s strategy. Ho is quite correct that the estimated effect of eliteness on the outcome from the third stage, Y, cannot be interpreted as the

true effect of eliteness. Because eliteness also affects grades, the full eliteness effect is $Y + X*Z$. If, as we expect, X is negative and Z is positive, this will be smaller—more negative—than Y .¹²³

So long as one keeps this complication in mind, post-treatment bias need not present a problem for Sander's strategy. Still, Ho raises a valid point that Sander's approach is not the only, nor necessarily the best, strategy. In the three-step strategy, estimation of the effect of affirmative action on black students' outcomes requires the correct estimation of four effects from three different statistical models. If any of these models goes wrong, the answer yielded at the end of the process will be biased.

We believe that the three-step strategy, given the existing data, will likely produce misleading results. One way that the three-step method can go awry is if there is heterogeneity or nonlinearity in any of the three steps. For example, in his "Reply to Critics," Sander argues that there is a "curvilinear" effect of grades in the third step: Bar exam success rates are more sensitive to small changes in grades for students with very low grades than for those with higher grades.¹²⁴ Even more importantly, the mismatch hypothesis is by definition one about heterogeneous effects of selectivity: A student with a 22 LSAT score might be mismatched at an elite law school, but one with a 42 would not be; the effect of eliteness on the former student would be much different than that on the latter. The linear three-step model described above assumes both complications away. Accounting for nonlinearity and heterogeneity of selectivity effects in the three-step strategy would require a full "structural" model that correctly specifies each of the three relationships, greatly complicating matters and eliminating the possibility of estimating the net "effect" of being black via simple multiplication and addition. To our knowledge, no one—including Sander—has attempted this.

The three-step strategy is also extremely demanding of the data. It requires not just good measures of students' entering credentials and outcomes, but also measures of the intermediate eliteness of the school attended and of law school grades. This is a major limitation. The "eliteness" measure in Sander's primary data set, the Bar Passage Study, is particularly poor. Sander notes in his "Reply to Critics" that he had not (at the time of writing his initial analysis)

¹²³ In our reading of the statistical literature, "posttreatment bias" typically refers to analysts who focus on Y rather than on $Y + X*Z$ as the effect of eliteness. Sander does not appear to be guilty of this.

¹²⁴ Richard H. Sander, *A Reply to Critics*, 57 *Stan. L. Rev.* 1963, 1969-1971 (2005).

appreciated the crudeness of the BPS “clusters,” which overlap substantially in the selectivity of the schools they include¹²⁵. The law school GPA variable is also imperfect (Rothstein and Yoon 2006). Perhaps because of these limitations, Sander in his “Systemic Analysis” jumps back and forth between the BPS data and another sample, the “1995 National Sample of Law Student Performance.”¹²⁶ Given substantial differences between the specifications that Sander uses for the three different steps, combining his estimates from the three steps into a single estimate of the affirmative action effect, as described above, would be quite difficult, and Sander never does so.

Ho estimates the total effect of eliteness on outcomes in one step by omitting the law school GPA (an “intermediate outcome”) from Sander’s third step. The affirmative action effect could then be obtained by adding a step—which Ho does not implement—corresponding to the first step of the three-step strategy described above. We contend that even the two-step strategy is needlessly complicated, and relies heavily on the quality of the “clusters” used in the BPS.

In our view, the most appealing way to implement the black-white comparison is to do it in one step. We regard it as well established fact—by our analysis in Part IV, and by similar analyses by Sander and Wightman—that black students attend more selective schools than do whites with the same credentials. If mismatch effects are important, then black students should post worse outcomes than similarly-qualified white students. This difference can be estimated directly, as the “reduced form” effect of race on outcomes. This specification should control for differences in outcomes, ideally in a flexible way that allows for substantial nonlinearities in the relationship between, say, the LSAT score and the graduation rate. It should not, however, control for the law school attended nor the grades earned in law school, as these are both intermediate effects of the student’s race.

This strategy thus has the substantial advantage that it does not require good measures of either school quality or law school grades. If there are mismatch effects to be found in the full three-step structural model, they should appear as black-white differences in the reduced-form

¹²⁵ See Sander, *A Reply to Critics*, *supra* note //, at 1972-73.

¹²⁶ See Sander, *Systemic Analysis*, note 152.

specification. Our earlier work explores the technical details of this one-step strategy, and readers are referred to it for a more involved discussion.¹²⁷

¹²⁷ See Rothstein and Yoon, 2006. The more technically inclined may recognize the one-step strategy as the reduced form for an “instrumental variables” estimate of the selectivity effect that uses race as an instrument for selectivity.

Part VI. Black-white gaps in law school outcomes, holding credentials constant

As discussed in the previous chapter, the difference in mean outcomes between black and white students with the same entering credentials provides the most credible available estimate of any mismatch effects on black students' outcomes. We present estimates of this sort here.

We consider several categories of outcomes: Performance in law school, bar exam performance, and post-law-school employment. From the first category, we examine the student's class rank at the end of the first year of law school and the student's graduation status as of five years after law school matriculation. From the second, we examine whether the student was ever observed to take the bar exam, whether she passed the exam on the first attempt, and whether she ever passed the exam.¹²⁸ Our employment outcomes are measured from the Bar Passage Study's follow-up survey, administered four to six months after students' graduation. We examine the fraction of students who have jobs that appear to be relatively prestigious,¹²⁹ the fraction working at large private law firms, and the reported annual salary. Following standard practice, we focus on the natural log of the annual salary. The black-white gap in this can be interpreted as the percentage difference between black and white students' salaries.

