1-1-2008

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Recommended Citation

William B. Turner, *A Bulwark against Anarchy: Affirmative Action, Emory Law School, and Southern Self-Help*, 5 HASTINGS RACE & POVERTY L.J. 195 (2008).

Available at: https://repository.uchastings.edu/hastings_race_poverty_law_journal/vol5/iss2/1

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“A Bulwark against Anarchy”: Affirmative Action, Emory Law School, and Southern Self-Help

WILLIAM B. TURNER*

Introduction

In retrospect, for Marvin Arrington, which law school he attended made a significant difference in his career. Arrington served for many years on the Atlanta city council and ran unsuccessfully for mayor while maintaining a highly successful law practice. He is now a judge in the Superior Court of Fulton County, Georgia. He asserts that, as he began his political career, one of his most important sources of support, including financial and other contributions, was the friends he made during law school.¹ Arrington's story would seem to be a pedestrian tale of provincial success, except for one thing. Marvin Arrington is African American. He graduated from Emory University Law School (“ELS”) in 1967. He was among the first African-American

* J.D., Wisconsin (2006), Ph.D., History, Vanderbilt (1996). This project began because Woodruff Professor of Law Martha Fineman had the good sense to see its importance. During my first year of work on the project, her Feminism and Legal Theory Project paid my salary.

1. Interview by Odini Nwakuche with Marvin Arrington, in Atlanta, Ga. (March 16, 2007). Arrington's admission to Emory Law School (“ELS”) in 1965 as a transfer student from Howard Law School was not the result of a formal affirmative action policy. Arrington was home from Howard for the summer after his first year of law school and chose to study at the ELS library. Dean Ben F. Johnson, Jr., saw him there, asked him why he was in the law library, and encouraged him to apply as a transfer student. *See id.* *See also* John D. Thomas, *A Legal Precedent*, EMORY MAG., Aug. 1998 (story describing circumstances of Arrington's arrival at Emory Law School). Arrington remains a useful example for an article about affirmative action. The very next year, Dean Johnson would create an affirmative action program at ELS called Pre-Start. *See infra* sec. IV. The issues in the current debate include the motives of law school administrators and of African-American law students, making Johnson's reasoning highly relevant. *See infra*, notes 138-40 and accompanying text.

graduates of Emory's law school, indeed of the university as a whole.

Affirmative action in law school admissions has generated substantial controversy in recent years. The decision of the United States Supreme Court upholding the affirmative action policy at the University of Michigan Law School² seems to have increased, rather than diminished, the controversy.³ Dissenting in that case, *Grutter v. Bollinger*, Justice Clarence Thomas delivered a withering critique in which he characterized the Michigan law school's affirmative action program as an "aesthetic,"⁴ similar to its choice of chairs for its classrooms — far short of the compelling state interest that any unit of government in the United States must show to justify any official racial classification.⁵

Emory's experience offers a unique opportunity to examine the history of affirmative action in law school admissions. Asserting that Emory never had an explicit policy against admitting African Americans, the Chair of Emory's Board of Trustees and the Dean of its Law School filed suit in 1962 to strike down a Georgia statute that would have rescinded Emory's tax exemption if the university began admitting African Americans.⁶ Four years later, with funding from the Field Foundation of New York, the same Dean, Ben F. Johnson, Jr., created Pre-Start.⁷ The purpose of Pre-Start was to allow African-American college graduates to demonstrate their aptitude for the study of law by taking full-fledged law classes during the summer. Those who earned a cumulative grade of seventy or above were eligible to matriculate at ELS as regular students the following fall and received academic credit for the summer courses.

By definition, Pre-Start students' admission credentials, particularly their scores on the Law School Admission Test (LSAT), fell below Emory's usual minimum.⁸ Johnson repeatedly referred to

2. *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003).

3. *Id.* at 348 (Scalia, J., dissenting). ("Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.").

4. *Id.* at 354 n.3 (Thomas, J., dissenting). For a reading of this dissent that reconciles Thomas' opposition to affirmative action with his support for racial equality, see Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787 (2004-2005).

5. *Grutter*, 539 U.S. at 353.

6. *Emory v. Nash*, 127 S.E.2d 798 (Ga. 1962) (*reh'g. denied*, Oct. 1, 1962). See *infra* sec. IV for discussion of this case, and the complete story of Pre-Start.

7. See *infra* sec. IV.

8. Dean Johnson explained that the LSAT scores of the first Pre-Start participants

Pre-Start as, *inter alia*, a test of the LSAT's ability to predict the performance of African Americans in law school.⁹ On Johnson's view, the LSAT was a miserable failure for this purpose. The more important point of Pre-Start, however, was to increase the number of African-American attorneys in the South. Pre-Start ended in 1972 with Dean Johnson asserting that the number of applications from African Americans had grown to the point that it was no longer necessary.¹⁰

This article demonstrates that Pre-Start is a useful historical case study for reframing the current debate over affirmative action in law school admissions. In effect, I perform post-hoc strict scrutiny on Pre-Start, finding that it meets not only the criteria that the majority articulated in *Grutter*, but even the far more exacting standard that Justice Thomas articulated in his *Grutter* dissent — racial classifications are permissible only as necessary for the state to perform its role as a "bulwark against anarchy."¹¹ Affirmative action at southern law schools functions as a bulwark against the anarchy of white supremacy. Increasing the number of African-American attorneys in the South functions as a form of self-help, for African Americans and for southerners generally.

In terms of the most recent cases addressing affirmative action, and in terms of the debate over the effects of affirmative action, the previously inaccessible story of Pre-Start provides new insights that should help all concerned — prospective law students, law school administrators, policy makers, and judges — think about the issues in new ways. This article makes no specific recommendations about what affirmative action policies, if any, law schools should have. However, this article does provide empirical evidence for an example that helps broaden the range of possible options and refocuses the debate over how to evaluate the effects of affirmative action programs.

Section I of this article provides a broad overview of the issues in the current debate and how Pre-Start fits into the debate. Section II describes the current state of the law regarding affirmative action in education. Section III explains how Pre-Start worked, and why Emory Law School Dean Ben Johnson chose to create the program in the first place. With the conceptual, legal, and empirical

averaged 369, as opposed to 545 for the class as a whole that year. See *infra* notes 148-149 and accompanying text for fuller discussion.

9. See *infra* note 175 and accompanying text.

10. Letter, Feb. 19, 1971, Ben F. Johnson, Jr., to Leslie Dunbar, Executive Director, Field Foundation, in folder, "Emory Law School Spring 1976," box 2T2, Field Foundation Records, Center for American History, University of Texas at Austin [hereinafter Field Foundation Records].

11. *Grutter*, 539 U.S. at 353 (Thomas, J., dissenting).

components in place, it is possible in Section IV to compare Pre-Start to the elements that the Supreme Court has identified for a legal affirmative action program. Finally, Section V focuses specifically on the LSAT as a key element in the debate over race and admission to and performance in law school.

I. The Current Debate

A. Affirmative Action: Bad for African Americans?

By disparaging the LSAT as a predictor of African Americans' performance in law school, Ben F. Johnson, Jr., differed with the recent claim by Professor Richard Sander that the LSAT is a reasonably reliable predictor of the performance of all law students, including African Americans.¹² According to Sander, we lack good information about the effects of affirmative action policies in American universities. He claims to provide such information, at least about law schools if not universities as a whole, based on his analysis of data from a study of bar passage rates conducted by the Law School Admission Council.¹³

According to Sander, his statistical analysis demonstrates that affirmative action programs tend to launch African-American students into much better law schools than they would otherwise get admitted to. Because of their relatively poor credentials compared to other students, they struggle, perform badly, have badly elevated rates of attrition, and are significantly less likely to pass the bar.¹⁴ In general, Pre-Start at Emory provides a useful perspective for evaluating Sander's claim that affirmative action in law school admissions does more harm than good to African-

12. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 412, 418 (2004). A number of authors have written in response to Sander. Stanford Law Review published several such responses, plus Sander's ripostes to them, in a subsequent issue of volume 57, 1807. The argument of the present article most closely resembles that of David B. Wilkins. David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1918 (2005) ("Although one can argue that black students who [fail to graduate from law school] would have been better off if they had never been admitted to law school in the first place . . . , if those blacks who do become lawyers benefit significantly from affirmative action, then it is hard to see why blacks as a group are worse off simply because a higher percentage of blacks fail the bar than whites.") (emphasis in original). Compare with *supra* note 1. See also Kevin R. Johnson & Angela Onwuachi-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).

13. Sander, *supra* note 12, at 414.

14. *Id.* at 371-72, *passim*.

American law students.¹⁵ As Sander puts it, "Perhaps most remarkably, a strong case can be made that in the legal education system as a whole, racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system."¹⁶

Statistical analysis such as Sander's can be useful for determining what large groups of people actually do. It is significantly less useful for understanding people's motives and aspirations.¹⁷ One obvious problem with statistical analysis is that a commitment to it tends to shape the kinds of questions one examines,¹⁸ and the types of information one is willing to count as relevant.¹⁹ As Sander and some of his critics agree, however, it is important to provide the best information possible to African Americans who are considering law school so that they may make

15. *Id.* at 371 ("What I find and describe in this Article is a system of racial preferences that, in one realm or another, produces more harms than benefits for its putative beneficiaries."). See also Richard H. Sander, *What Do We Know about Lawyers' Lives? The Racial Paradox of the Corporate Law Firm*, 84 N.C.L. REV. 1755, 1759 (2006) ("The use of large preferences by firms leads to disparities in expectations and performance that ultimately hurt the intended beneficiaries of those preferences.").

16. Sander, *supra* note 12, at 373. But see Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in THE BLACK-WHITE TEST SCORE GAP 37 (Christopher Jencks & Meredith Phillips, eds., 1998) ("In some cases, advocates of color-blind admissions go further and argue that racial preferences are actually a disservice to their nominal beneficiaries, who would be better off at less demanding institutions. If this were true, racial preferences would certainly be hard to defend. But it seems to be false.").

17. See Sander, *supra* note 12, at 422-23 (explaining that the same statistical generalization can be very useful in predicting aggregate outcomes but nearly useless in predicting individual outcomes). See also JOEL DREYFUS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 20 (Harcourt College Publishers 1979) (describing admissions process at UC Davis medical school that gave rise to *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), in terms that foreground the disparity between what a statistical representation shows, and what the faculty on the admissions committee describe themselves as having done).

18. See Sander, *supra* note 12, at 425 n.165 ("My own, unpublished research suggests that a talented young person of any race growing up in a low-to-modest socioeconomic environment has a better chance of reaching the upper-middle class through ordinary capitalism than through a graduate degree, such as a law degree. If this is true, it suggests that a key goal of our public education and university system—to promote opportunity and bring talent to the fore—is not working."). But this assumes that the only way to measure opportunity and talent is through class mobility, which, one suspects, Sander measures primarily or exclusively in terms of income. In doing so, Sander hypostatizes his own goals and preferences into generalizations about the social order.

19. See, e.g., Sander, *supra* note 12, at 369 ("These effects are interesting and important, but I give them short shrift for the most part because they are hard to measure and there is not enough data available that is thorough or objective enough for my purposes.").

the most informed choices possible about whether to go to law school at all, and for those who have the good fortune to choose among admitting institutions, which law school to go to.²⁰

Statistical analysis can help to inform such choices by providing comparisons of many institutions, assuming that the data offers a reliable representation of those institutions, and the results of choices among them, to begin with.²¹ Like statistical analysis, historical research tends to shape the researchers' choices of questions to ask and evidence to accept. Historical accounts typically focus, for various reasons, on a single institution or small group of institutions. By definition, therefore, they are unrepresentative in the statistical sense. But, also by definition, leadership is statistically unrepresentative. In order to be truly in the lead, one must be ahead of the pack.

Emory is an important and instructive example of leadership in racial integration and affirmative action because its administrators took the lead among southern research universities with voluntary desegregation,²² and with Pre-Start. The story of why Emory's

20. Ian Ayers & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?* 57 STAN. L. REV. 1807, 1809 (2005); Sander, *supra* note 12, at 481-82.

21. That statistical data can create as many controversies as it resolves is obvious from competing rankings of law schools. The most famous, from *U.S. News & World Report*, indicates that, for 2008, Yale is #1 while Harvard and Stanford tie for #2, Emory is #22, and Wisconsin (where I attended law school) is #36. <http://grad-schools.usnews.rankingsandreviews.com/grad/law/search> (last visited April 18, 2008). By contrast, a ranking scheme by the Thomas M. Cooley School of Law that evaluates graduates more heavily than admittees produces some results that differ markedly. Harvard is now #1, but Yale drops to #6 and Stanford to #22, while Wisconsin rises to #21 and Emory is not in the top 50 at all. See Thomas M. Cooley Law School, *Judging the Law Schools: Overall Rankings 2007*, <http://www.cooley.edu/rankings/overall2007.htm#rank> (last visited Apr. 13, 2008). Thomas E. Brennan and Don Le Duc, in explaining Cooley's method, compare the *U.S. News & World Report* approach to ranking football teams on the basis of draft picks and the opinions of coaches and sportswriters, but disregarding performance in actual games. See Thomas E. Brennan & Don Le Duc, *General Introduction*, http://www.cooley.edu/rankings/intro_9th (last visited Apr. 9, 2008). According to the Consus Group, Emory ranks 35th among American law schools, while the University of Georgia ranks 37th. See The Consus Group, *Composite Law School Rankings* (2007), http://www.consusgroup.com/news/rankings/law_schools/law_schools.asp (last visited Apr. 9, 2008). In explaining their method, the Consus Group asserts, "[w]hile many law school rankings fluctuate wildly from year to year, TCC's comprehensive methodology produces a stable, accurate picture of America's best law schools." *Id.* The Consus Group's rankings come closer to those of *U.S. News & World Report*: Yale is first, Harvard second, Stanford third, Wisconsin 38th. *Id.*

22. But see Melissa Fitzsimons Kean, "At a Most Uncomfortable Speed": The Desegregation of the South's Private Universities, 1945-1964 (2000) (Ph.D. dissertation, Rice University). Kean disputes the claim that racial integration of Duke, Emory, Rice, Tulane, and Vanderbilt was as voluntary as those institutions' constituents often claim. *Id.* at 1. I do not disagree with Kean's analysis, especially her point that these institutions desegregated only because of the various external pressures that African

administrators did so, and with what consequences for the institution,²³ provide the primary evidentiary basis for this article. The story of Dean Ben Johnson's reasoning for pursuing integration while many of his peers fought it, and for starting an affirmative action program at Emory Law, creates an opportunity to rethink the terms of the current debate about affirmative action, in law schools particularly, but in American higher education more generally as well.²⁴

While African-American and other applicants to American law schools may wish to use Sander's data in evaluating what schools to apply to and attend, they may also wish to know about the history

Americans created via the civil rights movement. However, the simple fact remains that Emory administrators, faced with such pressure, took positive steps to bring integration about, rather than fighting it tooth and nail. Compare Emory's experience to Vanderbilt. PAUL K. CONKIN, *GONE WITH THE IVY: A BIOGRAPHY OF VANDERBILT UNIVERSITY* 539 (University of Tennessee Press 1985) ("For a brief time Vanderbilt became, in the national press, one of the most widely reviled universities in the country."); Theo Emery, *Activist Ousted from Vanderbilt is Back, as a Teacher*, NY TIMES, Oct. 4, 2006, at A16 (discussing how James Lawson, expelled from Vanderbilt Divinity School in 1960 for organizing sit-ins against segregation in Nashville, returned in fall 2006 to teach at Vanderbilt).

23. Clearly, the consequences of Pre-Start for Emory as an institution are partly a function of its consequences for the students who gained admission through the program. We are still in the process of tracking down those students. Logistically as well as intellectually, it is important to report the outcomes for students in a separate article. It might seem that this decision undercuts the ability of the present article to respond to Sander's thesis, but I believe part of the problem with Sander's article is that it frames the debate much too narrowly. Therefore, while *A Systemic Analysis* is the 800-pound gorilla in this debate, demanding some form of direct address, I actually hope to avoid having the present article become entirely, or even primarily, a response to Sander. Instead, I hope to engage more directly with Justice Thomas' dissent in *Grutter*.