We begin with graphical evidence.¹³⁰ Figure 6.1 shows average first year class rank as a function of the entering percentile score, separately for white and black students. The class rank is scaled to equal zero for the lowest-ranked student at each law school and one for the highest-

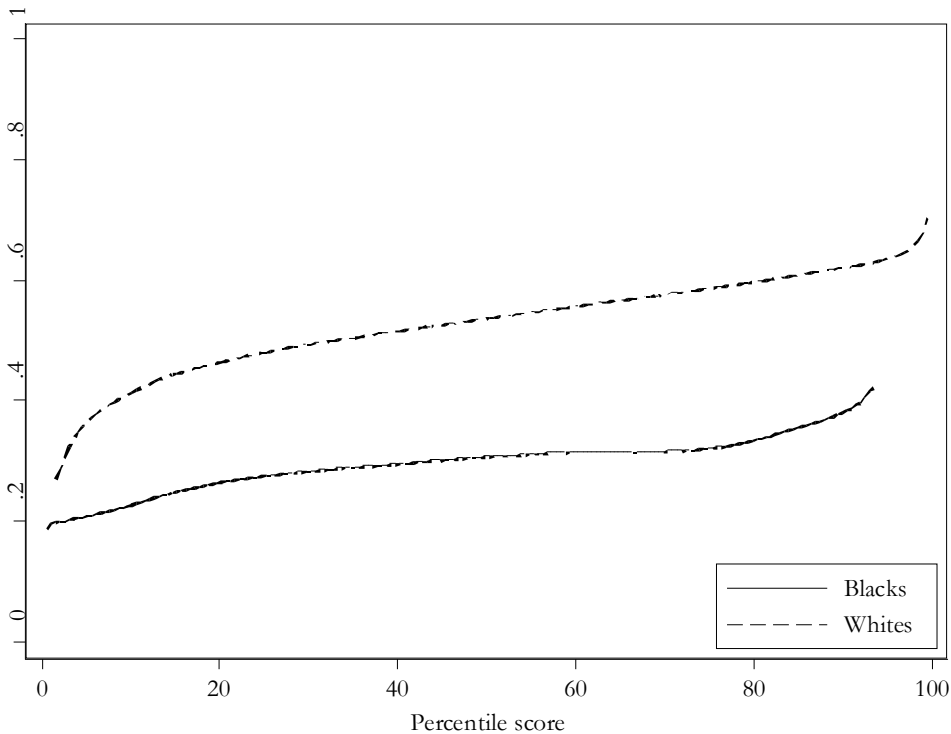
¹²⁸ There are several limitations to the Bar Passage Study's bar exam measures. Most importantly, we do not observe the state in which the exam was taken nor the actual score; we simply observe whether the student passed on the first attempt and whether she ever passed (by July of the 5th year after beginning law school). There are a few states for which the BPS data report successful attempts but not unsuccessful attempts. Students who attempted the exam only in these states and never passed therefore appear never to have taken the exam, and students who passed only on the second or third attempt in these states appear to have passed on the first try. As only 4% of students who passed the bar did so in these states, we expect that there are few students whose status is mismeasured.

¹²⁹ We code the following job types as prestigious: Large private law firms (50 or more attorneys), academic, prosecutor's office, and public defender's office. We code the remaining job types—mid-size and small firms, solo practice, government agencies, public interest, and other—as non-prestigious. Those who have not yet accepted a job are counted as not having good jobs.

¹³⁰ These graphs are drawn from the analysis reported in Rothstein and Yoon (2006), who describe the details of their construction.

ranked student. It is thus measured only relative to other students at the same law school; by design, there is no difference in average class rank between students at the most and least selective law schools.

Figure 6.1
Mean first-year class rank (0=lowest, 1=highest), by race and percentile score



Source: BPS

Figure 6.1 shows that within each race the relationship between student credentials and class rank is positive, but fairly weak except among the most- and least-qualified students. This weak relationship most likely reflects a negative effect of school selectivity on class rank, holding individual credentials constant: More selective schools offer stiffer competition for the top ranks, and most likely assign lower ranks to any given achievement level. Because students with better credentials will tend to attend more selective schools, on average, this masks the positive relationship between credentials and student achievement.

At any fixed level of entering credentials, there are large differences between the average class ranks of black and white students. Among students with percentile scores of 20, for example, the average white student's first year GPA places her at the 47th percentile of her class,

while the average black student winds up at only the 26th percentile of her (potentially different) class. The gap is slightly larger among students with better credentials, reaching a maximum around the 75th percentile.