24. See *Parents Involved in Community Schools v. Seattle School District No. 1*; *Crystal D. Meredith, custodial parent and next friend of Joshua Ryan McDonald v. Jefferson County Board of Education et al.*, 127 S. Ct. 2738 (2007) [hereinafter, *Parents Involved*]. These cases, which the Court decided in the June 2007 term, deal entirely with public elementary and secondary schools, but the Court's analysis relies heavily on the logic of *Grutter* in evaluating what constitutes a compelling state interest that can justify using racial classifications. See *id.* Thus, the Court has now held squarely that discrimination for purposes of the Equal Protection Clause is also discrimination for purposes of Title IV, *id.* at 2748, and has applied the strict-scrutiny analysis of a higher education case to elementary and secondary schools. *Id.* at 2751. The Court asserts in *Parents Involved* that "the present cases [involving elementary and secondary schools] are not governed by *Grutter*," *id.* at 2753, but the point is that the exception for racial classifications in university admissions that *Grutter* allows does not apply to elementary and secondary schools, where the considerations of university administration do not apply. Thus, the Court's analysis of elementary and secondary schools' use of racial classifications is even stricter than that of universities. The key unresolved question for private universities is whether a private right of action exists under Title VI that would allow individuals to sue them for their affirmative action programs.

of Pre-Start and what it tells us about the varying motives and experiences of institutions and the persons who administer those institutions. In creating Pre-Start, Johnson had in mind the large issue of increasing the number of African-American attorneys in the South.²⁵ But Johnson appreciated the point that, in order to achieve that goal, historically segregated institutions such as Emory would have to make an extra effort in order to overcome a long history of distrust for them on the part of African Americans. Other methods exist for doing so, but affirmative action programs have the triple effect of, first, increasing the number of African-American students in the institution by, second, asserting a belief that they have greater academic capacity than conventional indicators suggest, thereby, third, signaling to potential applicants the institution's interest in addressing the continuing effects of racial discrimination in our society.²⁶

The argument of this article is that the critics of affirmative action are right: Affirmative action does tend to increase racial hostility, at least in those who see themselves as entitled to the places in law school and other classrooms that African Americans get by dint of affirmative action.²⁷ But ending affirmative action

25. See *infra* note 181 and accompanying text.

26. See *infra* sec. IV.

27. See, e.g., *Grutter*, 539 U.S. at 317 ("Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment; Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 USC § 2000d; and Rev Stat § 1977, as amended, 42 USC § 1981. Petitioner further alleged that her application was rejected because the Law School uses race as a 'predominant' factor, giving applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups.' Petitioner also alleged that respondents 'had no compelling interest to justify their use of race in the admissions process.'") (some internal citations omitted); *Gratz v. Bollinger*, 539 U.S. 244, 257 (2003) ("Petitioners asserted that the LSA's use of race as a factor in admissions violates Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 USC § 2000d, and the Equal Protection Clause of the Fourteenth Amendment"); *Smith v. Univ. of Washington*, 233 F.3d 1188, 1191 (2000) ("Smith claimed that the denials of admission had been due to racially discriminatory admissions policies, which violated 42 U.S.C. §§ 1981, 1983, and 2000d"); *Hopwood v. State of Texas*, 78 F.3d 932 (1996), *reh'g and suggestion for reh'g en banc denied*, April 4, 1996; *reh'g en banc denied*, April 4, 1996, 1996 U.S. App. Lexis 9919; *cert. denied*, 518 U.S. 1033 (1996) ("The plaintiffs sued primarily under the Equal Protection Clause of the Fourteenth Amendment; they also claimed derivative statutory violations of 42 U.S.C. §§ 1981 and 1983 and of title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ('title VI'). The plaintiffs' central claim is that they were subjected to unconstitutional racial discrimination by the law school's evaluation of their admissions applications. They sought injunctive and declaratory relief and compensatory and punitive damages"); *Bakke*, 438 U.S. at 278-79 ("[Petitioner] alleged that the Medical School's special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, Art. I, § 21, of the California Constitution, and § 601 of Title VI of the Civil

also increases racial hostility insofar as African Americans – and presumably others – see attacks on affirmative action as attacks on the principle of racial equality.²⁸ Institutions thus face a choice: cater to the white people who consider affirmative action to be “reverse discrimination,” or cater to African Americans who see affirmative action as a necessary means of remedying the effects of past discrimination. Of course, institutions have to make their choices in this area within the context of law. This article suggests that the application of the law to affirmative action programs might reasonably vary according to geography and other salient facts about the institution.

That is, historical evidence can put statistical generalizations into a very different light.²⁹ The South was unrepresentative

Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d.”).

28. See, e.g., Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 482-83 (2006) (“This Article focuses on affirmative action in higher education as but one, albeit a particularly illustrative one, of a myriad of examples of the continued strategic consistency and evolving tactical transformation of White supremacy. The principle thesis of this Article is that, at its core, the intense polarization of the debate over affirmative action is less about the surrogate discourses of diversity, candor, and fairness and fundamentally more about the racialized perspectival chasm regarding the standpoint from which racial reality is interpreted, articulated, legitimized, conceived and imagined in juridical, political, and public discourse”); Andre Douglas Pond Cummings, *Open Water: Affirmative Action, Mismatch Theory and Swarming Predators – A Response to Richard Sander*, 44 BRANDEIS L.J. 795 (2006). See also Charlotte Steeh & Maria Krysan, *Trends: Affirmative Action and the Public, 1970-1995*, 60 PUBLIC OPINION Q. 128 (1996) (convergence, but remaining significant disparity, between blacks and whites in opinions about affirmative action and related issues). But see Carol M. Swain, Robert R. Rodgers, & Bernard W. Silverman, *Life After Bakke Where Whites and Blacks Agree: Public Support for Fairness in Educational Opportunities*, 16 HARV. BLACKLETTER L.J. 147 (2000) (reviewing public opinion polling data indicating large areas of overlap between black and white respondents). Both sets of authors stress the point that public opinion in this area is particularly hard to gauge because the wording of the questions has an unusually large impact, with much of the public not necessarily associating specific practices with the phrase “affirmative action” as experts would. Steeh & Krysan, *supra*, at 128; Swain, et al., *supra*, at 161. See also Faye J. Crosby & Cheryl VanDeVeer, *Introduction*, in SEX, RACE, AND MERIT: DEBATING AFFIRMATIVE ACTION IN EDUCATION AND EMPLOYMENT 1-5 (Faye J. Crosby and Cheryl VanDeVeer, eds., 2000) (discussing meaning of “affirmative action”). Swain, et al., proved wrong with their prediction that “the Supreme Court, with its current membership, is quite likely to reject the diversity rationale when it has occasion to revisit the issue of racial preferences in higher education,” Swain, et al., *supra*, at 148, compare Grutter, 539 U.S. at 325, “today we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions,” but the rest of their analysis is compelling. Indeed, among the many reasons to examine the history of affirmative action at Emory is that doing so may help reconcile the law with public opinion in a manner that Swain, et al., argue is desirable and inevitable.

29. See, e.g., Wilkins, *supra* note 12, at 1919 (responding to Sander by claiming benefits of affirmative action over time to African Americans).

relative to the United States as a whole in 1962³⁰ and in 1978,³¹ and it remains so today.³² But the very facts that make it unrepresentative also make it the logical focal point for exploring affirmative action policy: nearly all of the states that had de jure segregation during the late nineteenth and early twentieth centuries had also had slavery,³³ and nearly all of them are part of the South to some degree.³⁴ More importantly, the majority of the nation's African

30. *Emory*, 127 S.E.2d 798.

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

32. See, e.g., Paul K. Conkin, *Hot, Humid, and Sad*, 64 J. SOUTHERN HIST. 3 (1998) (presidential address to the Southern Historical Association discussing ways in which history continues to shape southern experience). But see Patricia Cohen, *Interpreting Some Overlooked Stories from the South*, N.Y. TIMES, May 1, 2007, at E1 (describing recent trend in southern history of exploring the region's connections to the rest of the nation, rather than its exceptionalism). Emory historian Joseph Crespino is nearly finished editing a book under the title THE END OF SOUTHERN HISTORY (forthcoming), in which the authors explore the possibility that the South will not much longer remain distinct within the United States. See also J. WILLIAM HARRIS, DEEP SOUTHS: DELTA, PIEDMONT, AND SEA ISLAND SOCIETY IN THE AGE OF SEGREGATION (Johns Hopkins University 2001) (demonstrating that "the South" is far from monolithic, even in terms of segregation).

33. See Conkin, *supra* note 32, for a useful map that defines "the South" in climatic terms such that it encompasses all of the states that joined the Confederacy (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia) plus most of Kentucky, Maryland, and Delaware as well as the southern half of Missouri (the four slave states that failed to secede), the southernmost tips of Illinois, Indiana, and Ohio (all immediately north of the Ohio River), and the eastern half of Oklahoma and southeastern corner of Kansas. See also WILLIAM L. BARNEY, BATTLEGROUND FOR THE UNION: THE ERA OF THE CIVIL WAR AND RECONSTRUCTION, 1848-1877 (Prentiss Hall 1990) (useful overview of the period that covers the run-up to secession and its aftermath).

34. See Conkin, *supra* note 32. Interestingly, several of the landmark school desegregation cases involve states that were not part of the Confederacy: *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sipuel v. Oklahoma*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). See Robert W. Frizzell, *Southern Identity in Nineteenth-Century Missouri: Little Dixie's Slave-Majority Areas and the Transition to Midwestern Farming*, 99 MISSOURI HIST. REV. 238 (2005). Oklahoma did not exist as a state at the time of secession. See David M. Ryan, *The All-American Battle*, 42 CIVIL WAR TIMES 44 (2004) (describing Battle of Honey Springs, July 17, 1863, at which Union prevented Confederacy from gaining complete control of Indian Territory). Cherokees living in Indian Territory did own slaves, before removal and afterward, and fought for the Confederacy. See TIYA MILES, TIES THAT BIND: THE STORY OF AN AFRO-CHEROKEE FAMILY IN SLAVERY AND FREEDOM (University of California Press 2005). Perhaps most ironically, Kansas was a major focal point for anti-slavery activity during the years immediately preceding secession. In the 1840s and 1850s, however, "antislavery" was not the same as "abolition," and free soilers in Kansas did not necessarily support rights for African Americans simply because they opposed the expansion of slavery into their state. See NICOLE ETCHESON, BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA (University of Kansas Press 2004). See also, Edward H. Sebesta & Euan Hague, *The U.S. Civil War as a Theological War: Confederate Christian Nationalism and the League of the South*, 32 CANADIAN REV. AM. STUDIES (2002) (explaining that the League of the South,

Americans continue to live in the South.³⁵ Whatever decisions we as a nation make about race-based affirmative action, they will have a disproportionate impact in the South.

B. "Emory . . . is in the South."³⁶

The history of integration at Emory in general, and Pre-Start in particular, is hugely important because Emory exemplifies the sort of southern institution, and therefore the sort of persons in the South, who wish to redeem the region's history by frankly acknowledging the continuing impact of slavery and segregation and thinking carefully and creatively about how to minimize that impact.³⁷ Pre-Start provides a starting point from which

formed in 1994, advocates formation of new Confederacy through secession of original eleven states, plus Oklahoma, Missouri, Kentucky, and Maryland).

35. See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* (U.S. Census Bureau Population Division Working Paper No. 56, Sept. 2002), available at <http://www.census.gov/population/documentation/twps0056/twps0056.pdf>. In 1990, the total black population of the U.S. was 29,986,060, 12 percent of a total of 248,709,873. *Id.* at tbl.1. In the Northeast, the black population was 5,613,222, 11 percent of a total of 50,809,229. *Id.* at tbl.2. In the Midwest, the black population was 5,715,940, 9.5 percent of a total of 59,668,632. *Id.* at tbl.3. In the West, the black population was 2,828,010, 5 percent of a total of 52,786,082. *Id.* at tbl.4. In the South, the black population was 15,828,888, 18.5 percent of a total 85,445,930. *Id.* at tbl.5. See also, U.S. CENSUS BUREAU, RACE AND HISPANIC ORIGIN IN 2005 5 (showing a map of the racial composition of United States by state in 2005), available at <http://www.census.gov/population/pop-profile/dynamic/RACEHO.pdf>. All of the states with more than twenty percent African-American population, Alabama, Delaware, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, are former Confederate states except Delaware and Maryland (again, slave states that failed to secede). *Id.* States with between ten percent and twenty percent African-American population are Arkansas, Connecticut, Florida, Illinois, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. *Id.* Virginia's percentage African-American population is 19.9. *Id.* As of July 1, 2004, African Americans made up 12.8 percent of the nation's total population. *Id.*

36. Statement by Emory President S. Walter Martin to "Selected Faculty Members," March 31, 1960, box 1, Desegregation Documentation, Emory University Archives [hereinafter "EUA"], Robert W. Woodruff Library, Emory University [hereinafter Desegregation Documentation]. In 1966, Emory administrator Norman C. Smith, with the assistance of Henry Bowden, President of the Board of Trustees and University Counsel, compiled documents relating to racial integration at Emory from a wide range of sources. In 1976, he deposited his compilation in the University Archives. Memo, Norman C. Smith to Don L. Bosseau, Director of Emory Libraries, Jan. 12, 1976, box 1, Desegregation Documentation. This excellent compilation provides a useful starting point for research on the topic.

37. See, e.g., Emory University Transforming Community Project, which "seeks to mobilize individuals in every sector of Emory University to engage in a reflective, fact-driven creation of this institution's history as it relates to race. The construction of this

southerners — black and white — can make a unique, significant contribution to the debate. In policy terms, the choice is perhaps less stark, but in rhetorical terms, it is even sharper now than it was in the early 1960s: Do you want to participate in a full and fair debate of the issues, or do you wish to continue engaging in a form of denial that impedes resolution of those issues?

Emory is a good place to look as well in terms of regional leadership. The debate over affirmative action tends to focus on nationally prominent institutions, and reasonably so, if only because of Sander's claim about the cascading effect of affirmative action,³⁸ which Emory faculty identified as a problem at the time of Pre-Start as well.³⁹ In addition to being one of the South's leading research universities, Emory is the leading private research university in Georgia. Anyone who understands the South realizes that, in important ways, the appropriate reference point for Emory is not Harvard,⁴⁰ but the University of Georgia.⁴¹ Integration of both institutions depended on changes in state law, but private institutions necessarily stand in different relationship to the state

history will be rooted in Emory's involvement in African-American enslavement, segregation, integration, and the world that blacks and whites created together in the South." Emory University Transforming Community Project, About This Project, <http://transform.emory.edu/> (last visited Apr. 9, 2008). See also, DAN P. MCADAMS, *THE REDEMPTIVE SELF: STORIES AMERICANS LIVE BY* (Oxford University Press 2006) (profiling as distinctively American individual life stories of "highly generative" individuals who see opportunities for good coming from their suffering, identifying the nation's history of racism as a particularly fructue source for such opportunities).

38. Sander, *supra* note 12, at 416-17 ("Affirmative action thus has a cascading effect through American legal education. The use of large boosts for black applicants at the top law schools means that the highest-scoring blacks are almost entirely absorbed by the highest tier. Schools in the next tier have no choice but to either enroll very few blacks or use racial boosts or segregated admissions tracks to the same degree as the top-tier schools. The same pattern continues all the way down the hierarchy.").

39. Nathaniel E. Gozansky & Michael D. DeVito, *An Enlightened Comparison: The Relevant Strengths and Weaknesses of the CLEO Program and the Pre-Start Program of Emory University*, 2 UNIV. TOL. L. REV. 719, 720 (1970).

40. Harvard was the express reference point for Emory trustees and administrators who decided in Jan. 1961 to supplement the University's existing library with a new research library. See Emory Trustees Development Committee Report, *First in the South – The Library for Advanced Studies*, Emory Board of Trustees Executive Committee Minutes (Jan. 12, 1961) (on file at Emory University Archives). As the title of the document indicates, Emory trustees saw their institution as southern, and as providing leadership for the South. *Id.*

41. For 2007, *U.S. News & World Report* ranked Emory 22nd (tied with George Washington University) and University of Georgia 36th (in an eight-way tie with Indiana at Bloomington, Alabama, Hastings, Colorado at Boulder, Maryland, UNC at Chapel Hill, and Wake Forest). *U.S. News & World Report*, Best Graduate Schools, http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php (follow "Law" hyperlink) (last visited June 29, 2007). But see *supra* note 21.

than public institutions do.⁴² Emory's initiative in integrating also means that it may still stand in a different relationship to southern identity than its public counterparts.⁴³

That is, whether Emory is a truly southern institution or not, it is very much an Atlanta institution. To some extent, Atlanta has always been different, a northern city in the South.⁴⁴ It was a center of transportation and commerce from its founding, with few planters and few slaves. It attracted residents, including political leaders, from outside the South before the Civil War, and it attracted manufacturing activity and African-American residents after the War.⁴⁵ Insofar as a characteristic of white southern identity at least through the second reconstruction of the 1960s was a willingness to perpetuate segregation in defiance of national and international condemnation,⁴⁶ Emory administrators were either not southerners, or a different breed of southerners.⁴⁷ Or they saw themselves as

42. *Compare Emory*, 127 S.E.2d 798 (striking down state statute that would have rescinded private institutions' tax exemption if they integrated racially) *with* *Holmes v. Danner*, Registrar of the University of Georgia, 191 F. Supp. 394 (M.D. Ga., 1961) (order prohibiting state officials from cutting off University of Georgia's state appropriations if it admitted African-American students).