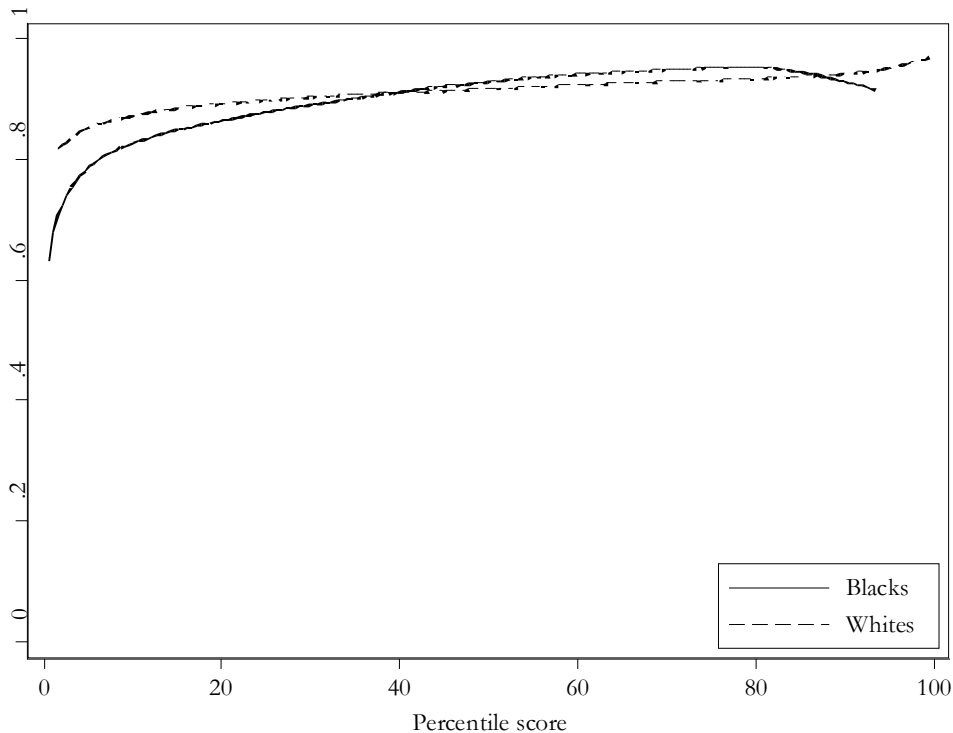
This black-white gap in class rank combines two effects. First, as we have seen, black students attend more selective schools, on average, than do white students with the same credentials. They therefore face stiffer competition, and with the same achievement levels will rank lower within their schools. Second, if mismatch effects are important, black students may suffer from them, and may have lower achievement during law school.¹³¹

The first effect lowers only relative performance, and would therefore disappear with an absolute scale. By contrast, the second effect impacts absolute performance levels. A strategy for separating them must therefore focus on outcomes that are measured on absolute rather than relative scales. Accordingly, law school grades are inappropriate because grading standards differ across law schools—many schools impose strict curves on first year grades, explicitly evaluating students relative to their peers rather than against any absolute standard—and because the BPS data suppress any between-school differences in grade point averages.

Law school graduation is a more objective measure (though perhaps not perfectly so, as schools may differ in their willingness to graduate struggling students). Figure 6.2 presents law school graduation rates, again as functions of the percentile score and separately for black and white matriculants. If mismatch effects are important, we should expect that black students would graduate at lower rates than do whites with the same entering credentials. This does not jump out of the graph: Graduation rates are high throughout the credentials distribution, and except at the lowest percentile scores black students graduate at approximately the same rate as whites.

¹³¹ There is a third potential contributor to this gap, of course: Black students may underperform white students with the same credentials even in the absence of mismatch effects, particularly if the credentials do not fully capture differences in student preparedness.

Figure 6.2
Graduation rates, by race and percentile score



Source: BPS

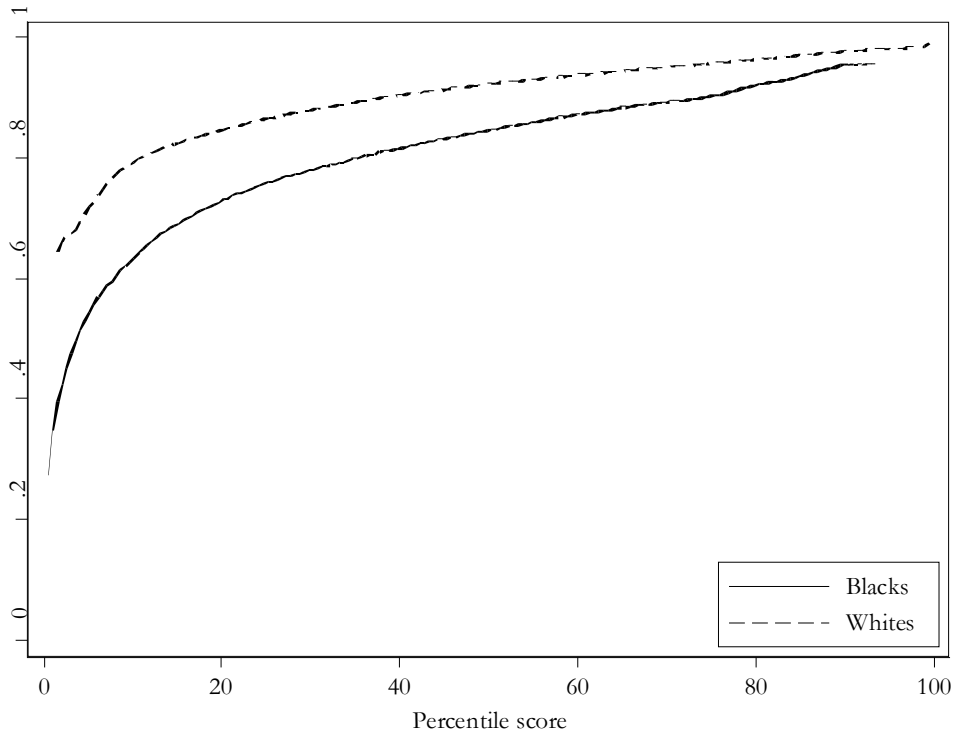
Bar exam passage is an even more objective outcome, as exams are graded blind, without reference to the student’s credentials, race, or school attended.¹³² Figure 6.3 reports the fraction of students who passed the bar exam on the first attempt.¹³³ Approximately 92 percent of white students and 62 percent of black students pass their first bar exams. This largely reflects differences in entering credentials, as bar passage is strongly related to the percentile score even within race. Even when we compare students with the same percentile scores, however, we see important gaps in bar passage rates. These are relatively small through most of the distribution—about 8 percentage points for students with percentile scores around 40—but are larger—above 20 percentage points—among students with the weakest credentials.

[Insert Figure 6.3 here]

¹³² The only threat to the comparability of bar exam outcomes is that the difficulty of the exam varies across states. Unfortunately, we do not observe the state in which the exam was taken, so cannot adjust for this.

¹³³ Students who did not graduate or who did not attempt the exam are excluded. We examine exam-taking as a separate outcome below.

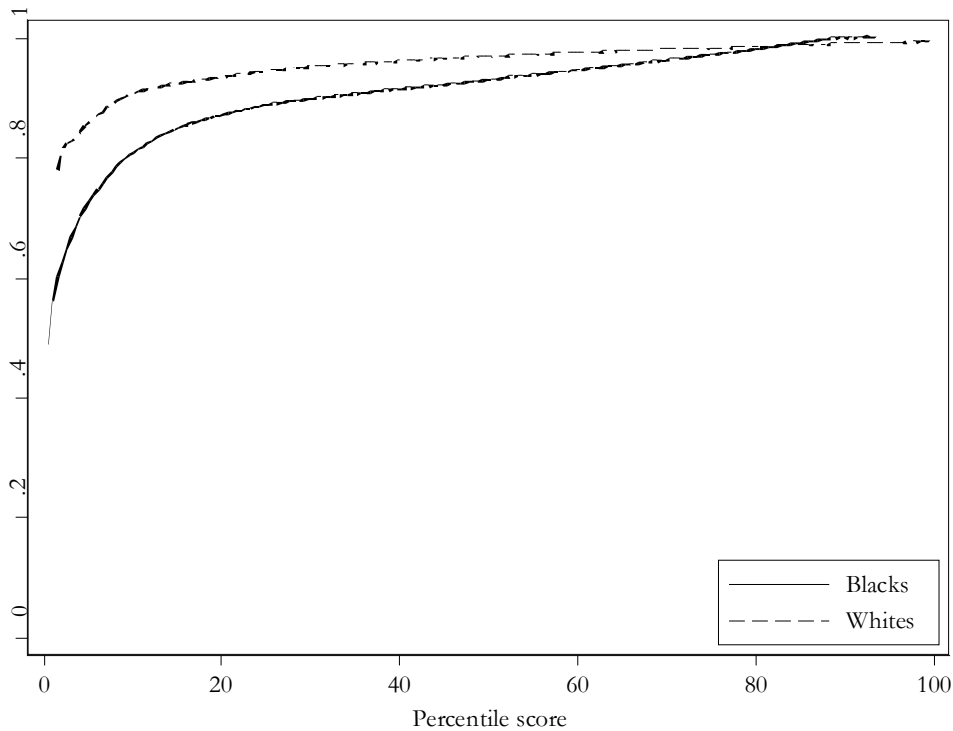
Figure 6.3
Fraction of law school graduates passing the bar exam on the first attempt, by race and percentile score



Source: BPS

Students who fail the exam may re-take it, and just over half of the students who failed the exam on the first attempt eventually passed. Figure 6.4 shows estimates of the fraction of graduates who ever passed the exam, restricted to those who attempted the exam at least once. Much of the black-white gap in first-time passage disappears when we turn to ultimate passage. We still see small gaps (around 5 percentage points at the 20th percentile), however, and these gaps are again largest among students with the worst credentials.

Figure 6.4
Fraction of law school graduates ever passing the bar exam on the first attempt, by race and percentile score



Source: BPS

Viewed together, Figures 6.1 through 6.4 offer mixed evidence for the mismatch hypothesis. Despite large black-white gaps in class rank, indicating that black students face much tougher competition than white students with the same LSATs and undergraduate GPAs, the graduation and bar passage rates are substantially smaller, particularly among students with percentile scores above about 20. Below this threshold—recall that three quarters of black law school matriculants have percentile scores below 20—we see larger gaps in outcomes.

Table 6.1 assembles the data from these graphs into estimates of mean black underperformance. The first column shows the raw black-white gap among all matriculants. Black students' class ranks are 30 percentage points lower than those of whites, on average. Blacks graduate from law school at lower rates than whites; those that graduate are (slightly) less likely to attempt the bar exam; and those that attempt the bar exam are much less likely to pass. Employment outcomes, in the last rows, are more ambiguous: Black law graduates are more likely to have good jobs after graduation (though these are slightly less likely to be at large

private law firms—the “good jobs” effect is driven primarily by government jobs). Mean annual salaries are nearly 6 percent lower for black graduates than for whites.

Table 6.1.
Black-white gap in outcomes, holding credentials fixed

	Raw	Adjusted for differences in entering credentials
	(1)	(2)
Class rank (0=lowest, 1=highest)	-0.30 (0.01)	-0.16 (0.01)
Graduation	-11.0% (1.0)	-6.4% (1.4)
Attempt bar (if graduate)	-2.1% (0.8)	-1.1% (1.4)
Pass bar on 1st try	-29.1% (1.4)	-14.5% (2.1)
Pass bar ever (if attempt)	-18.3% (1.2)	-9.3% (2.0)
Good job	+4.1% (1.9)	+12.8% (4.4)
Large law firm job	-0.3% (1.4)	+8.2% (3.1)
log(annual salary)	-0.058 (0.027)	+0.056 (0.090)

Notes: Standard errors in parentheses. Bold coefficients are significant at the 5% level. For column 2, we estimate a regression of each outcome on a quartic in the admissions index, using only white students, and use this to predict the outcomes the average white student would have if the white admissions index distribution matched that of blacks. Standard errors are estimated via the bootstrap, with 500 replications.