43. Emory administrator Thomas E. Jenkins tells the story of a particularly bright native Georgian who chose to attend the University of Georgia rather than Emory. When asked why she did so, she replied, "Emory is like a northeastern school. If I wanted to go to a northeastern school, I would go to the northeast." Interview with Thomas E. Jenkins, Emory Administrator, in Atlanta, Ga. (June 20, 2007).

44. James Aaron Frith, *The Manger of the Movement: Atlanta and the Black Freedom Struggle, 1890-1950* 5 (1997) (Ph.D. dissertation, Yale University); ALLISON DORSEY, *TO BUILD OUR LIVES TOGETHER: COMMUNITY FORMATION IN BLACK ATLANTA, 1875-1906* 1 (University of Georgia Press 2004) ("Atlanta was manifestly a city of the New, rather than the Old, South."). On the distinction between the New and Old Souths, see NUMAN V. BARTLEY, *THE NEW SOUTH, 1945-1980* (Louisiana State University Press 1995); DEWEY W. GRANTHAM, *THE SOUTH IN MODERN AMERICA: A REGION AT ODDS* (University of Arkansas Press 1995); HOWARD N. RABINOWITZ, *THE FIRST NEW SOUTH, 1865-1920* (Harlan Davidson 1992); EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* (Oxford University Press 1992); *DEVELOPING DIXIE: MODERNIZATION IN A TRADITIONAL SOCIETY* (Winfred B. Moore, Jr., Joseph F. Tripp, and Lyon G. Tyler, eds. 1988); GAINES M. FOSTER, *GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH, 1865 TO 1913* (Oxford University Press 1987); C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH* (Louisiana State University Press 1951).

45. Frith, *supra* note 44, at 6-7.

46. See, e.g., Thomas Victor O'Brien, *Georgia's response to Brown v. Board of Education: The Rise and Fall of Massive Resistance, 1949-1961* (1992) (Ph.D. dissertation, Emory University).

47. The settlement ending racial segregation in downtown Atlanta in 1961 elicited from Mayor Hartsfield the famous assertion that his was a city that was "too busy to hate." See Jack L. Walker, *Sit-Ins in Atlanta: A Study in the Negro Revolt*, in *ATLANTA, GEORGIA, 1960-1961: SIT-INS AND STUDENT ACTIVISM* 87 (David Garrow, ed., 1989). Hartsfield demonstrated his senses of civic pride, and of humor, during this crisis by

having the opportunity and the responsibility to change aspects of the South that needed changing.

Ben Johnson and other Emory administrators recognized during the early 1960s that segregation was the single largest impediment — perhaps the only impediment⁴⁸ — to their goal of making Emory a nationally recognized research university on par with Harvard, the University of Chicago, Stanford, etc. Critics of affirmative action often posit a tension between policies that serve to increase African-American enrollment and the goal of maintaining the highest possible intellectual standards.⁴⁹ Johnson saw the matter differently. He saw the university's intellectual authority as a function, at least in part, of its moral authority. More concretely, by the 1960s, national funding agencies and learned societies had become vocal in their condemnation of segregation and promised not to cooperate with institutions that practiced it.⁵⁰ Insofar as the

stating, "Well, at least in the field of lunch counter demonstrations, Atlanta can claim two firsts. With the help of the Ku Klux Klan, it can be the first to claim integrated picketing. And now we have radio-directed picketing. At least we are handling our problems in a progressive way." *Id.* at 82.

48. Although Emory now has a reputation as a rich institution, primarily by dint of major contributions from the Robert W. Woodruff Foundation, that largesse began in 1979, after racial integration and Pre-Start. During the 1960s, Emory was not particularly prosperous among American research universities. See, e.g., Development Committee, *Report to the Board of Trustees*, Nov. 2-3, 1961, explaining "urgency" of need for income to pay for capital expenditures, which must nevertheless wait for resolution of integration issue. In folder, "Annual Meeting - Board of Trustees, 1961," box 7, Henry Bowden files, EUA. See also, Nancy Diamond, *Catching Up: The Advance of Emory University since World War II*, 19 HIST. HIGHER ED. ANN. 149, 152 (1999). Of course, it seems reasonable to wonder if the leadership of Emory administrators in racial integration helped the institution to attract major donations.

49. Sander does not make this claim, but a necessary inference from the claims he does make is that African Americans who secure admission to much better law schools than they otherwise would drag down the academic quality of the institutions that they attend. See, e.g., Sander, *supra* note 12, at 432 (discussing his evidence for dramatic differences in performance between white and African-American students). See also John Nussbaumer, *The Disturbing Correlation between ABA Accreditation Review and Declining African American Law School Enrollment*, 80 ST. JOHN'S L. REV. 991 (2006) (describing evidence that ABA accreditation review leads law schools to increase their mean LSAT scores and decrease their African-American enrollments); Dave Berkman, *Racial Equality: Campus Abstraction Meets Classroom Reality*, 52 LIBERAL EDUC. 422 (1966) (presenting an agonized discussion of how one professor has responded to problem of ill-prepared African-American students in his own classes). During his service as an administrator at Emory, after he graduated from law school, Marvin Arrington addressed this point, asserting that the source of African Americans' substandard academic performance was not lack of ability, but racism. Letter from Marvin S. Arrington, to Faculty of Emory Law School (Feb. 4, 1970), in folder, "Black Students," box 11, Judson Ward files [hereinafter Ward files], EUA.

50. See Kean, *supra* note 22, at 1 ("The desegregation of the private universities of the South was in fact accomplished by coercion — by northern foundations, professional

American university system has succeeded by fostering dialogue among faculty around the nation, no university could excel without participating in national networks.

Johnson never articulated the point this way, but his actions as dean of Emory Law School carry the implication that the collective denial by privileged white men that was racial segregation necessarily undermined, not only their moral status, but their ability to engage fully in their stated intellectual enterprise. Just as Thomas Jefferson notoriously lost his otherwise impressive empirical faculties when the subject came to race, so professors at segregated institutions missed out on important aspects of the world they lived in by dint of their institutions' refusal to admit African Americans.

C. Plus Ça Change, Plus C'est la Meme Chose

I am a structuralist.⁵¹ I see overwhelming evidence in the world for the proposition that the patterns of thought and language that all humans grow up with profoundly and necessarily shape, not only how we interpret the world, but how we perceive it.⁵²

academic associations, accrediting bodies, faculties that began to vote with their feet, divinity students and professors who felt called to oppose racial oppression, alumni who withheld contributions, and, the final straw, by new federal rules for grant recipients. And ultimately, behind all these pressures was the power of the grass-roots civil rights movement, led by southern blacks themselves, which created a national crisis of conscience and brought places like these schools under the close scrutiny of the entire nation.").

51. I am actually a poststructuralist in that I believe the structures of human culture change over time. They change very slowly, and no individual or small group can exercise much control over the direction, pace, or content of the change, but it does occur. For fuller elaboration of this point, see WILLIAM B. TURNER, *A GENEALOGY OF QUEER THEORY* 19-24 (Temple University Press 2000). Of the many reasons I have to be grateful to Martha Fineman, not least is her description of herself as a structuralist during our many conversations about my research on the history of integration and affirmative action at Emory, giving me license to describe myself thus in my legal scholarship. See also Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). Krieger does not couch her argument in terms of structuralism, but the point is the same: Cognitive, that is, perceptual, factors can explain most of contemporary discrimination better than motivational factors. *Id.*

52. See Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories? Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 208, 217 (1989) ("The systems function rather like molecular biology's double helix: They replicate preexisting ideas, thoughts, and approaches."). Note that this article uses as its epigraph the famous opening passage from MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SERIES* xv (Routledge 1973), in which Foucault relates a Chinese taxonomy of animals and comments on "the stark impossibility of thinking *that*." *Id.* at 203. The point of this passage is not that we cannot translate it—Foucault probably read it in French, and the passage makes its point well enough in English as

Michel Foucault argued that what was most striking about European intellectual history from the beginning of the scientific revolution through the nineteenth century was not so much the development consistently over that time of individual fields of inquiry as the striking consistency within periods from one field to another. A particular mode of defining and analyzing objects, on this view, prevailed through the nineteenth century, making evolutionary biology, linguistics, and economics more conceptually congruent with one another than any was with its apparent predecessors of the period before 1800.⁵³ An implicit point in Foucault's work is that, within a given historical period, the same questions will recur repeatedly, never achieving resolution, but eventually becoming irrelevant as the circumstances change.⁵⁴

This article demonstrates that integration at Emory and Pre-Start have much to tell us about the recurring debate over affirmative action, particularly in law schools, but in American higher education generally. But what documents from the 1950s and 1960s in the archives at Emory and other southern universities,

well. The point is that Foucault could never have produced the taxonomy as an autochthonous thought. *See also*, FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Charles Bally & Albert Reidlinger, eds., Wade Baskin, trans., 1959); FREDRIC JAMESON, *THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM* (Princeton University Press 1972); CLAUDE LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (Claire Jacobson & Brooke Grunfest Schoepf, trans. 1963); Jacques Derrida, *Structure, Sign and Play in the Human Sciences*, in *THE LANGUAGES OF CRITICISM AND THE SCIENCES OF MAN: THE STRUCTURALIST CONTROVERSY* (Richard Macksey & Eugenio Donato, eds., 1970); MICHEL FOUCAULT: *BEYOND STRUCTURALISM AND HERMENEUTICS* (Hubert L. Dreyfus & Paul Rabinow, eds., 1982); TILOTTAMA RAJAN, *DECONSTRUCTION AND THE REMAINDERS OF PHENOMENOLOGY: SARTRE, DERRIDA, FOUCAULT, BAUDRILLARD* (Stanford University Press 2002).

53. FOUCAULT, *THE ORDER OF THINGS*, *supra* note 52. Foucault emphatically rejected the term "structuralist" as a description of his work, *id.* at xi, but his assertion only makes sense as differentiating him from structuralist literary critics of the period. *See* TURNER, *supra* note 51.

54. *See, e.g.*, *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 16, at vii:

Social scientists have been trying to understand the black-white test score gap since World War I, when test scores collected from the U.S. Army's wartime recruits first demonstrated its existence. But empirical research on the subject has proceeded in fits and starts. By now this cycle has become predictable. First someone claims that the black-white gap is largely innate. Then skeptics challenge this claim. The debate starts off largely unencumbered by evidence, but it eventually precipitates a number of useful empirical studies. The issue is not fully resolved, but the number of plausible explanations is smaller at the end of the debate than at the beginning. This happened in the 1920s. It happened again in the 1970s, after Arthur Jensen published 'How Much Can We Boost IQ and Scholastic Achievement?' in the *Harvard Education Review* in 1969. It seems to be happening again now, at least partly as a result of *The Bell Curve*.

considered in light of the current affirmative action debate, demonstrate above all else is the depressing sameness of the debate then and now.⁵⁵ The terms and the specific policies have changed, but the structure of certain arguments has not.⁵⁶ The hope to find some justification for eliminating affirmative action sounds distressingly like the hope to find some justification for continuing segregation.

My claim is not that all opponents of affirmative action are closet segregationists. Part of the point of structuralism is that the enduring patterns of thought and meaning in a culture can resist impressively the efforts of individuals to change them. Changing the patterns of culture is like overcoming addiction: it is impossible unless one first recognizes that the problem exists. My claim is that we have advanced little from the end of slavery in terms of debating whether Americans as a whole bear significant responsibility for eradicating the effects of slavery and segregation. If we do, then affirmative action is reasonable, even tepid. If we do not, then affirmative action is racial discrimination that is no better than the old kind for preferring blacks over whites, instead of vice versa.

All of the challenges to affirmative action policies in federal courts to date have involved public universities.⁵⁷ With the exception of *Hopwood*, they have involved universities outside of the South. It is tempting to consider what would happen if universities

55. *Infra* notes 302-307 and accompanying text.

56. Hunt, *supra* note 28, at 480 ("A matter of considerable scholarly and political debate is whether the dramatic change in the power of racism represents a real defeat or merely, in response to changing circumstances, a tactical withdrawal from the overt center stage and a redeployment in new disguises, metaphors, and surrogate discourses with the same tired unreconstructed strategic goals of total racial domination, racialized exclusion, and uncontested normative White supremacy.").

57. See *Bakke*, 438 U.S. at 281-84 (discussing whether a private right of action exists under Title VI, concluding solely for purpose of the instant case that it does); *Smith*, 233 F.3d at 1201 (upholding decertification of class for mootness, holding that diversity is compelling state interest justifying use of race in law school admission program); *Hopwood*, 78 F.3d at 934 (holding Univ. of Texas law school's affirmative action program violated Fourteenth Amendment's Equal Protection Clause); *DeFunis v. Odegaard*, 416 U.S. 312, 319-20 (1974) (dismissing a challenge to Univ. of Wash. Law school admission policy as moot). See also *Wygant v. Jackson Board of Education*, 476 U.S. 267, 283-84 (1986) (striking down scheme for laying off public school teachers in Michigan district that gave preference by race). But see *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1988) (striking down race-based set-aside for municipal contractors in capital of the Confederacy). "That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies [as racial set-asides] are appropriate. . . . It would seem equally clear, however, that a state or local subdivision. . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction." *Id.* at 490-91.

such as Emory, Vanderbilt, Duke, Tulane,⁵⁸ and others in the South demonstrated their keen interest in increasing the number of African-American attorneys in the South. Emory faculty and administrators concentrated their recruitment for Pre-Start in the South on the logic that the region had the largest need for African-American attorneys. They also concentrated their recruitment at historically black colleges and universities ("HBCUs").⁵⁹ One could as easily do so today. The institutions still exist.⁶⁰ Systematic recruitment at them might even be good for the HBCUs themselves, as their ability to place their graduates in law (and other professional?) schools could attract more and better applicants to them.

The Supreme Court's analysis of affirmative action as a remedy for past discrimination has always proceeded at the level of individual institutions, not an entire region.⁶¹ Further, in the area of civil rights, regional variation was always the problem, not the solution. The Fourteenth Amendment defines citizenship in national terms in order to minimize state variation in the rights that citizens enjoy.⁶² African Americans resorted to the federal courts in challenging segregation because state courts would usually not defy state legislatures by striking segregation statutes down⁶³ (*Emory v.*

58. See Kean, *supra* note 22. I omit Rice from this list because my focus is on law schools, which Rice does not have. I rely on Kean's list because it gives some principle of selection for this brief list, which omits a number of fine law schools in the South.

59. See *infra* notes 156-160 and accompanying text.

60. One of Clarence Thomas's reasons for opposing affirmative action, or even vigorous methods to achieve integration, is his concern that encouraging large numbers of African-American students to attend predominantly white institutions will cause the collapse of historically black colleges and universities, which white students show no sign of applying to in large numbers. See *Gutter*, 539 U.S. at 364-65 (Thomas, J., dissenting) ("The Court never acknowledges . . . the growing evidence that racial (and other sorts) of heterogeneity actually impairs learning among black students"); KEVIN MERIDA & MICHAEL A. FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* 153, 257-59 (Doubleday 2007).

61. See *supra* note 57 and accompanying text.

62. U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."). See also, *Croson*, 488 U.S. at 490 ("The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race."). Speaking of the Thirteenth and Fourteenth Amendments in *Ex parte Virginia*, the Court stated: "They were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress." 10 U.S. 339, 345 (1880).

63. Federal judges were usually better, but not always. See, e.g., *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962) (noting that the trial judge "held, 'there is no custom or policy now, nor was there any at the time of the plaintiff's application, which excluded Negroes from entering the University.' This about-face in policy, news of which may startle some people in Mississippi, could have been accomplished only by telepathic

Nash is the exception that proves the rule⁶⁴). Regional variation in the law of affirmative action could be, for opponents of affirmative action, the same as the belief that one can distinguish malicious from benign racial classifications⁶⁵ — definitionally impermissible.

It could be that such institutions already engage in such practices on the belief that suits against private universities are highly unlikely.⁶⁶ Just as Emory could integrate peacefully while violence broke out at public universities in the deep South, so perhaps Emory and its cousins can proceed quietly with affirmative action while litigation swirls about them. Besides its inherent historical interest, *Pre-Start* is fascinating because it allows us to see what one law school did when no threat of litigation existed at all. It also allows us to consider what a program might have to look like in order to win five votes on a shifting Supreme Court. Decisions involving racial classifications — not just in education, but in other areas as well — have a striking propensity to produce highly fractured opinions from the Court.⁶⁷ It seems clear that, in this

communication among the University's administrators . . .").