Source: Authors' analysis of BPS

The second column of the table shows the portion of these gaps that remains after we account for differences between black and white students' entering credentials.¹³⁴ This

¹³⁴ Rothstein and Yoon (2006) discuss a “reweighting” strategy for accomplishing this while allowing for arbitrarily nonlinear effects of entering credentials on outcomes. That strategy requires dropping from the analysis over ten percent of black students for whom there are too few white comparison observations. In order to retain all students in the present analysis, we adopt a less sophisticated approach that uses a polynomial function to form out-of-sample predictions for white students with very low credentials. We regress each outcome on a quartic in the admissions index, using a sample of white students, and use the fitted values to predict the outcome that each black student would get if the white credentials-outcome relationship applied.

comparison is more favorable to black students on every dimension. Black-white gaps in class rank, graduation, and bar passage are each cut by about one half relative to the unconditional gaps in column 1, though most remain significant. The black graduation rate is 6.4 percentage points lower than that for white students with the same credentials. Among students who graduate, black and white students attempt the bar at approximately the same rates. The gap in first-time passage rates is 14.5 percentage points; for ultimate passage (among students who attempt the exam) it is 9.3.

Employment outcomes show a substantially different pattern. Black students are 12.8 percentage points *more* likely to have first jobs that we classify as “good” than white students with the same credentials, and are 8.2 percentage points more likely to work at large law firms (those with more than 50 attorneys). Black students also earn slightly (about 5.6 percent) higher salaries than whites with the same credentials, though this gap is not statistically significant.

Taken together, the estimates in Table 6.1 are consistent with the presence of mismatch effects on law school graduation and, even more so, on bar passage. There is no indication of mismatch effects on employment outcomes. There is an important caveat here, however: Employers of young lawyers may themselves practice affirmative action, hiring black students with low achievement over white students with higher achievement. If so, estimated white underperformance in employment may not be indicative of academic underperformance. Nevertheless, there is no evidence that the net effect of preferences in admissions and hiring is to hurt the employment outcomes of black law graduates, at least in the first years of their careers.

Figures 6.1-6.4 indicate that black-white gaps in outcomes vary importantly with student credentials, however. In Table 6.2, we disaggregate the gaps from Column 2 of 6.1, estimating them separately for each of five groups of students: Those with percentile scores below 10, between 10 and 20, between 20 and 40, between 40 and 60, and above 60.

[Insert Table 6.2 here]

Column # reports the difference between the observed average black outcome and the average of these predicted values. This is generally quite similar to that obtained from the more sophisticated reweighting approach, and differences seem to reflect the differing samples rather than the limitations of our polynomial regression.

Table 6.2.
Adjusted black-white gap in outcomes, by admissions index percentile score

	Admissions index percentile				
	0 - 10	10 - 20	20 - 40	40 - 60	60 - 100
	(1)	(2)	(3)	(4)	(5)
Class rank (0=lowest, 1=highest)	-0.13	-0.20	-0.22	-0.23	-0.23
	(0.01)	(0.01)	(0.01)	(0.02)	(0.03)
Graduation	-9.4%	-2.5%	-0.7%	+0.8%	+1.4%
	(2.0)	(1.3)	(1.2)	(1.5)	(2.3)
Attempt bar (if graduate)	-2.0%	-0.8%	+0.8%	+1.9%	-1.0%
	(2.0)	(1.1)	(1.1)	(1.4)	(3.0)
Pass bar on 1st try	-17.5%	-13.2%	-9.9%	-6.7%	-4.8%
	(3.1)	(1.9)	(1.8)	(2.3)	(2.8)
Pass bar ever (if attempt)	-12.1%	-7.6%	-4.8%	-2.6%	-1.1%
	(2.9)	(1.6)	(1.3)	(1.6)	(1.4)
Good job	+6.0%	+15.0%	+22.8%	+29.0%	+32.8%
	(6.4)	(2.9)	(2.9)	(4.0)	(5.0)
Large law firm job	+2.7%	+10.1%	+16.5%	+20.3%	+19.5%
	(4.5)	(1.8)	(2.4)	(3.6)	(6.2)
log(annual salary)	-0.025	+0.100	+0.184	+0.208	+0.155
	(0.130)	(0.045)	(0.038)	(0.046)	(0.059)
<i>Distribution of black students across categories</i>					
Status quo admissions					
Number	1,684	481	416	174	172
Percent of total	58%	16%	14%	6%	6%
Race blind admissions					
Number	378	189	236	126	149
Percent of total	35%	18%	22%	12%	14%

Notes: Standard errors in parentheses. Bold coefficients are significantly different from zero at the 5% level. See Table 6.1 for description of methods.

Source: Authors' analysis of BPS

Consistent with Figure 6.1, the black-white gap in class rank is approximately constant across the five groups, and is if anything increasing with student credentials. For the other outcome measures, however, the trend is different. In each case, black students in the bottom decile of the admissions index distribution perform worse, relative to white students with the same credentials, than do those in higher deciles. Evidence for mismatch effects on graduation and bar passage is far stronger in the bottom decile than in the upper four quintiles of the admissions index distribution. Similarly, black graduates show substantially better employment outcomes than white graduates in the upper nine deciles, while gaps in the bottom decile are smaller and insignificant.

This negative relationship between entering credentials and the size of the black-white gap in outcomes is important for two reasons. First, it suggests that we must be cautious in inferring mismatch. Recall from Part III that many white applicants with percentile scores below 20 (i.e. in the bottom two deciles) are not admitted to any law school. It is likely that these would-be students would have graduated and passed the bar exam at low rates, lower than those for white students with the same credentials who were admitted. If so, the comparisons between black and white law school matriculants, as in Tables 6.1 and 6.2, may be biased in favor of whites, particularly in the bottom two groups. That is, even if black and white applicants would have achieved similar average outcomes, conditional on entering credentials, there is reason to expect that those white students who actually matriculated would have outperformed black students—for whom the selection pressure is much less intense—even in the absence of affirmative action. As Table 6.2 shows, the evidence for mismatch effects comes disproportionately from the subset of law students for whom this selection bias is most likely to be a problem. Absent a strategy for assessing the magnitude of selection bias, conclusions about the size of the mismatch effect on the average black student cannot be very strong.