64. *Emory*, 127 S.E.2d 798 (striking down segregation provision of state tax code by Georgia Supreme Court).

65. *Grutter*, 539 U.S. at 371 (Thomas, J., dissenting) (citing *Adarand Constructors v. Peña*, 515 U.S. 200, 239).

66. See *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting) ("One can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment—and the networks and opportunities thereby opened to minority graduates—whether or not they can do so in full candor through adoption of affirmative action plans of the kind here at issue.") See also, *id.* at 275 n.22 (Rehnquist responding that Ginsburg would have the Court adapt the Constitution to the practices of universities, rather than vice versa).

67. Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 301 (1990) ("From its beginning in *Bakke* through the most recently decided cases, the Court has splintered again and again, and the Justices have authored opinions that constitute a bitter and divisive dialogue."). See *Parents Involved*, 127 S. Ct. 2738 (Chief Justice Roberts gathering the votes of four justices, Scalia, Thomas, Alito, and Kennedy, for the holding and most of his opinion, but losing Kennedy's vote for parts III-B and IV of his opinion). Arguably, *Grutter* and *Gratz* follow this pattern, with Justice O'Connor playing the role of Justice Powell, whose opinion in *Bakke* split the difference between two groups of his colleagues, each consisting of four Justices. The key difference is just the historical circumstance that the Court reviewed two distinct fact patterns in which O'Connor discerned a legally significant difference, such that she could vote with two majorities. See also, e.g., *League of United Latin American Citizens ("LULAC") v. Perry*, 126 S. Ct. 2594, 2603 (2006) (reviewing racial gerrymandering in Texas congressional districts) ("Kennedy, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts II-A and III, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined, an opinion with respect to Parts I and IV, in which Roberts, C. J., and Alito, J., joined, an opinion with respect to Parts II-B and II-C, and an opinion with respect to Part II-D, in which Souter and Ginsburg, JJ., joined. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Breyer, J., joined as to Parts I and II. Souter, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, J., joined.

respect, the Court accurately reflects the divisions in the larger society. Is it only "meddling," to borrow Justice Thomas's term,⁶⁸ for university administrators to seek solutions to this problem, albeit by trial and error, with their admissions policies? Richard Sander's analysis attracted substantial attention,⁶⁹ not only because his central claim was highly provocative, but also because participants and observers have a genuine need to know the effects of their choices. Pre-Start is a unique historical example that, as the next section shows, has had no impact on existing law, but should influence future decisions.

II. The Law of Affirmative Action

Bad facts, the old saying goes, make bad law. The facts of *Regents of the University of California v. Bakke*⁷⁰ may not have been bad,⁷¹ but they did not reflect very well the history of discrimination that gave rise, first to laws prohibiting such discrimination, and

Breyer, J., filed an opinion concurring in part and dissenting in part. Roberts, C. J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Alito, J., joined. Scalia, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Thomas, J., joined, and in which Roberts, C. J., and Alito, J., joined as to Part III"); *Croson*, 488 U.S. 469, 475 (1989) ("O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined, an opinion with respect to Part II, in which REHNQUIST, C. J., and WHITE, J., joined, and an opinion with respect to Parts III-A and V, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined. STEVENS, J., post, p. 511, and KENNEDY, J., post, p. 518, filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, post, p. 520. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, post, p. 528. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, post, p. 561.").

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

69. See, e.g., Adam Liptak, *Ideas & Trends; For Blacks in Law School, Can Less be More?*, NY TIMES, Feb. 13, 2005, at D3, available at http://www.nytimes.com/2005/02/13/weekinreview/13liptak.html?_r=1&scp=1&sq=%22Ideas+%26+Trends%3B+For+Blacks+in+Law+Schoo%2C+Can+Less+be+More%3F%22&st=nyt&oref=slogin. See also Jonathan D. Glater, *Ideas & Trends; Straight "A" Student? Good Luck Making Partner*, NY TIMES, Dec. 3, 2006, at D3; Adam Liptak, *Lawyers Debate Why Blacks Lag at Major Firms*, NY TIMES, Nov. 29, 2006, at A1. See also, Cummings, *supra* note 28, at 799 ("Sander's study and article has [sic] created a conflagration of attention and rebuke.").

70. 438 U.S. 265 (1978).

71. See DREYFUS & LAWRENCE, *supra* note 17, at 32 ("These unspectacular events have brought into question the university's commitment to the defense of the case and cast doubt on the competence of the attorneys involved. The facts indicate that the university lawyers were hampered not so much by a lack of lawyering skills as by the competing concerns of their client and an ambivalence about the issues central to the case.").

second to affirmative action policies. Besides being in the West, the region with the smallest percentage African-American population in the United States, the medical school at the University of California at Davis, whose admission policies precipitated the law suit, had only existed since 1968.⁷² It cannot ever have practiced official racial segregation because it came into existence only after federal statutes prohibited such actions. Regardless, *Bakke* presented the first major challenge to an affirmative action program to reach the United States Supreme Court. Perhaps surprisingly, twenty-five years elapsed before the Court again addressed affirmative action in higher education. The Court came to opposite determinations regarding the respective affirmative action programs in *Grutter v. Bollinger*⁷³ and *Gratz v. Bollinger*.⁷⁴ The legal holdings in both cases, however, reaffirmed the core holding of *Bakke*, particularly the rule that diversity in the student body is a compelling state interest that can justify race-based affirmative action under the Equal Protection Clause and Title VI of the 1964 Civil Rights Act.⁷⁵

The *Gratz* Court also expressly reiterated that "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI."⁷⁶ That is, although *Bakke*, *Gratz*, and *Grutter* all involve public institutions, the holdings of the three cases apply to any private university of any stature because such institutions certainly receive sufficient federal funds to ensure that disregarding Title VI would be prohibitive.⁷⁷

The problem with all of these cases for deciding affirmative action law and policy is that their facts have little to do with the reality of racial discrimination in most of the United States. Emory's experience with Pre-Start is a much better test. Courts cannot choose their litigants. Barring directly conflicting decisions in the circuits, it seems unlikely that the Supreme Court will take another case involving affirmative action in higher education any time soon. But those opinions have scarcely settled the debate. One of the chief

72. *Bakke*, 438 U.S. at 273.

73. 539 U.S. 306 (2003).

74. 539 U.S. 244 (2003).

75. *Gratz*, 539 U.S. at 268; *Grutter*, 539 U.S. at 325.

76. *Gratz*, 539 U.S. at 276 n.23.

77. See, e.g., EMORY UNIVERSITY, CONSOLIDATED FINANCIAL STATEMENTS AND SUPPLEMENTARY INFORMATION, AUG. 31, 2006 & 2005 3 (government grants and contracts providing \$224,319,000 out of \$2,609,156,000 in total operating revenue), available at <https://www.finance.emory.edu/external/financials/2006/emoryfinancials.pdf>. See also DESEGREGATING AMERICA'S COLLEGES AND UNIVERSITIES: TITLE VI REGULATION OF HIGHER EDUCATION (John B. Williams, III, ed. 1988). But see STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT (Johns Hopkins University Press 1995).

purposes of this article, therefore, is to use Emory's experience with Pre-Start as the basis for stepping back from the Supreme Court decisions and rethinking the premises of the debate. This section describes the legal issues that have arisen repeatedly in the Supreme Court's decisions in this area, which are: the application of strict scrutiny as the correct level of analysis; what constitutes a compelling state interest; whether a given use of race is sufficiently narrowly tailored; and when the program in question will end.

A. Strict Scrutiny and Compelling State Interest

The plaintiff in *Bakke* applied to the medical school at the University of California at Davis, but did not win admission.⁷⁸ He filed suit, claiming that the school's practice of reserving a set number of spaces in its entering class for racial and ethnic minorities violated "his rights under the Equal Protection Clause of the Fourteenth Amendment, Art. I, § 21, of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964 . . ."⁷⁹ The medical school at UC Davis had only existed for a few years at that time, having been created in 1968,⁸⁰ after the passage of the 1964 Civil Rights Act. The opinion asserted that, absent a past practice of discrimination, remediation of discrimination was not a plausible justification for that institution to offer in support of its affirmative action policy.⁸¹

In what is becoming a pattern for Supreme Court decisions involving racial classifications,⁸² no opinion of the Court attracted a majority of Justices' votes. Even so, despite coming in a mere plurality opinion, Justice's Powell's reasoning became highly influential. As O'Connor put it in her *Grutter* opinion, "Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice

78. *Bakke*, 438 U.S. at 276-77.

79. *Id.* at 278.

80. *Id.* at 273.

81. *Id.* at 301-02 (distinguishing cases where courts allowed race-conscious remedies as following judicial determination of de jure discrimination, which did not exist in instant case). "[W]e have never approved preferential classifications in the absence of proved constitutional or statutory violations." *Id.* at 302. See also, *Parents Involved*, 127 S. Ct. at 2768 (Seattle schools never legally segregated, Jefferson County schools formerly segregated, but declared "unitary" by federal judge such that remedies for previous segregation no longer apply).

82. See *supra*, note 67.

Powell's views on permissible race-conscious policies."⁸³ The appropriate level of review was explicitly an issue in *Bakke*, with Powell asserting that the Court had always applied strict scrutiny to racial classifications and must continue to do so.⁸⁴ In *Grutter*, the issue was not whether to apply strict scrutiny – the majority held that it was necessary to do so⁸⁵ – but whether the majority's analysis actually deserved the name, "strict scrutiny." The dissenters unanimously argued that the majority's scrutiny of the admissions policy in question was far from strict.⁸⁶

Under strict scrutiny, a racial classification must serve a compelling state interest in order to survive constitutional muster. One of the key elements in Justice Powell's *Bakke* opinion is his consideration of possible compelling state interests for affirmative action.⁸⁷ Because it informs the holding that University of Michigan Law School affirmative action program is legal,⁸⁸ Justice O'Connor's summary in *Grutter* of Justice Powell's analysis in *Bakke* may serve as the official version and merits extended quotation.

83. *Grutter*, 539 U.S. at 323. *But see Hopwood*, 78 F.3d at 944 ("We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection. . . . No court since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis. Indeed, recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny."). Patently, this analysis is no longer good law, given the express holding of both *Grutter* and *Gratz* that diversity is a compelling state interest under strict scrutiny. *Gratz*, 539 U.S. at 268; *Grutter*, 539 U.S. at 325.

84. *Bakke*, 438 U.S. at 287-91. *See also, Parents Involved*, 127 S. Ct at 2751 ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny") (*citing, inter alia, Grutter*, 539 U.S. at 326).

85. *Grutter*, 539 U.S. at 326-27.

86. *Grutter*, 539 U.S. at 346-47 (Scalia, J., dissenting, joining dissents by Rehnquist, J., and Thomas, J.); Court's deference to educational judgment of Michigan Law School is "antithetical to strict scrutiny." *Id.* at 356-57, 362 (Thomas, J., dissenting). "Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference." *Id.* at 380 (Rehnquist, J., dissenting); "The Court . . . does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedent." *Id.* at 387 (Kennedy, J., dissenting).

87. *Bakke*, 438 U.S. at 305-316.

88. *Grutter*, 539 U.S. at 325 ("[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

First, Justice Powell rejected an interest in "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession" as an unlawful interest in racial balancing. Second, Justice Powell rejected an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." Third, Justice Powell rejected an interest in "increasing the number of physicians who will practice in communities currently underserved," concluding that even if such an interest could be compelling in some circumstances the program under review was not "geared to promote that goal."

Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the *First Amendment*." Justice Powell emphasized that nothing less than the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."⁸⁹

Justice O'Connor closed this section of the decision with the assertion that "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."⁹⁰

The point about deference to the academic freedom of universities is central to O'Connor's reasoning. Where the dissenters in *Grutter* asserted that the majority failed to follow through on its promise of strict scrutiny,⁹¹ O'Connor replied that "[o]ur scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university."⁹² In other words, the *Grutter* majority believed that it had subjected the law school's affirmative action program to strict scrutiny and found that program constitutionally permissible. The extent of the Court's willingness to defer to the expertise of university administrators remains an open question, although the dissenters in *Grutter*

89. *Id.* at 324 (internal citations omitted).

90. *Id.* at 325.

91. See *supra* note 86. See *Grutter*, 539 U.S. at 369 (Thomas, J., dissenting) ("The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court.").

92. *Grutter*, 539 U.S. at 327.

effectively asserted that such deference was already excessive,⁹³ and a majority of the Court has since cabined it by asserting that it does not extend to the actions of administrators at public elementary and secondary schools.⁹⁴

B. Narrow Tailoring

*Grutter v. Bollinger*⁹⁵ and *Gratz v. Bollinger*⁹⁶ instantly made Supreme Court history on the moment of their announcement. *Grutter* upheld the affirmative action policy of the University of Michigan Law School, while *Gratz* struck down the affirmative action policy of the University of Michigan's undergraduate college. Never before had a single litigant both won and lost cases on the same issue on a single day. In both cases, plaintiffs asserted that their failure to win admission to the respective schools resulted from the use of racial classifications in admissions processes, which precluded white applicants from competing on equal terms with racial and ethnic minority applicants.⁹⁷ Such practice allegedly violated both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act.⁹⁸

The issue of narrow tailoring determined the outcomes of the two cases. Justice O'Connor, who voted with the majority in both cases, emphasized that the distinction she saw between the two programs lay in the capacity for individualized determination in the law school's program that was lacking in the undergraduate program.⁹⁹ Individualized determination made the law school's program sufficiently narrowly tailored to survive strict scrutiny.¹⁰⁰ The individualized determination ensured that, while race was a factor in admissions decisions, it was not the overriding factor.¹⁰¹ Rather, it was one factor among many that the law school used in order to admit students according to the policy goals, including diversity, which the faculty had set.¹⁰² Using race as a plus factor in

93. See *supra* note 86.

94. *Parents Involved*, 127 S. Ct. at 2768

95. 539 U.S. 306 (2003), *reh'g denied*, *Grutter v. Bollinger*, 539 U.S. 982 (2003).

96. 539 U.S. 244 (2003).

97. *Gratz*, 539 U.S. at 257; *Grutter*, 539 U.S. at 317.

98. *Gratz*, 539 U.S. at 249, 275; *Grutter*, 539 U.S. at 317, 343-44.

99. *Grutter*, 539 U.S. at 333-34. See also, *Gratz*, 539 U.S. at 276 (O'Connor, J. concurring) ("Unlike the law school admissions policy the Court upholds today in *Grutter v. Bollinger*, the procedures employed by the University of Michigan's . . . Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants.") (citation omitted).

100. *Grutter*, 539 U.S. at 333-43.

101. *Id.*

102. *Id.*

admissions did not have the effect of insulating racial and ethnic minority applicants from the rest of the applicant pool, as a quota would,¹⁰³ or as the automatic assignment of points in the undergraduate program did.¹⁰⁴

The key legal holding of the two cases, then, is that diversity among the student population is a compelling state interest that can justify a race-based affirmative action program even under strict scrutiny, so long as the mechanism for achieving diversity is narrowly tailored.¹⁰⁵ Although intervening plaintiffs in *Gratz* asserted that the undergraduate program served to remedy discrimination by the institution, the trial court dismissed that claim, and the Supreme Court expressly sustained that dismissal.¹⁰⁶ It is noteworthy that the problem with the argument for remediation of past discrimination in *Gratz* was that the intervening plaintiffs failed to provide any evidence for it, and the university "never asserted" it "throughout the course of this litigation."¹⁰⁷ Nothing in the *Gratz* opinion indicated that the Court was revisiting its willingness to accept that justification where litigants could show probative evidence for it. By contrast, in her *Grutter* opinion, O'Connor took some pains to rehearse trial testimony asserting that the purpose of the law school's affirmative action plan was not to remedy past discrimination.¹⁰⁸

This was a key issue in the case. In O'Connor's summary, "Applying strict scrutiny, the District Court determined that the law school's asserted interest in assembling a diverse student body was not compelling because 'the attainment of a racially diverse class . . . was not recognized as such by *Bakke* and is not a remedy for past discrimination.'"¹⁰⁹ She later rejected this reasoning, asserting that "we have never held that the only governmental use of race that can

103. *Grutter*, 539 U.S. at 334-35.

104. *Gratz*, 539 U.S. at 271-72. ("The current [undergraduate] policy does not provide such individualized consideration. The [undergraduate] policy automatically distributes 20 points to every single applicant from an 'underrepresented minority' group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups."). "[T]he selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class." *Id.* at 279 (O'Connor, J., concurring).

105. *Grutter*, 539 U.S. at 325-27.

106. *Gratz*, 539 U.S. at 257 n.9.