Second, the differences in black-white gap across the credentials distribution are informative about how much the elimination of affirmative action could contribute to the closing of black-white gaps. We demonstrated in Part IV that the number of black students admitted to law school would fall dramatically were race-based preferences eliminated. Under the (speculative) hypothesis that mismatch effects would disappear entirely with the elimination of preferences, improved success rates of those black students who would be admitted could offset the reduction in admitted students, producing only small reductions or even increases in the number of black law graduates or bar entrants.

The final rows of Table 6.2 show the distribution of black matriculants across the five percentile score categories, first in the status quo and second in our simulation of race-blind admissions. Where 59 percent of the black students observed in our data come from the bottom decile, under race-blind admissions only 37 percent of the (much smaller) total come from this decile; over 800 students with percentile scores below 10 who currently matriculate would not do so without preferences. By contrast, the number of black matriculants with percentile scores above 60 would fall by only 10, and the share coming from this range would nearly triple.

Thus, Table 6.2 provides reason to think that any gap-closing effect that results from the elimination of racial preferences would be relatively small. The black applicants who would be admitted under race-blind rules would come disproportionately (relative to the current distribution among black matriculants) from the upper end of the index distribution. Black-white gaps in outcomes are relatively small in this portion of the distribution, so even if they are somehow made to disappear this will have relatively little effect on the number of black graduates or bar-passers. By contrast, only a small fraction of the black applicants with percentile scores below 10 would be admitted without preferences, so even if the success rate could be improved substantially for black matriculants in this range the effect would be dwarfed by the reduction in the number of admitted students.

Table 6.3.
Adjusted black-white gap in mean outcomes, status quo index
distribution and distribution under race-blind admissions

	Status quo	Admissions index distribution that would arise with race-blind admissions
	(1)	(2)
Class rank (0=lowest, 1=highest)	-0.16 (0.01)	-0.19 (0.01)
Graduation	-6.4% (1.4)	-3.6% (1.0)
Attempt bar (if graduate)	-1.1% (1.4)	-0.6% (1.0)
Pass bar on 1st try	-14.5% (2.1)	-12.0% (1.5)
Pass bar ever (if attempt)	-9.3% (2.0)	-7.1% (1.3)
Good job	+12.8% (4.4)	+17.6% (2.9)
Large law firm job	+8.2% (3.1)	+11.4% (2.2)
log(annual salary)	+0.056 (0.090)	+0.095 (0.051)

Notes: Standard errors in parentheses. Bold coefficients are significant at the 5% level. See Table 6.1 for description of methods.

Source: Authors' analysis of BPS

Table 6.3 provides another view of this argument. Column 1 repeats the estimated average underperformance of black students (relative to white students with the same credentials) from Column 2 of Table 6.1. Column 2 shows the average underperformance of black students with credentials like those who would be admitted without race preferences. This has little effect on the class rank gap; Figure 6.1 and Table 6.2 show that black underperformance on this dimension is roughly constant across the admissions index distribution. It substantially shrinks the black-white gap in graduation and bar exam passage rates, however, and expands the black advantage on employment outcomes, as on each of these outcomes black students with high percentile scores perform better relative to whites with the same scores than do those with low percentile scores.

Part VII. How does it all add up? Does affirmative action increase the number of black lawyers?

As a final exercise, we combine our estimates of the effect of affirmative action on the number of admitted black students with those of mismatch into a simulation of the total effect of preferences on the number of black graduates, bar entrants, and beginning associates at large firms. Estimates are presented in Table 7.1.

Table 7.1.
Effect of eliminating affirmative action and mismatch effects
on the production of black lawyers

	Status quo	Change in admissions (w/ observed success rates)	Eliminate B/W gaps	New total	% change from current
	(1)	(2)	(3)	(4)	(5)
Matriculate	2,928	- 1,851	0	1,077	- 63%
Graduate	2,371	- 1,454	+ 39	955	- 60%
Attempt bar	2,159	- 1,314	+ 39	885	- 59%
Pass bar					
1st attempt	1,349	- 748	+ 120	721	- 47%
Ever	1,695	- 978	+ 85	801	- 53%
Good job	700	- 366	- 32	301	- 57%
Large law firm job	272	- 117	- 14	142	- 48%

Source: Authors' analysis of grid and BPS data

The first column of the table shows the number of black students clearing various hurdles in the BPS data. 2,928 black students matriculated in 1992, of whom 2,371 graduated, 1,695 passed the bar exam, and 272 were employed with large law firms four to six months after their scheduled graduation.

Columns 2 through 4 present a simulation in which we assume that gaps in outcomes between black and white students with the same credentials could somehow be closed without changing admissions policies. This would lead an additional 183 black students to graduate and 323 to pass the bar exam (column 2), corresponding to 8 and 19 percent increases, respectively (column 4). Recall, however, that black graduates are *more* likely than are white students with the same credentials to get good jobs. This effect is large enough to overwhelm the gap in

graduation rates; in our simulation of the elimination of both gaps, we project 79 fewer black students with good jobs and 27 fewer at large law firms (-11 percent and -10 percent, respectively).

The simulation in Columns 2-4 provides a useful baseline but is not otherwise very relevant, as if mismatch is the source of black underperformance it would be difficult to eliminate without changes in admissions policies. The remaining columns of Table 7.1 carry out the full simulation, in which we suppose that race-based preferences are eliminated and that this causes black underperformance to disappear. We show the two effects in separate columns. First, Column 5 shows the change in the number of black students reaching each threshold that would arise simply from excluding many current black students from law school, with no change in the success rates of those black students who remain. Column 6 shows the additional change that would result from closing black-white gaps in success rates among the students who would attend law school without affirmative action. Columns 7 and 8 are analogous to 3 and 4, and show the number of black students who would reach each threshold in the simulation and the percentage change relative to the status quo.