107. *Id.* (emphasis in original.).

108. *Grutter*, 539 U.S. at 319.

109. *Id.* at 321.

survive strict scrutiny is remedying past discrimination."¹¹⁰ Instead, "we hold that the Law School has a compelling interest in attaining a diverse student body. The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."¹¹¹ After *Grutter* and *Gratz*, the law of the land is that public universities¹¹² may use racial classifications as part of narrowly tailored programs that have as their purpose the diversification of their student bodies.

For the *Grutter* majority, what made the law school's program sufficiently narrowly tailored to pass constitutional muster was the claim that its goal was a "critical mass" of racial and ethnic minority, and other underrepresented, students.¹¹³ The majority distinguished the achievement of such critical mass from a quota, which *Bakke* forbade,¹¹⁴ by characterizing it as "flexible."¹¹⁵ A quota or similar program would be unacceptably rigid in insulating one group from competition with others insofar as it set aside a specific number of seats that only the favored group could occupy.¹¹⁶ But the majority was willing to defer to the law school in its claim that it needed to admit a minimum percentage of racial and ethnic minority students in order for the program to achieve its purpose.

As part of their insistence that the Law School's program was no different from the undergraduate program, and therefore equally illegal, Rehnquist¹¹⁷ and Kennedy¹¹⁸ asserted in dissent that the notion of achieving a "critical mass" of racial and ethnic minority students was merely a pretext for racial balancing. In joining the

110. *Id.* at 328. See also, *Parents Involved*, 127 S. Ct. at 2752 (asserting that the Court has only ever approved use of racial classifications to remedy past discrimination, and to achieve diversity in the student population of universities).

111. *Grutter*, 539 U.S. at 328.

112. See *Parents Involved*, 127 S. Ct. at 2754 ("The Court in *Grutter* expressly articulated key limitations on its holding — defining a specific type of broad-based diversity and noting the unique context of higher education but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.").

113. *Grutter*, 539 U.S. at 335-36.

114. *Id.* at 334.

115. *Id.* at 337.

116. *Id.* at 334. But see Sander, *supra* note 12, at 405 (claiming that the Law School system produces the same outcomes as the undergraduate system, making O'Connor's distinction between the two spurious).

117. *Grutter*, 539 U.S. at 379 (Rehnquist, J., dissenting) ("Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing.").

118. *Id.* at 389 (Kennedy, J., dissenting) ("The dissenting opinion by The Chief Justice, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.").

dissents of Justices Rehnquist and Thomas, Scalia used the terms “fabled” and “mystical” to characterize the “critical mass” claim.¹¹⁹ Rehnquist included in his dissent tables showing what he regarded as a high consistency between the percentage of racial and ethnic minorities among the applicants to the law school, and the percentage of such students who actually received offers of admission.¹²⁰ To the dissenters, this consistency disproved the Law School’s claim to use a flexible method that allowed for individualized consideration toward the goal of achieving a critical mass of students from underrepresented groups.

C. Sunset

As Justice Ginsburg explained in her *Grutter* concurrence¹²¹ and her *Gratz* dissent,¹²² the rationale for race-based affirmative action is that our nation’s history of slavery and segregation left African Americans woefully deficient in economic and cultural capital, justifying preferences for them in various forms of state action for the purpose of allowing them to catch up. Accounts of the origins of affirmative action frequently quote the famous speech by President Lyndon Johnson at Howard University’s commencement on June 4, 1965: “But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, do as you desire, choose the leaders you please.”¹²³

But the argument that remedying past discrimination justifies affirmative action is a chronologically specific justification. It invites the query, if affirmative action is necessary now, and if it works,

119. *Id.* at 346 (Scalia, J., dissenting).

120. *Id.* at 539 U.S. at 384 (Rehnquist, J., dissenting) (“the correlation between the percentage of the Law School’s pool of applicants who are members of the three minority groups [African American, Hispanic, and Native American] and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying ‘some attention to [the] numbers.’”). See *id.* at 336 for the majority’s riposte. Even if one accepts Rehnquist’s empirical claim about the correlation between the number of applicants and the number of admittees, still it seems more plausible to believe that the University of Michigan Law School administrators were simply doing what they claimed to do and doing it well than to accuse them of duplicity.

121. *Id.* at 344-46 (Ginsburg, J., concurring). See also, *id.* at 338 (majority opinion) (“By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”).

122. *Gratz*, 539 U.S. at 298-303 (Ginsburg, J., dissenting).

123. See, e.g., HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* 174 (Oxford University Press 1990); Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 BYU EDUC. & L. J. 1, 5 (2006).

then it should become unnecessary at some point in the future. Even Justice Marshall, in explaining why he thought affirmative action programs remained necessary, implicitly accepted the principle of chronological specificity.¹²⁴ In its most recent decision regarding racial classifications in public education, the Court asserted the lack of a determinate endpoint as one reason to strike down the policies for assigning students in two school districts.¹²⁵ The *Grutter* decision asserts that "race-conscious admissions policies must be limited in time. . . . Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle."¹²⁶ It goes on to predict that affirmative action in university admissions will only be necessary for another twenty-five years.¹²⁷

This time limit is patently arbitrary, but it reflects the difficulty of articulating a more robust standard for deciding when African Americans have sufficiently caught up in order to justify eliminating race-based affirmative action. In her concurrence in *Grutter*, Justice Ginsburg suggests that numerical parity for African Americans in admission to selective undergraduate and graduate programs would be an important indicator that the time had come to cease affirmative action.¹²⁸ All agree that, if race-based affirmative action policies are ever permissible, they must be finite.

Bad facts make bad law. The opinions in *Grutter* indicate that everyone agreed: the University of Michigan Law School had concocted a justification for its affirmative action program. The only disagreement was over whether the Court should accept that justification.¹²⁹ One of Richard Sander's key claims is that the *Bakke*

124. *Croson*, 488 U.S. at 552-53 (Marshall, J., dissenting) ("I . . . do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges.").

125. *Parents Involved*, 127 S. Ct. at 2757-58.

126. *Grutter*, 539 U.S. at 342. See also, *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.").

127. *Grutter*, 539 U.S. at 343. See Paul E. Peterson, *Toward the Elimination of Race Differences in Educational Achievement*, in *GENERATIONAL CHANGE: CLOSING THE TEST SCORE GAP* 2, 22 (Paul E. Peterson, ed., 2006) (using O'Connor's sunset requirement as the reference point, arguing that data exists to determine what policies would eliminate race differences in educational achievement, so the only real question is whether the political will exists to implement those policies).

128. *Grutter*, 539 U.S. at 344-346 (Ginsburg, J., dissenting).

129. See, e.g., *Id.* at 346 (Scalia, J., dissenting) ("I join the opinion of the Chief Justice. As he demonstrates, the University of Michigan Law School's mystical 'critical mass' justification for its discrimination by race challenges even the most gullible mind."). *Id.* at 379 (Rehnquist, J., dissenting) ("The Law School claims it must take the steps it does to achieve a "'critical mass'" of underrepresented minority students. But its actual program bears no relation to this asserted goal. Stripped of its 'critical mass' veil, the

decision led university administrators to continue using technically illegal affirmative action policies, but conceal the fact.¹³⁰ One result, Sander suggests, has been a failure of research into affirmative action at American law schools.¹³¹ In Pre-Start at Emory, we have a case study of a plain-speaking dean at a southern law school who aspired to make his a "front-ranking"¹³² institution and created one of the nation's first affirmative action programs, which began and ended before *Bakke*. The next section of this article describes Pre-Start.

III. Pre-Start

In contrast to the University of California at Davis and the University of Michigan, Emory University could only implement an affirmative action program in one of its professional schools after it began admitting African-American students at all. In other words, unlike UC Davis or Michigan, Emory could legitimately assert that its affirmative action program served to correct for past discrimination.¹³³ Emory was unusual among southern universities in that its administrators sought integration, rather than fighting it. In legal terms, where the university administrators in most desegregation suits were the defendants,¹³⁴ at Emory, the university served as the plaintiff. Having contributed to the racial integration of his university by serving as counsel in *Emory v. Nash*, however, Emory Law School Dean Ben F. Johnson, Jr., remained dissatisfied with his own school's inability to attract African-American

Law School's program is revealed as a naked effort to achieve racial balancing.") (citation omitted).

130. Sander, *supra* note 12, at 385.

131. *Id.* at 372, 385.

132. Ben F. Johnson, Jr., *Long Range Development Program, Part II, September 2, 1964, Emory University School of Law, Ten-Year Program, 1965-75*, in folder, "1964 Annual Meeting - Board of Trustees - October 29 and 30," Box 7, Henry L. Bowden Office Files, EUA. According to Johnson, "it is realistic, not fanciful, to propose that there can be developed here in the southeast a law school approaching what has been developed over the past 60 years in the mid-west at the University of Chicago." *Id.*

133. See *supra*, notes 89, 110 and accompanying text for discussion of this point in current law.

134. See *Meredith*, 305 F.2d 343 (5th Cir. 1962), *cert denied*, *Fair v. Meredith*, 371 U.S. 828 (1962) (ordering district court to issue injunction requiring Univ. of Miss. to admit African-American applicant); *Holmes v. Danner, Registrar of the University of Georgia*, 191 F. Supp. 394 (1961) (order prohibiting state officials from cutting off Univ. of Ga.'s state appropriations if it admits African-American students); *Lucy, et al. v. Adams, Dean of Admissions, University of Alabama*, 350 U.S. 1 (1955) (reversing trial court's stay of its own injunction pending appeal to require Univ. of Ala. to admit African-American student). See also cases cited *supra*, note 27.

applicants.¹³⁵ Something more than desegregation simpliciter was necessary.

In terms of the current debate, the following account of Pre-Start at Emory belies Sander's summary of how affirmative action policies came about and first operated.

There are many ironies in this state of affairs, but perhaps the central irony is this: Law schools adopted racial preferences because, soon after they began to seek actively in the 1960s to increase black enrollment, they confronted the black-white credentials gap. The schools conceived of preferential policies to overcome the gap, hoping that by ignoring the differences in credentials they could perhaps make the gap go away.¹³⁶

Johnson and his colleagues at Emory did not simply ignore the credentials gap between black and white applicants, nor did they conceive of Pre-Start in such simplistic terms.¹³⁷ This is an important point to make if only because many of the critics of affirmative action write as if the creators of affirmative action policies acted at best cynically,¹³⁸ perhaps even maliciously¹³⁹ — or,

135. Telephone interview with Michael DeVito, former professor of law, Emory University, Jan. 15, 2007.

136. Sander, *supra* note 12, at 480. Sander does mention Pre-Start in a footnote, but gives little information about it. *Id.* at 378 n.29. Of course, he could not give much information about Pre-Start because little was available when he wrote. Even so, he does not mention Gozansky and DeVito, *supra* note 39, who gives a detailed account of Pre-Start.

137. Johnson did, however, offer a similar critique of the programs of the Council on Legal Educational Opportunity ("CLEO"), which observers routinely compared Pre-Start to at the time, since they were the two most prominent models of how to increase African-American enrollment in law schools. See Gozansky & DeVito, *supra* note 39. In a draft report to the Field Foundation, Johnson wrote, "In substance, then, ours is a unique program; it is different from CLEO and other programs which appear to have as their objective to get black students in and through law school on a volume basis, as 'high-risk' students. I think we are all agreed that we do not wish to participate in this sort of program." Letter from Ben Johnson, Dean of Emory Law School, to Leslie Dunbar, Executive Director, Field Foundation, (July 1969), [hereinafter Dunbar letter], in folder, "Pre-Start Program for Prospective Black Law Students, 1966-1969," Series 016, Special Programs, box 1, Emory Law School Archives [hereinafter "ELSA"] (reporting on Pre-Start). See also letter from Leslie Dunbar, Executive Director, Field Foundation, to Constance L. Dupre, Legal Services Program, Office of Economic Opportunity (Nov. 6, 1967), in folder, "Law School, 1966-71," box 2, Ward files, EUA ("The Emory plan takes the Negro college and its degree seriously, puts the student on the real track, and allows him to prove himself against a standard of the real world. The Harvard plan, on the other hand, is one of the myriad of recent outcroppings of the moral unease of American universities, beset by the demands of the Negro question and their own historically achieved remoteness from it. What so many of these actions have in common is the offer by college A to give remedial, non-credit, instruction to college B's students.").

138. Sander, *supra* note 12, at 405 ("It may be that Justice O'Connor did not

more charitably, as in *Hopwood*¹⁴⁰ and in Thomas' *Grutter* dissent,¹⁴¹ in a well meaning but badly misguided way. Pre-Start was a very thoughtful program, and Ben Johnson considered it a success.

A. How Pre-Start Worked¹⁴²

Two full academic years, 1963-64 and 1964-65, would elapse between *Emory v. Nash* and the arrival of the first full-time¹⁴³

understand that the law school and college admissions systems were functionally identical in their treatment of race, due perhaps to weaknesses in the plaintiff's presentation. Or it may be that Justice O'Connor cared only about form, not substance. We should perhaps infer that racially segregated admissions, or large, fixed numerical boosts awarded on the basis of race, are fine so long as they are not specifically identified as such in the admissions office's public pronouncements (or in sworn testimony before a court).").

139. *Grutter*, 539 U.S. at 346 (Scalia, J., dissenting) ("I also join Parts I through VII of Justice Thomas's opinion. I find particularly unanswerable his central point: that the allegedly 'compelling state interest' at issue here is not the incremental 'educational benefit' that emanates from the fabled 'critical mass' of minority students, but rather Michigan's interest in maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude blacks and other minorities.").

140. *Hopwood*, 78 F.3d at 934 ("With the best of intentions, in order to increase the enrollment of certain favored classes of minority students, the University of Texas School of Law ('the law school') discriminates in favor of those applicants by giving substantial racial preferences in its admissions program.").

141. *Grutter*, 539 U.S. at 350 (Thomas, J., dissenting) ("I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School. The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination.").

142. Various accounts of the Pre-Start Program and its origins exist. See Ben F. Johnson and Michael D. DeVito, *Emory University School of Law Progress Report to The Field Foundation: Pre-Start Program for Prospective Negro Law Students*, Nov. 10, 1966 [hereinafter *Progress Report*]; Ben F. Johnson and Michael D. DeVito, *Emory University School of Law Report to the Field Foundation: 1966-67 Pre-Start Program for Prospective Negro Law Students*, Oct. 1967 [hereinafter *1967 Report to Field Foundation*] both in folder, "Pre-Start Program," box 14, Ward files, EUA; Ben F. Johnson and Nathaniel E. Gozansky, *Emory University School of Law Report to the Field Foundation: 1969 Pre-Start Program for Prospective Black Law Students*, Jan. 1970 [hereinafter *1969 Report to Field Foundation*], in folder, "Pre-Start Program for Prospective Black Law Students," Series 016, Special Programs records, box 1, ELSA; Letter, Ben Johnson to Jim Sibley, June 16, 1971 [hereinafter Sibley letter], describing Pre-Start, in folder, "Law School, 1966-71," box 2, Ward files, EUA.

143. Ted Smith was the first African American to matriculate in the Emory Law School. He enrolled in the evening program. Judge Marvin Arrington noted Smith as his predecessor during remarks at the annual Emory Black Law Students' Association Banquet, Mar. 8, 2007, Atlanta, Ga. Under Johnson's direction, Emory Law School eliminated its evening program because "... the operation of the Evening Division is a

African-American students, Marvin Arrington and Clarence Cooper, at Emory Law School. Arrington and Cooper were both transfer students from Howard University in Washington, D.C.¹⁴⁴ Both enrolled in the fall semester of 1965.¹⁴⁵ But the problem remained that the most highly qualified African-American students typically also applied to, got accepted to, and attended more prestigious schools.¹⁴⁶ The persistent problem with African-American applicants to Emory was that their scores on the LSAT were below Emory's usual standard.¹⁴⁷

As Johnson explained of the first participants in Pre-Start, their scores "average[d] 369 against our regular beginning class average of 545; in terms of national percentile rating this was the difference between the 12th percentile and the 69th."¹⁴⁸ After three years of the program, Emory law professors Nathaniel Gozansky and Michael DeVito reported on thirty-five students who had participated in Pre-Start through 1968. For those students, the mean LSAT score was 355, the median was 368.¹⁴⁹ Over the same period, the mean LSAT for all entering Emory Law students was 567.¹⁵⁰

The solution to the problem of deficient LSAT scores from African-American applicants that Dean Johnson developed, in conjunction with Professor DeVito, was Pre-Start, which the Emory Law School operated each summer from 1966 through 1972. The idea behind Pre-Start was to eliminate the LSAT as an admission requirement, substituting the candidates' actual performance in a law school course that was ordinary in every respect except that it would occur during the summer, and all of the students in the class would be African-American candidates.¹⁵¹ DeVito would teach the course. Any candidate who scored seventy or above would be eligible for admission as a regular student in the law school during

hindrance to the development of the Law School as the faculty would like to see it developed." *Emory Law School Annual Report to the President, 1966-67* at 29, EUA; see also *Emory Law School Annual Report to the President, 1967-68* at 37, EUA.

144. See John D. Thomas, *A Legal Precedent*, EMORY MAG., Autumn 1998 (story about Marvin Arrington, describing his arrival with Clarence Cooper at the Law School in 1965), available at http://www.emory.edu/EMORY_MAGAZINE/autumn98/marvin.html.

145. *Id.*

146. Gozansky & DeVito, *supra* note 39, at 720.

147. *Id.*

148. Sibley letter, *supra* note 142. See also, Gozansky & DeVito, *supra* note 39, at 721 for discussion of reasons, that have nothing to do with academic ability, why African Americans might not do well on LSAT.

149. Gozansky & DeVito, *supra* note 39, at 737.

150. *Id.*

151. *Id.* at 729.

the following fall.¹⁵² Their completion of the summer class would count toward the credits they needed to graduate, giving them the apparent advantage¹⁵³ of a one-course reduction relative to the rest of the students during their first year.¹⁵⁴ Recognizing that not only the LSAT, but also the cost of law school, likely constituted a major impediment for many of the target students, Johnson also proposed to provide the students with grants for both the summer study, and for their first year of law school.¹⁵⁵ Afterward, Pre-Start students would have to "resort to the usual student aid and loan programs available to law students generally."¹⁵⁶

Emory's proximity to the Atlanta University complex of African-American colleges and universities proved helpful in getting Pre-Start running. Johnson and DeVito consulted with Melvin D. Kennedy of Morehouse and Samuel D. Cook of Atlanta University in developing the program.¹⁵⁷ During the 1970-71 academic year, Gozansky would take half-time leave in order to serve as associate director of the Council of Legal Educational Opportunity ("CLEO") with Kennedy.¹⁵⁸ During the first year, Emory offered positions in Pre-Start to twelve students, all but three of whom came from Atlanta institutions: two each from Atlanta University and Clark, Morehouse, and Morris Brown Colleges, one from Spelman College.¹⁵⁹ The other three came from the Tuskegee Institute in Tuskegee, Alabama. Talladega College, in Talladega, Alabama, recommended one student who withdrew after initially accepting the appointment. South Carolina College, in Orangeburg,

152. Ben F. Johnson, *Emory University School of Law Proposal: A "Pre-Start" Program for Prospective Negro Law Students*, Jan. 7, 1966, at 4 [hereinafter *Pre-Start Proposal*], reprinted in *Progress Report*, *supra* note 142, at app. A.

153. See Gozansky & DeVito, *supra* note 39, at 729-30. They assert that, even with the course reduction, many Pre-Start students earned unexpectedly low grades during their first regular quarter of study. *Id.* Those students typically rebounded, however, earning better grades in subsequent quarters. Gozansky & DeVito speculated that the summer course gave the Pre-Start students an inaccurate sense of the amount of effort required to succeed in law school, but that the shock of their first-quarter grades was enough to disabuse them. *Id.*

154. *Pre-Start Proposal*, *supra* note 152, at 4.

155. *Id.* at 2, 6.

156. *Id.* at 6.

157. *Progress Report*, *supra* note 142, at 8.

158. Memorandum from Ben F. Johnson, Dean of Emory Law School, to Judson C. Ward, Vice President of Emory University (Mar. 31, 1970), in folder, "Law School, 1966-71," Ward files, EUA. CLEO was originally a Great Society program that served to increase the number of African-American attorneys mostly as an anti-poverty program. It has since flourished and continues to exist. See CLEO, <http://www.cleoscholars.com>.

159. *Progress Report*, *supra* note 142, at 11. Although these students all attended Atlanta institutions, they hailed not only from Georgia, but from Alabama, Arkansas, California, Florida, and Mississippi. *Id.*

South Carolina, recommended no student, perhaps because the amount of time between confirmation of the grant and the start of the actual program was quite short, leaving officials there too little time to respond.¹⁶⁰ In subsequent years, as word of the program spread and as Emory law professors DeVito and Gozansky recruited systematically at historically African-American institutions, the pool of potential participants increased, including the variety of sending institutions.¹⁶¹

Student selection was inherently a problem. The express goal was to identify students who would likely succeed in law school, but who had performed too poorly on the LSAT to win admission to an accredited program. The solution was to ask pre-law advisors at the sending institutions to choose the participants. During the first year, 1966, some of the students did not even take the LSAT until the summer of their participation in Pre-Start. As the Progress Report stated, "fortunately for the reliability of the experiment, each student selected . . . would not have been eligible for admission under conventional procedures because of substandard LSAT scores."¹⁶²

DeVito and Gozansky altered details of the program over the years as they learned from experience.¹⁶³ Overall, however, the Pre-Start program remained essentially the same for seven years. The single biggest exception was 1968, the year in which Emory participated in the beginning of the CLEO program. The number of students who initially enrolled in Pre-Start was twelve in every year except 1967, when it was eleven, and 1968, when it was 40. The lowest percentage of successful students — that is, of Pre-Start participants who scored well enough to enroll in law school — was 58.3, or seven out of twelve, in 1970. In 1968, the CLEO year, 37 of 40 students succeeded, for a rate of 92.5 percent.¹⁶⁴ The 1968 CLEO class was unusual not only for its size, but for the range of law schools besides Emory that successful participants earned admission to, including Temple, Texas, Berkeley/Boalt Hall, Georgetown, and Yale.¹⁶⁵

Pre-Start students were always free to apply to other law schools, but one key difference between Pre-Start and CLEO was the expectation in Pre-Start that most or all Pre-Start students would matriculate at Emory, while CLEO assumed little or no correlation

160. *Id.*

161. See 1969 Report, *supra* note 142, at 2.

162. Progress Report, *supra* note 142, at 10.

163. Gozansky & DeVito, *supra* note 39, *passim*.

164. See chart, School of Law Annual Report to the President, 1969-70 at 36, EUA; Sibley letter, *supra* note 142.

165. School of Law Annual Report to the President, 1967-68, *supra* note 143, at 29.

between the law school the students attended for the summer program and the law school that they would matriculate at. The reason why the total number of students in the program was much lower for all of the Pre-Start years than it was for the CLEO year is that Emory hoped to admit all of the Pre-Start participants as regular students, so Emory administrators had to regulate admission to Pre-Start according to the number of students they could subsequently absorb into the incoming class.¹⁶⁶

In 1971, Johnson reported that Emory had enrolled a total of 99 students in Pre-Start/CLEO.¹⁶⁷ Twelve of those students were enrolled at the time of the report, leaving 87 for whom Johnson knew the outcome. Seventy-one succeeded — that is, performed well enough to gain admission to a law school — while sixteen did not, for a success rate of 82 percent. Of the seventy-one successful students, twenty-nine enrolled at other law schools, while forty-one enrolled at Emory.¹⁶⁸ Of those forty-one, fourteen left without graduating,¹⁶⁹ two transferred to other law schools, nine were current students, and eighteen graduated from Emory.¹⁷⁰ Johnson also reported that, of all African-American graduates from Emory Law School, a total of twenty-eight at that time (including those African-American students who did not come through Pre-Start), sixteen had passed some state's bar exam, nine were preparing to

166. See *supra* note 137 for Johnson's critical evaluation of CLEO as compared to Pre-Start.

167. Sibley letter, *supra* note 142.

168. *Id.* What happened to the 71st student is unclear. This may have been a typographical error.

169. One of the problems Sander identifies with current affirmative action programs is high attrition rates for under-qualified students. See Sander, *supra* note 12, at 370, 379, 436, 440-41. Fourteen departures of 41 students constitutes an attrition rate of 34 percent, which is extremely high. From his LSAC-BPS data, Sander finds attrition rates of 8.2 percent for whites and 19.2 percent for blacks. *Id.* at 436. In table 5.7, Sander shows that African-American students with index scores of 400 and below — a score at which virtually no white applicant gets admitted to any law school — have an attrition rate of 39.6 percent. *Id.* at 441. For African-American students with index scores between 400 and 460, the attrition rate is 33.1%. *Id.* But at that level, the attrition rate for whites is 22.2 percent, and the difference between the African American and white rates steadily declines as index scores grow. *Id.* Even at the 400-460 level, I do not consider the difference in the attrition rates that impressive. Sander anticipates this response and insists that one problem with attrition is that it correlates strongly with law school grades, which in turn correlate strongly with bar passage. *Id.* at 442. This is certainly the sort of information that should be available to African-American prospective law students, but it also fails to decide the policy issue. In a culture that values individual risk as the putative source of innovation and achievement, what if African-American prospective law students know the odds and still want the opportunity?

170. Sibley letter, *supra* note 142. Again, these figures do not add up properly: 18 + 14 + 9 + 2 = 43, not 41. Perhaps one of the extra students here is the missing student from note 168?

take a bar exam, and the outcome for three was unknown.¹⁷¹ Even if one assumes that the three unknowns failed, the pass rate for African-American graduates of Emory Law was 84.2 percent based on these figures. Writing in 1970, Johnson claimed a first-try pass rate of "over 85%" for Emory Law graduates as a whole,¹⁷² so the bar passage rate for African Americans was consistent with the rate for the entire school in this period.¹⁷³

Johnson and DeVito were at pains to insist that the intent of Pre-Start was not "compensatory."¹⁷⁴ They defined "compensatory" to mean "a program to make up for deficiencies in prior education."¹⁷⁵ This claim reflects their strong belief that the problem with admission of African-American students to law school lay not with the students or their educational backgrounds, but with the LSAT. They repeatedly described Pre-Start as, *inter alia*, an experiment to evaluate the LSAT's reliability.¹⁷⁶ In the preliminary report to the Field Foundation, they asserted that the first nine Pre-Start students to enroll at Emory Law School would not have secured admission to an accredited law school otherwise.¹⁷⁷ However, those students, "selected without regard to conventional admission criteria, are substantially overperforming what might have been predicted by such criteria."¹⁷⁸

171. Sibley letter, *supra* note 142. This is particularly important information insofar as one of Sander's chief claims is that African Americans who attend higher-tier schools than they would otherwise based on their application criteria tend to have more trouble passing bar exams than they would otherwise. Sander, *supra* note 12, at 373, 443-45.

172. Letter from Ben F. Johnson, Dean of Emory Law School, to Lt. Col. Ross M. Goddard, Jr., Directorate of Military Support, Dept. of the Army (Dec. 11, 1970), (in folder), "Law School, 1966-71," box 2, Ward files, EUA [hereinafter Letter to Goddard].

173. I should note here my recognition that, even if I find some other source with which to verify these numbers, the sample size is far too small for valid statistical generalizations. The temptation to run these numbers is impossible to resist, however. I assume that any reader will want to know. Further, their appearance in various documents that Johnson wrote — not only official reports to the President of the University, but also in letters — indicates that he considered them significant, so they help to understand his motives for and opinions about Pre-Start.

174. See, e.g., 1969 Report, *supra* note 142, at 1.

175. Progress Report, *supra* note 142, at 7.

176. *Id.* at 3, 5; 1969 Report, *supra* note 142, at 1; Gozansky & DeVito, *supra* note 39, at 721.

177. Progress Report, *supra* note 142, at 2.

178. *Id.* But see Sander, *supra* note 12, at 424 ("A number of careful studies, stretching back into the 1970s, have demonstrated that average black performance in the first year of law school does not exceed levels predicted by academic indicators. If anything, blacks tend to underperform in law school relative to their numbers, a trend that holds true for other graduate programs and undergraduate colleges."). Of course, if Pre-Start students would not have gained admission to an accredited law school at all based on their application credentials, then passing by the skin of their teeth at Emory Law would qualify as "overperformance."

B. Ben Johnson, Evangelist of Legal Education

Pre-Start's function as a test of the LSAT's reliability for African Americans was subsidiary to its primary goal. Johnson saw considerable inherent value in increasing the number of African-American attorneys in the South, and he saw Pre-Start as a useful vehicle for this purpose. Recall here Justice Powell's discussion of potential justifications for racial classifications in the *Bakke* opinion.¹⁷⁹ As O'Connor reiterated in her summary, Powell did not actually reject the possibility of using affirmative action to increase the number of professionals practicing in underserved areas.¹⁸⁰ He noted instead that the admissions program at the UC Davis School of Medicine did not seem to have that goal as its purpose.¹⁸¹ Pre-Start emphatically did have that goal as its purpose.

Johnson's explanation of his reason for wanting to increase the number of African-American attorneys in the South sounds patronizing to the modern ear, but it also reflects his faith in the value of the American legal system, at least insofar as the legal system could eliminate its racist practices. Johnson's justification for increasing the number of African-American lawyers, as stated to the Field Foundation, is worth quoting at length.

Unfortunately, there are segments of our society — the lower socio-economic groups, of which the Negro community is only one — which are suspect or even hostile to the rule of law, particularly in its implementation and operation with respect to their people. Simply stated, they believe the law is their oppressor and their enemy. One confirmation of this, in their eyes, at least, is that practically none, or at most only a few, of their people are involved as lawyers in the development of law and administration of justice; they naturally conclude, consciously or subconsciously, that neither the law nor the legal profession is for them or their kind.

The Program proceeds on the assumption that a witness to these people is needed concerning the importance of the rule of law in our society, and that this witness can best be made by persons of a kindred background whose education in law and participation in the legal profession will speak for itself.¹⁸²

179. *Bakke*, 438 U.S. at 305-16.

180. *Grutter*, 539 U.S. at 324. See *supra* note 89 and accompanying text for discussion.

181. *Bakke*, 438 U.S. at 305-16; *Grutter*, 539 U.S. at 324.

182. *Progress Report*, *supra* note 142, at 5-6. Compare Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 403 (1987) ("I think what I saw in the eyes of those who reached out to me in the hallways of the courthouse was a profoundly accurate sense of helplessness — a knowledge that without a sympathetically effective lawyer (whether judge, prosecutor or defense

Johnson was, in short, an evangelist of legal education.

This statement indicates that Johnson saw African Americans as a monolithic bloc who would respond reliably to a widely accepted leadership class.¹⁸³ The evidence indicates that he was wrong on this point. As early as the sit-ins, which lasted in Atlanta from March 1960 through March 1961 (actual desegregation occurred in September 1961), disputes emerged between established African-American leaders and newer, more militant leaders.¹⁸⁴ But Johnson was making a point here more about the legal system, and by implication American government as a whole, than about African Americans. His concern was that, in practice, the options were either to take vigorous steps to improve African Americans' representation in legal and political systems, or face a stark choice between increasing lawlessness and increasing police power.

A key concern that Johnson never mentioned explicitly,¹⁸⁵ but

attorney) they would be lining those halls and those of the lock-up for a long time to come. I probably got more than my fair share of outstretched arms because I was one of the few people of color in the system at that time; but just about every lawyer who has frequented the courthouse enough has had the experience of being cast as a saviour." See also Sander, *supra* note 12, at 376-77 (describing attitude similar to Johnson's among other law school administrators during this period).

183. This assumption itself presents a potential legal problem, although it may be permissible for officials in a private institution to make such assumptions in ways that public officials may not. See *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2618 (2006) (quoting *Miller v. Johnson*, 515 U.S. 900, 920 (1995)) ("The recognition of nonracial communities of interest reflects the principle that a State may not 'assum[e] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"). See also *Holder v. Hall*, 512 U.S. 874, 903 (1994) (Thomas, J., concurring) ("The dabbling in political theory that dilution cases have prompted, however, is hardly the worst aspect of our vote dilution jurisprudence. Far more pernicious has been the Court's willingness to accept the one underlying premise that must inform every minority vote dilution claim: the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well. Of necessity, in resolving vote dilution actions we have given credence to the view that race defines political interest. We have acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own 'minority preferred' representatives holding seats in elected bodies if they are to be considered represented at all.").

184. Jack L. Walker, *Protest and Negotiation: A Case Study of Negro Leadership in Atlanta*, in *ATLANTA, GEORGIA, 1960-1961: SIT-INS AND STUDENT ACTIVISM*, *supra* note 47, at 31. Many authors have noted growing tensions among African-American leaders in this period. See, e.g., Lawrence Bobo, *Race, Public Opinion, and the Social Sphere*, 61 PUB. OPINION Q. 1, 3 (1997) (noting empirical evidence for significant variation in opinion among racial and ethnic minority groups, cautioning against assuming uniformity).