For a variety of reasons, this simulation should provide an upper bound to the number of successful black law students under race-blind admissions. First, as argued in Part IV, it is unrealistic to think that mismatch effects on black students would disappear with affirmative action. Thus, even if all black underperformance is due to mismatch this simulation overstates the benefits of changes in admissions policies. Second, as in Part V we assume that black admissions outcomes under race-blind admissions would be as good as those seen today for whites with the same credentials. More likely, unobserved aspects of black students' applications are worse than those of the comparison white students, so blacks would be admitted at lower rates than whites are today if common standards were applied.

As noted earlier, roughly 1/3 as many black students would matriculate in law school without race preferences as are seen today. The excluded students would come disproportionately from the bottom of the pool, and thus have low success rates today. Still, Figures 6.2-6.4 indicate that even at the bottom of the pool, substantial fractions of black students *are* successful. The elimination of preferences would thus have substantial negative effects on the number of black law graduates, bar entrants, and law firm associates, as shown in

Column 5. The number of black law matriculants would fall by 1,851; 1,454 fewer black students would graduate; 978 fewer would pass the bar exam, 366 fewer would get good jobs; and 117 fewer would begin associate positions at large law firms.

These effects arise simply from the exclusion of many black students from the pool of law students. They would be partially offset if the elimination of preferences would be accompanied by disappearance of gaps in success rates among those black students who remain. As noted above, we think this is optimistic. Even so, Column 6 shows that the offsetting effect will be quite small. Most importantly, with only 1/3 as many black matriculants, even large increases in success rates would have only small effects on the number of successful students. Second, those black students who remain would tend to have relatively strong credentials and, as the results in Table 6.2 and 6.3 indicate, the degree of current underperformance for such students is relatively small. Thus, Column 6 indicates that elimination of mismatch effects would add only 39 black law school graduates and 85 bar entrants. Because black students currently enter prestigious jobs at *higher* rates than do whites with similar credentials, elimination of black-white gaps would lower their success rates on these dimensions, reducing the number of black students with good jobs by 32 and the number of large-firm associates by 14.

Columns 7 and 8 show the overall results of our simulation. These paint a bleak picture. Even using assumptions that almost surely overstate the importance of mismatch effects, they are dwarfed by the first-order effect of eliminating preferences, the reduction in the number of black students admitted. The number of black law graduates would fall by 60 percent, while the numbers of bar entrants and large-firm associates would each fall by half.¹³⁵

It is important to emphasize that this analysis focuses on the *number* of successful black students, not on the success *rate*. A shift to race-blind admissions would increase the measured success rate substantially. But this would not come primarily from effects on mismatch. Rather, the shift would displace many of the entering black students with the lowest *ex ante* probabilities

¹³⁵ Footnote about Sander's NC article, and implications for his results: If any of the displaced associates would have made partner, this almost certainly overwhelms any mismatch effects on partnership rates. Note that Sander hasn't actually provided evidence for mismatch effects. We could point out that the credentials, GPAs, etc. of black associates are much worse than those of white students...

of success. This will mask the evidence that many black law school applicants have poor numerical credentials, but will do nothing to address the underlying problem.

To further illustrate the contrast between the “displacement” effect of eliminating preferences and the effect on mismatch, we can compare our simulation of race-blind admissions with a second simulation in which we simply exclude the black students with the lowest index scores but make no changes to the schools attended nor the success rates of those black students with scores above our threshold. By choosing a threshold that yields the same number of black matriculants as in our first simulation, we can capture only the “displacement” effect of eliminating preferences and preserve all mismatch effects.

Results are shown in Table 7.2. By design, the two simulations yield (approximately) the same number of entering black law students. These students have very different distributions across schools in the two simulations, however: In the “pure displacement” simulation, many more black students attend the elite law schools and many fewer attend the least selective schools. If selective schools are bad for their black students on average, then, this should maximize mismatch effects. In fact, the pure displacement simulation yields average black outcomes that are notably better than in the race-blind admissions simulation, on every dimension. Indeed, in this simulation black graduation and bar passage rates approach those seen among white law students, while employment outcomes are far better.¹³⁶

¹³⁶ This comparison is perhaps a bit unfair to whites, as some of the white students in Column 1 have entering credentials below the threshold used in our second simulation. Applying the threshold equally to both races, however, would exclude only 7% of white students (as compared with 63% of black students), and would raise the success rate of the white sample only slightly. Moreover, even with a race-blind threshold, the average index score would be much lower among blacks than among whites, simply because the black distribution is lower than that of whites.

Table 7.2.
Comparing race-blind admissions with a policy of excluding students with very low admissions index scores

	Status quo		Eliminate preferences and B/W gaps in success rates	Exclude black students with lowest admissions index scores
	Whites	Blacks		
	(1)	(2)	(3)	(4)
# of matriculants	33,499	2,928	1,077	1,075
<i>Fraction in each cluster</i>				
Elite	8%	8%	14%	19%
Public Ivy	16%	16%	20%	25%
2nd Tier Public	27%	29%	28%	30%
2nd Tier Private	38%	24%	20%	16%
3rd Tier	10%	6%	4%	1%
Minority	2%	18%	13%	9%
<i>Fraction meeting each milestone</i>				
Graduate	91%	80%	89%	89%
Attempt bar	85%	73%	82%	84%
Pass bar				
1st attempt	78%	45%	67%	67%
Ever	82%	57%	74%	76%
Good job	26%	29%	28%	47%
Large law firm job	12%	12%	13%	25%

Source: Authors' analysis of grid and BPS data

This further underscores the unimportance of mismatch effects in the big picture. The overwhelming determinant of low black success rates is the inclusion in the population of matriculants of students with low LSAT scores and GPAs who would not be admitted to *any* law school without race-based preferences. The black graduation and bar passage rate could be brought near to that of whites by excluding these students, but this would improve no individual student's chances of success.