185. Johnson did indicate his attention to what he called "the signals emanating from black student unrest throughout the country," and explained what Emory Law School was doing to respond to those signals even as he insisted that no such unrest had

which must have been part of his thinking, was the outbreak of riots by African Americans in major cities with distressing regularity each summer from 1965 through 1968.¹⁸⁶ As Hugh Graham has demonstrated, the riots had a direct, if somewhat unpredictable, effect on Congress and federal legislation.¹⁸⁷ Graham also explains that Nixon's much-reported "Southern Strategy" was really more a border-state strategy, as he calculated that any appeal for the die-hard segregationist vote — requiring direct competition with George Wallace — would cost more in moderate support than it was worth.¹⁸⁸ Generalized calls for law and order on behalf of the "silent majority" fit this strategy perfectly, allowing Nixon to articulate the fears of many voters, South and North, without making explicit reference to the politics of race.¹⁸⁹

Although the concern must have been much the same, Ben Johnson's response to the problem differed dramatically from Nixon's. Johnson pointed out that, of 5,000 lawyers registered with the State Bar of Georgia at the time (he gives no date), only thirty-four were African American. Of those, twelve worked for the federal government. Johnson assumed that the remaining twenty-two were in private practice.¹⁹⁰ He considered the mere fact of segregation inherently unfair at least in part because of his religious beliefs.¹⁹¹ But Johnson also had the very lawyerly perspective that

occurred at ELS. Dunbar letter, *supra* note 137.

186. See Sander, *supra* note 12, at 378 (impact of race riots during the 1960s as impetus for affirmative action programs in law schools). This is also where Sander mentions Pre-Start as an exception, having begun before the riots became a pattern. Sander's chronology is correct, as is his characterization of Pre-Start as exceptional, but I suspect that Johnson's understanding of the situation dated back at least to the sit-ins of 1960-61.

187. GRAHAM, *supra* note 123, at 175, 255-77, 268 ("The tough-minded 90th Congress was primarily interested in cracking down on the nationwide escalation of violence, including both ghetto riots and southern violence against civil rights workers.").

188. *Id.* at 303.

189. See MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* (Princeton University Press 2006) (exploring how school desegregation contributed to moves by whites to suburbs, and to the Republican Party, in several southern cities, including Atlanta, during the 1960s and 1970s); Robert A. Levine, *The Silent Majority: Neither Simple nor Simple-Minded*, 35 PUB. OPINION Q. 571 (1971-72) (arguing that most white Americans don't mind living in racially integrated neighborhoods, but not as the minority, which is why they tell pollsters that they do not mind integrated neighborhoods, but often oppose open-housing initiatives); Charles Morgan, Jr., *Politics, Race, and the Law: The Southern Strategy*, 1 BLACK POLITICIAN 8 (1970) (arguing that Nixon tried to win southern votes by appealing to both whites and blacks). See also Tali Mendelberg, *Executing Hortons: Racial Crime in the 1988 Presidential Campaign*, 61 PUB. OPINION Q. 134 (1997) (quantitative study showing that infamous Willie Horton ads supporting George H.W. Bush for President in 1988 worked by invoking viewers' racial prejudice, not concern about crime).

190. Mendelberg, *supra* note 189. See also Sibley letter *supra* note 142.

191. Telephone interview with Michael DeVito, former professor of law, Emory

the absence of African-American attorneys necessarily undermined the legitimacy of the legal system.

Reporting on Pre-Start in 1969, Johnson placed it into the larger context of integration generally at Emory Law School. He predicted that:

[W]e will have 20-30 black students in law school here regularly. This is a comfortable size for us. It is large enough for the white students and faculty to know that we must adapt and learn how to get along more effectively with black students; in other words, we cannot deal with integration as a casual matter or on a token basis. From the black students' standpoint it is large enough to provide them with a core of black friends with common problems as a buttress against loneliness, etc. I am convinced that the worst thing that can happen is to encourage the enrollment of one, two, or three black students in a predominantly white law school where they will inevitably be treated either too casually or too patronizingly and inevitably feel their alienation more bitterly; this kind of integration is worse than no integration.¹⁹²

This, of course, is the concept of "critical mass" that dissenters in *Grutter* so roundly denounced.¹⁹³ It demonstrates the extent to which the Justices who chose to play at being law school administrators for purposes of deriding affirmative action had little or no actual information about the issue.

Johnson knew whereof he spoke on this issue. Just two months before he wrote, a group of African-American undergraduate students had staged protests at Emory precisely to publicize their sense that the university needed to work more vigorously to achieve genuine racial integration, beyond simply admitting African Americans as students.¹⁹⁴ Whatever he thought about those

University (January 15, 2007). Johnson's grandson, Ben F. Johnson, IV, reported the following anecdote about his grandfather: when the Druid Hills Baptist Church, which Johnson attended, "integrated" by allowing African Americans only into the basement for worship services, Johnson organized a group of white congregants to sit in the basement with them as a protest. Mary J. Loftus, *A Life of Courage and Commitment*, EMORY MAG., Autumn 2006, at 37.

192. Dunbar letter, *supra* note 137.

193. *Grutter*, 539 U.S. at 346-47 (Scalia, J., dissenting); *See also id.* at 379 (Rehnquist, J., dissenting) ("Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing"); *id.* at 389 (Kennedy, J., dissenting) ("The dissenting opinion by The Chief Justice, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."). *See supra* note 120 and accompanying text for discussion.

194. *See* Complaint, *Emory University v. Steve Abbott, et al.* (May 25, 1969, Superior Court for County of DeKalb, Ga.), in folder, "Desegregation," box 19, Ward files, EUA

students' methods — and the decision to secure an injunction against them caused substantial disagreement among other Emory administrators¹⁹⁵ — Johnson showed a remarkable willingness and ability to hear what African-American students at Emory wanted and needed, and to respond to their demands in a constructive way.¹⁹⁶

In doing so, Johnson and his faculty strove to reconcile the demand for racial integration with the larger interests of Emory Law School, Emory University, and the rest of the student body. This is the balancing of competing demands that administrators routinely engage in, but which the dissenters in *Grutter* seem completely ignorant of. Describing Pre-Start, Gozansky and DeVito explained that "[r]ecruitment is concentrated in the South. This decision is based on the theory that the place which is in most need of black attorneys is the South."¹⁹⁷ This stands in sharp contrast to Emory Law School's general recruitment practices during this period. In 1969, Johnson conveyed to university administrators a memo from the law school's recruitment committee asserting flatly that Emory already attracted all of the highly qualified students it could get from the South, necessitating recruitment in other regions.¹⁹⁸ Insofar as it was successful, of course, Emory Law School would then be responsible for increasing the likelihood that highly qualified law students, having attended law school in Atlanta, would remain in Atlanta, thereby either diluting Atlanta's identity

(detailing events of protest and requesting restraining order enjoining further protests pending hearing). Just over one year later, Johnson would also report with some pride that the effort to encourage a nationwide student strike in response to news of the invasion of Cambodia had met with no success at Emory Law School. Letter to Goddard, *supra* note 172.

195. Memorandum from E. Jerome Zeller, Dean of Students, to Sanford Atwood, President of Emory University (May 27, 1969) (objecting strenuously to service of restraining order on students) ("You now proceed fully against my personal principles and my professional advice."), in folder, "Black Students," box 11, Ward files, EUA.

196. See, e.g., *supra* note 185. With regard to the rest of Emory, beyond the law school, see correspondence between President Sanford Atwood and representatives of Black Student Alliance ("BSA") (July 17, 1969) and notes of meeting between various Emory administrators, including President Atwood, and BSA representatives (July 24, 1969), in folder, "Black Students," box 11, Ward files, EUA.

197. Gozansky & DeVito, *supra* note 39, at 724.

198. See memorandum from Ben F. Johnson, Dean of Emory Law School, to Sanford Atwood, President of Emory University (Nov. 11, 1969) (conveying memo from Professor Stubbs to Law School Recruiting Committee, (Oct. 28, 1969) in folder, "Law School, 1966-71," box 2, Ward files, EUA) ("The foregoing information concerning southern schools and the evaluated quality of their programs and their students suggests some of the difficulty in developing a first quality student body from the South alone.") [hereinafter Johnson Memo to Atwood, 1969]. See also *School of Law Annual Report to the President, 1969-70*, *supra* note 143, at 29.

as a southern city, or perpetuating its historical role as an ambivalently southern city.¹⁹⁹

The recruitment committee memo indicated that only one southern state, Virginia, could claim an average LSAT score for its residents, 525, that exceeded the national average, 517.²⁰⁰ Florida's average was 516, Georgia's was 497.²⁰¹ For students entering Emory Law School in fall 1961, the average score for those who took the LSAT (seventy-seven of ninety, thirteen did not take the test) was 501.²⁰² By the time Pre-Start began in 1966, the average score for students entering Emory Law School was 545.²⁰³ Virtually any significant success by Pre-Start students demonstrates that anyone who judged solely by LSAT scores was missing an important pool of qualified potential students from the South in African Americans. This data also indicates the extent to which the South's peculiar history continued to manifest, *inter alia*, in poor academic performance, not just among African Americans, but generally.²⁰⁴ A necessary implication of Pre-Start, in the context of Emory Law's larger recruitment strategy at the time, was that, in order to find more qualified white students, Emory had to look outside the South, while they had only begun to tap the well of qualified African-American students within the South.²⁰⁵

Emory Law School's recruitment strategy in this period is also further illustration of the point that quantitative data alone cannot resolve these issues because one's interpretive frame has a profound impact on how one reads the data. Melissa Kean writes about Goodrich C. White, President of Emory from 1942 to 1957, and his military service in the World War I period.

[White] administered intelligence tests to southerners, both black and white, in an effort to identify those who were unfit for military duty. This effort would yield results that deeply puzzled

199. See *supra*, note 43 and accompanying text.

200. Johnson Memo to Atwood, 1969, *supra* note 198.

201. *Id.*

202. *Law School Annual Report to the President, 1961-62* at 20, EUA.

203. See *supra*, note 148 and accompanying text.

204. See Conkin, *supra* note 32, at 3.

205. Recall that, although the first group of Pre-Start students came entirely from colleges and universities in the South, they grew up all over the country, *supra* note 159, so this is something of an exaggeration. To some extent, what Emory accomplished with white students — attracting highly qualified applicants to Atlanta from outside the South — it also accomplished with black students. At least one African-American graduate of ELS who entered some time after Pre-Start ended, and who grew up in western Massachusetts, made clear that an important part of his decision to attend Emory was his perception that Atlanta was a good place for an African American to live. Interview with Kevin Ross, Kevin Ross and Associates, in Atlanta, GA. (Oct. 3, 2007).

the analysts who would spend years trying to explain them away: many black soldiers from the North scored higher than southern white farmers. These results apparently fascinated White, who kept his original copies of some of the early reports in his files.²⁰⁶

Perhaps most importantly, the data again suggest that scores on "standardized" tests reflect more the educational and other cultural opportunities the test-takers have had in their lives than any inherent ability.²⁰⁷

In the initial grant application to the Field Foundation, Johnson represented Pre-Start as imposing a certain opportunity cost on Emory Law School, which was already enrolling "the maximum number of students it can physically handle,"²⁰⁸ with "relatively high" admissions qualifications coming in.²⁰⁹ In terms of the current debate, this necessarily means that Pre-Start students took seats that would otherwise have gone to qualified white students.²¹⁰

But Johnson also identified various benefits to the law school as an institution, and to the white students who made up its more traditional constituency. "While there is a tendency to focus on the Program's benefit to the pre-start students, their presence in the Law School has brought an easily overlooked value to the student body at large."²¹¹ As a specific example, Johnson noted, "[t]he students are facing the problem of integrating their legal fraternities, and a great deal of responsible and mature thought and action has been generated because of this."²¹² In other words, Pre-Start "aspire[d] to 'achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of

206. Kean, *supra* note 22, at 34. Compare THE BLACK-WHITE TEST SCORE GAP, *supra* note 16.

207. See, e.g., Christopher Jencks, *Racial Bias in Testing*, in THE BLACK-WHITE TEST SCORE GAP, *supra* note 16, at 64 ("Psychologists have been trying to measure intelligence since the late nineteenth century. The tests they have used for this purpose have not changed much since World War I and have hardly changed at all since World War II. But while the tests have not changed much, psychologists' understanding of what the tests measure has changed substantially. Instead of thinking that intelligence tests measure biological potential, psychologists now think of them as measuring developed abilities."). See also Richard E. Nisbett, *Race, Genetics, and IQ*, in THE BLACK-WHITE TEST SCORE GAP 88-103, *supra* note 16 (asserting that relevant studies show more environmental than genetic influence in determining intelligence).

208. A consistent theme, beginning with the 1964-65 annual report and continuing through to the completion of Gambrell Hall in 1972, was the need for a new building to provide much-needed space.

209. *Pre-Start Proposal*, *supra* note 143, at 6-7.

210. *Supra* note 27 and accompanying text.

211. *Progress Report*, *supra* note 142, at 20.

212. *Id.*

its parts.'" ²¹³

Perhaps the most important part of Johnson's perspective, then, is that, while Pre-Start's most obvious beneficiaries were the African-American students who had an opportunity to attend law school that they might not otherwise have had, the benefits of the program spread much wider. Emory Law School's supererogatory efforts to attract African-American students from 1966 to 1972 benefited the other students who attended the school with them, the legal system as a whole, and therefore, by extension, the society as a whole. ²¹⁴

Gozansky and DeVito chose not to specify exactly why they believed the need for African-American attorneys was greatest in the South. The answer seems obvious; most of the African Americans in the United States lived in the South, and southern states uniquely had statutes requiring racial segregation. ²¹⁵ But one can also infer the logic Gozansky and DeVito used from the fact that they served for several years as faculty advisors to the Emory Chapter of the Law Students Civil Rights Research Council, ²¹⁶ "a nation-wide movement of law students to aid attorneys engaged in civil rights litigation by doing legal research and brief writing." ²¹⁷ Ben Johnson and at least a significant segment of his faculty, that is, were explicitly on the side of the African Americans in the struggle

213. *Grutter*, 539 U.S. at 315.

214. Johnson's observations about the general benefit of Pre-Start reveal the obvious, egregious flaw in the reasoning of Justice Scalia's dissent in *Grutter*. Scalia argues that nothing about diversity as a goal for public universities differentiates it from diversity as a goal in all the other activities of state government, offering as proof the fact that students earn no grades based on their understanding of or commitment to diversity. In his view, no principle exists by which to cabin diversity within universities as a compelling state interest, such that other state entities may now claim it for such purposes as hiring preferences. 539 U.S. at 347-48 (Scalia, J., dissenting). But graded courses alone are not the defining characteristic of universities' educational programs. Many of the key lessons that college students learn as undergraduates involve basic principles of maturity and responsibility that no one grades them on, but which can dramatically affect their grades insofar as they fail to learn those lessons. These are also lessons that employers, including state government, assume that college graduates will already have learned before they become employees. Law students must take courses in, indeed an entire examination in, professional responsibility, which necessarily involves issues responsible interaction with clients. What Scalia and Thomas resolutely refuse to acknowledge is that effective education is about much more than what happens in individual classes.

215. See *supra* notes 33, 35 and accompanying text.

216. *Law School Annual Report to the President, 1966-67*, *supra* note 143, at 5; *Law School Annual Report to the President 1967-68*, *supra* note 143, at 23; *Law School Annual Report to the President, 1968-69* at 25, EUA; *Law School Annual Report to the President 1969-70*, *supra* note 164, at 28.

217. *Law School Annual Report to the President, 1966-67*, *supra* note 143, at 20.

over racial segregation.²¹⁸

Pre-Start began and ended before *Bakke*. As the next section shows, however, reading current law on affirmative action through the lens of Pre-Start can be instructive. A post-hoc strict-scrutiny review of Pre-Start demonstrates that it would easily pass constitutional muster, not only by the terms of the majority opinion in *Grutter*, but even by the terms of Justice Thomas's dissent.