Conclusion

This article elucidates misconceptions regarding affirmative action and the mismatch hypothesis. While there has been long-standing debate over the constitutionality and equitability of affirmative action, recent debate has centered over actual effects that affirmative action has had.

Using limited data on law school admissions, we examine the role of race-based preferences in law school admissions. We find that these preferences have had large effects on the number of black law students, and thereby on diversity in law schools. Given the Court's pronouncement in *Grutter* that diversity is a legitimate justification for affirmative action, this is a particularly salient finding. In the absence of affirmative action, we estimate that the number of black students entering law school would fall by about 60%, while black representation at the most selective schools would fall by 90%. We also find little support for Sander's "cascade effect"—black enrollment would fall not just at the elite law schools but also at middle-tier schools.

The second portion of our analysis concerns so-called "mismatch effects." Sander has recently claimed that these effects are extremely important in law school, to the point that affirmative action *reduces* the number of black lawyers. We find some evidence to support the presence of these effects, particularly for the least qualified entering law students. Our estimate of the magnitude of these effects, however, is much smaller than that implied by Sander's analysis. They can account for only about half of the observed black-white gap in graduation and bar passage rates. Moreover, mismatch effects are concentrated among the very students who would be denied the opportunity to attend law school were affirmative action preferences eliminated or reduced.

An important question is how our results would change if our methods were applied to more recent data. Linda Wightman used grid data for 2000-01 to perform a simulation like that in our Table 4.2 for that cohort. Her results indicated that race-blind admissions would have only excluded 14 percent of black students who were admitted in that year,¹³⁷ as compared with the 53 percent that we conclude would have been excluded in 1990-91. This appears to reflect an increase in the number of black applicants with LSAT scores in the lower middle of the

¹³⁷ See Wightman (2003), *supra* note //, at 243.

distribution, as indicated by a comparison of Figure 3.1 and 3.3. The increase in black representation among applicants with high LSAT scores has been much smaller, and it seems likely that if our simulation of the distribution across types of schools could be conducted for 2001 applicants the results would be similar to those for 1991. Moreover, Chambers et al. argue that the 2001 cohort was an anomaly, and that data on more recent cohorts would show much larger fractions of black students being excluded by a shift to race-blind admissions.¹³⁸ Thus, while our simulations would not be quite as bleak for recent cohorts, it is clear that affirmative action remains a significant contributor to the maintenance of racial diversity in law school.¹³⁹

We can say much less about how mismatch effects might have changed over time. It is worth noting, however, that the benefits that might derive from reduced mismatch necessarily shrink as black-white gaps in admissions probabilities shrink: The anti-mismatch consequences of a reduction in preferences arise only by denying students access to schools to which they are currently admitted; if preferences have smaller effects on where black students are admitted than they did in 1991, elimination of those preferences must necessarily have smaller effects on the degree of mismatch. Thus, our bottom-line result that preferences increase rather than reduce the production of black lawyers does not seem likely to have changed since 1991.

What is the import of this result for policy? We do not deny the large, important gaps in success rates between entering black and white law students. 19% of black students who start law school fail to graduate, and only 57% become lawyers. This is a potentially serious problem, not least because these students incur large costs in their failed attempts at law. But our analysis suggests that mismatch effects are not an important part of the solution to this problem.

A more reasonable read of the facts that law schools—not just the elite ones, but primarily the less selective schools—are taking chances on black applicants who do not meet their ordinary admissions standards. Some of these students are unsuccessful, exceeding half of the least-qualified students. But some do succeed. Moreover, the high rate of failure is not primarily an indication that these students are mistreated by the affirmative action apparatus, but simply a reflection of the fact that not all chances work out. Law schools might consider taking

¹³⁸ Chambers, Clydesdale, Kidder, and Lempert, 2005. #Albert—we could get the 2004 data from Bill Kidder and do our Table 4.2. Do you think that would help?#

¹³⁹ Krueger, Rothstein and Turner argue that affirmative action will remain necessary to the maintenance of diversity at highly selective undergraduate admissions for at least the next 25 years.

steps to increase the chances of success and to reduce the costs of failure. Tutoring programs might help with the first, while the second could involve forgiving part or all of the debt incurred by students who prove unable to pass the bar exam.

Finally, students with very poor credentials should think hard about whether the high risk of failure is justified by the rewards for success in law school. Our analysis cannot answer this question—we do not know what the alternative to law school is for the students in our data. Indeed, it is not clear that it is appropriate for legal educators to make these decisions for students; we think it would be better for students to make them on their own. To facilitate informed decisions, however, students should perhaps be provided with more complete information about the success rate of entering law students with various credentials.

As a policy matter, reasonable people may disagree about whether the costs of “taking a chance” on marginal black applicants outweigh the benefits, and we have little that is new to say about this. Our analysis suggests, however, that mismatch effects cannot be invoked to argue that there are no benefits. Only a very few 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.

Absent from our discussion is a statement of our own positions on the merits of affirmative action. We decline to take a position here, as we believe it is outside the scope of this paper. Our goal is merely to shed light on the factual evaluation, and thereby to promote more informed constitutional and normative debate. We hope that the foregoing has done so.