IV. Justifying Race-Based Affirmative Action

To some degree, the students staged their protest demonstrations because they no longer felt that they were legitimate participants in the democratic process. During the interviews students frequently expressed mistrust and suspicion of all politicians, both white and Negro, and their attitude seemed to be that, for the most part, the legislative bodies at both the state and national levels were simply institutions which had signs over their doors reading 'whites only.'²¹⁹

The two key elements of race-based affirmative action policies in *Grutter* and *Gratz* are a compelling state interest to justify any such practice, and the narrow tailoring of the particular practice in order to achieve the greatest possible benefit while ensuring the smallest possible harm to non-beneficiaries.²²⁰ Writing for the majority in *Gratz*, Rehnquist accepted, apparently grudgingly,²²¹ the holding of *Grutter* that diversity in the student body is a sufficiently

218. Interviews consistently confirm this claim. Nathaniel Gozansky asserts that some Emory law professors probably opposed racial integration of the university, but they recognized the inevitable and chose to remain silent. Interview with Nathaniel Gozansky, law professor, Emory University, in Atlanta, Ga. (Nov. 11, 2006). Similarly, Randolph Thrower, 1936 graduate of Emory Law School, served as President of the Board of Visitors in 1961 and produced a report to the Board of Trustees on the topic of racial integration. Letter from Henry Bowden, Board Chair, to Randolph Thrower, (May 3, 1961), thanking Thrower for sending the Report, and *Report of Special Committee to Review University Policy on Admissions* [hereinafter *Report of Special Committee*], both box 1, Desegregation Documentation. Thrower now remembers little discussion of the integration decision. Interview with Randolph Thrower, in Atlanta, Ga. (June 9, 2007). That Thrower's lack of memories about integration has more to do with the lack of controversy surrounding the decision than with any failure of memory on his part is clear from his detailed recollections of, *inter alia*, his 1954 run for a seat in the U.S. House of Representatives as a Republican. He reports that, after speaking as a candidate at Morehouse College, he received threatening phone calls. *Id.*

219. Walker, *Protest and Negotiation*, *supra* note 184, at 35.

220. See, e.g., *Grutter*, 539 U.S. at 341.

221. *Grutter*, 539 U.S. at 380 (Rehnquist, J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.").

compelling state interest to justify race-based affirmative action policies by public universities.²²² Explaining the apparent contradiction of voting with the majorities in two cases that came to opposite conclusions, O'Connor stated that the undergraduate program under review in *Gratz* failed the narrow-tailoring test, but the law school program in *Grutter* passed that test.²²³

This section examines Pre-Start in light of the standards that the Court articulated in *Grutter* and *Gratz*, and particularly in light of Thomas's dissent in *Grutter*. Pre-Start, as Ben Johnson justified it at the time, easily satisfies the requirement for a compelling state interest. Indeed, it meets the state interest requirement that Justice Thomas asserts in his *Grutter* dissent, which is significantly more demanding than the requirement that the *Grutter* majority states. The requirement for narrow tailoring is a bit more difficult, except that the particular compelling state interest that Pre-Start advanced renders unclear how one would even apply the test for narrow tailoring. But, as we have seen, Johnson's account of the number of African-American students he hoped to enroll consistently at Emory Law School exemplifies the concept of "critical mass."²²⁴

A. "A Bulwark Against Anarchy"

Justice Thomas's dissent in *Grutter* provides the most demanding possible standard for justifying affirmative action, or any other policy based on race. Having reviewed the Court's decisions in this area with respect to the test of compelling state interest as the only permissible basis for racial classifications, Thomas wrote, "Where the Court has accepted only national security, and rejected even the best interest of a child, as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity.'"²²⁵

222. *Gratz*, 539 U.S. at 268.

223. *Grutter*, 539 U.S. at 333-41. But see Sander, *supra* note 12, at 405 (asserting that based on his statistical analysis that the individualized review that O'Connor claimed to find in the law school program, its saving grace, did not exist, or if it did exist, the outcome would be no different than if the law school used the same method as the undergraduate college).

224. *Supra* note 192 and accompanying text.

225. *Grutter*, 539 U.S. at 353 (Thomas, J., dissenting). See also *Gratz*, 539 U.S. at 281 (Thomas, J., concurring) ("I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause."); *Parents Involved*, 127 S. Ct. at 2782 ("Neither of the parties has argued — nor could they — that race-based student assignment is necessary to provide a bulwark

The prevailing account for why Richard Nixon won the 1968 presidential election includes prominently the claim that many Americans perceived the nation as flying apart at the seams at the time, given growing protest against the Vietnam War, the general indifference of hippies to prevailing social norms, and, perhaps most importantly, the outbreak of race riots in various cities beginning almost immediately after the signing of the 1965 Voting Rights Act and continuing through the summer of 1968.²²⁶ It is not an exaggeration to say that Ben Johnson's evangelical justification for affirmative action at Emory Law School — the need to provide a witness to African Americans for the proposition that the American legal system really is just, and is so by dint, *inter alia*, of adequately representing its constituents in all senses and at all points — reflected his belief that lawyers in the late 1960s had a unique opportunity and responsibility to serve as a "bulwark against anarchy."²²⁷

To some extent, this should always be true of a legal system. In John Locke's account, humans always have a responsibility to abide by natural law, which prohibits harming another's life, liberty or property.²²⁸ Given that many humans will refuse to abide by natural law, those who wish to enforce it cooperate to create systems of positive law that provide greater protection to the participants.²²⁹ The experience of the United States as a Lockean republic suggests that the single greatest threat to this system is the wholesale refusal to ensure equal protection of natural rights for entire groups. Beginning with periodic outbreaks of violent resistance by slaves and continuing through the Civil War,²³⁰ the Ku Klux Klan,²³¹

against anarchy or to prevent violence.").

226. See, e.g., JOAN HOFF, NIXON RECONSIDERED (Basic Books 1996) (arguing that Nixon achieved a highly liberal, often overlooked, domestic agenda, more building on than departing from the Johnson administration); WILLIAM C. BERMAN, AMERICA'S RIGHT TURN: FROM NIXON TO BUSH 2, 8, *passim* (Johns Hopkins University Press 1992); PATRICK J. BUCHANAN, RIGHT FROM THE BEGINNING, *passim* (Regnery Publishing 1988) (general theme that United States had lost its way as a nation during the 1960s); WILLIAM A. RUSHER, THE RISE OF THE RIGHT 179-80 (W. Morrow 1984).

227. Johnson never used this phrase, but the activities he reported as dean of Emory Law School — not just Pre-Start, but providing legal services to the poor as part of training law students, faculty members' participation in civil rights efforts, etc. — reflect his keen sense that lawyers had an active role to play in making American society more just for all its members.

228. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 6 (1689) ("The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.").

229. *Id.* at §§ 88-89, 123.

230. SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (Harvard University Press 2001) (including discussion of responses to slave

lynching as a de facto policy tool throughout the late nineteenth and early twentieth centuries,²³² the Klan again,²³³ the various race riots that whites inflicted on African Americans (Atlanta, 1906²³⁴; Springfield, 1908²³⁵; East St. Louis, 1917²³⁶; Chicago, 1919²³⁷; Tulsa, 1921;²³⁸ Detroit, 1943²³⁹), the Klan again, and the bombings²⁴⁰ and

rebellions by Gabriel Prosser, Denmark Vesey, and Nat Turner); CHRISTOPHER WALDREP, *ROOTS OF DISORDER: RACE AND CRIMINAL JUSTICE IN THE AMERICAN SOUTH, 1817-1880* (University of Illinois Press 1998) (local study based on trial court records showing how race was frequently dividing line between whites' reliance on court system and their resort to extralegal violence).

231. See, e.g., Edward John Harcourt, *Who Were the Pale Faces? New Perspectives on the Tennessee Ku Klux*, 51 CIV. WAR HIST. 23 (2005) (new evidence of white supremacist organization founded in Columbia, TN in 1868); Lewis Nicholas Wynne & Milly St. Julien Vappie, *The Camilla Race Riot and the Failure of Reconstruction in Georgia*, 16 J. S. GEO. HIST. 31 (2004) (connecting race riot in Camilla, GA in 1868 to Reconstruction political conflict and the utility of Klan violence in restoring white supremacist rule); LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872* (University of Georgia Press 1996) (presenting a narrow interpretation of federal civil rights authority in trials anticipated subsequent narrowing by U.S. Supreme Court); DAVID CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* (Duke University Press 1981).

232. LYNCHING IN AMERICA: A HISTORY IN DOCUMENTS (Christopher Waldrep, ed., 2006); David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC. REV. 793 (2005); MICHAEL J. PFEIFER, *ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874-1947* (University of Illinois Press 2004) (lynching as reflecting lower-class distrust of legal system, occurring nationally in this period).

233. PAUL ORTIZ, *EMANCIPATION BETRAYED: THE HIDDEN HISTORY OF BLACK ORGANIZING AND WHITE VIOLENCE IN FLORIDA FROM RECONSTRUCTION TO THE BLOODY ELECTION OF 1920* (University of California Press 2005) (discussing that careful voter registration drive in Fla., 1919-1920, unavailing as local, state, and federal authorities permitted Klan violence against African-American voters); John M. Craig, "There is Hell Going On Up There": *The Carnegie Klan Riot of 1923*, 72 PENN. HIST. 322 (2005) (telling of riot, including one death and several injuries, that ensued in 1923 when Klan marched in Pa. town without permit); GLENN FELDMAN, *POLITICS, SOCIETY AND THE KLAN IN ALABAMA, 1915-1949* (University of Alabama Press 1999) (documenting extralegal violence of the Klan in this period). But see STEVE SUITTS, *HUGO BLACK OF ALABAMA: HOW HIS ROOTS AND EARLY CAREER SHAPED THE GREAT CHAMPION OF THE CONSTITUTION* (New South Books 2005) (exploring, *inter alia*, Klan involvement of surprisingly liberal Supreme Court justice).

234. DAVID FORT GODSHALK, *VEILED VISIONS: THE 1906 RACE RIOT AND THE RESHAPING OF AMERICAN RACE RELATIONS* (UNC Press 2005); GREGORY MIXON, *THE ATLANTA RIOT: RACE, CLASS, AND VIOLENCE IN A NEW SOUTH CITY* (University Press of Florida 2005).

235. ROBERTA SENECHAL, *THE SOCIOGENESIS OF A RACE RIOT: SPRINGFIELD, ILLINOIS IN 1908* (University of Illinois Press 1990).

236. Malcolm McLaughlin, *Reconsidering the East St. Louis Race Riot of 1917*, 47 INT'L. REV. SOC. HIST. 187 (2002).

237. WILLIAM M. TUTTLE, JR., *RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919* (University of Illinois Press 1996) (1970).

238. ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921,*

murders²⁴¹ of civil rights activists and their supporters, nothing has so frequently threatened a descent into anarchy in the United States as white supremacy. White supremacists are disorderly, a chronic, anarchic threat to the natural rights and positive law that the rest of us — African American and otherwise — would peaceably enjoy.²⁴²

Any number of means exist to contain the threat that white supremacists pose, and the responsibility certainly should not fall only on African Americans. Affirmative action in law schools, and especially in southern law schools, is a patently logical policy — mild in its reasonableness — in support of the compelling state interest to prevent the anarchy that results when African Americans face the choice of violently defending themselves against white supremacists, or death. Clearly, the slaveholding states would never have seceded from the Union to begin with had the slaves had

RACE, REPARATIONS, AND RECONCILIATION (Oxford University Press 2002); JAMES S. HIRSCH, *RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY* (Houghton Mifflin 2002).

239. Sharon E. McHaney, et al., *Detroit's 1943 Riot*, 77 MICH. HIST. 34 (1993); Dominic J. Capeci, Jr., *Black-Jewish Relations in War Time Detroit: The Marsh, Loving, Wolf Surveys and the Race Riot of 1943*, 47 JEWISH SOCIAL STUDIES 221 (1985).

240. CHARLES E. CONNERLY, "THE MOST SEGREGATED CITY IN AMERICA": CITY PLANNING AND CIVIL RIGHTS IN BIRMINGHAM, 1920-1980 (University of Virginia Press 2005) (placing events such as bombing of Sixteenth Street Baptist Church in 1963 into context of systematic white efforts to contain African Americans through use of zoning laws); DIANE MCWHORTER, *CARRY ME HOME, BIRMINGHAM, ALABAMA: THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION* (Simon & Schuster 2001); Jack L. Walker, *Sit-Ins in Atlanta: A Study in the Negro Revolt*, *supra* note 47, at 83.

241. GARY MAY, *THE INFORMANT: THE FBI, THE KU KLUX KLAN, AND THE MURDER OF VIOLA LIUZZO* (Yale University Press 2005) (presenting a study of murder of Viola Liuzzo, housewife from Detroit whom Klansmen murdered in 1965 while she was driving civil rights workers between Selma and Montgomery, Alabama, including role of FBI and its informant, who may also have known about attacks on Freedom Riders in 1961 and bombing of Sixteenth Street Baptist Church in Birmingham in 1963); John Drabble, *To Ensure Domestic Tranquility: The FBI, COINTELPRO-WHITE HATE and Political Discourse, 1964-1971*, 38 J. AM. STUD. 297 (2004) (describing FBI efforts to infiltrate and discredit Klan during 1960s); Glenn Feldman, *Soft Opposition: Elite Acquiescence and Klan-Sponsored Terrorism in Alabama, 1946-1950*, 40 HIST. J. 753 (1997) (explaining that elites were concerned about Klan violence mostly because it raised the specter of federal intervention).

242. See *Louisiana: Supremacist to Rally in Jena*, N.Y. TIMES, Jan. 22, 2008, at A12; Chip Berlet & Stanislav Vysotsky, *Overview of U.S. White Supremacist Groups*, 34 J. OF POL. & MIL. SOC. 11 (2006); HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* (University of Massachusetts Press 1988). See also Hunt, *supra* note 28, at 481 ("This Article finds common cause with that side of the debate which holds, in short, that racism has not died either a quiet or ignominious death. It argues, instead, that racism has merely traded in its old and crude weapons of colonialism, slavery, Jim Crow segregation, and racial terrorism in exchange for more subtle, and ultimately more effective, modern, sophisticated weaponry of metaphor, rhetoric, language, image, denial, and most importantly — perspective.").

effective political and legal representation in those states at the time — that is, had the slaves not been slaves.²⁴³ Johnson's primary goal with Pre-Start was to increase the number of African-American attorneys in the South — to increase, that is, the ability of African Americans in formerly segregated states to defend themselves from the depredations of white supremacy.

The other element in the equal protection analysis as Justice Thomas rehearses it is narrow tailoring.²⁴⁴ Perhaps critics of affirmative action in law school admissions know of some more narrow way to combat the problem of roving potential violence by white supremacists against African Americans. If so, they should tell the rest of us what it is.

Training African Americans who may choose to become prosecutors and/or judges, or increasing the likelihood that persons of other races who will become prosecutors and/or judges have some understanding of African Americans' experience, is narrowly tailored to serve a compelling state interest.²⁴⁵ It is also a solution that nicely balances the legitimate expectations of African Americans for enforcement of positive law to protect their natural rights with the legitimate concern that more draconian measures to contain the anarchic threat of white supremacy will result in harm to other rights if only as the inevitable result of unlimited state power. It is, in the most literal sense, the triumph of law over anarchy. It is the creation of opportunities for legal self-defense by African Americans against the lawlessness of white supremacy. If the courts are open, then all African Americans need is the opportunity, including the skills, to use them.²⁴⁶ Note that this argument does

243. Given the impressive ability of Confederate apologists to dominate the public debate over the history of slavery and secession, *see infra* note 307 and accompanying text, it seems well here to point out that all responsible historians agree: secession and the American Civil War reflected the desire to preserve slavery. *See* Mark Voss-Hubbard, *The Infrapolitics of Slavery?*, 32 *REVIEWS AM. HIST.* 41 (2004) (presenting review of WILLIAM A. LINK, *ROOTS OF SECESSION: SLAVERY AND POLITICS IN ANTEBELLUM VIRGINIA* (UNC Press 2003) containing summary of recent titles on the topic), Roger L. Ransom & Richard Sutch, *Conflicting Visions: The American Civil War as a Revolutionary Event*, 20 *RESEARCH ECON. HIST.* 249 (2001) (reviewing significance of changing economy at the North for precipitating political divergence between the sections).

244. Thomas himself actually spends effectively zero effort discussing the narrow-tailoring prong because his insistence that the University of Michigan Law School has no compelling state interest in considering race in the first place renders the issue of narrow tailoring moot. *See Grutter*, 539 U.S. at 361 (Thomas, J., dissenting).

245. *See* ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 186-89 (Oxford University Press 2007) (describing the enormous power prosecutors wield, including call for systematic studies of racial bias in prosecutorial decisions).

246. *See* MERIDA & FLETCHER, *supra* note 60, at 265-66, noting similarities at certain points between Justice Thurgood Marshall and Justice Clarence Thomas, quoting Justice

not depend on the assumption that all African Americans, or all members of any other race, think or act alike.²⁴⁷ It is, rather, highly individualized²⁴⁸ insofar as it allows those African Americans (and others) who wish to combat white supremacy to do so by serving as officers of a court. As officers of a court, African Americans and others who oppose white supremacy may contribute to the prosecution of white supremacists.

The reverse point is also true. Describing Atlanta in the late nineteenth century, one historian has suggested that statutes requiring racial segregation were virtually redundant because white supremacy was already a deeply ingrained principle among police officers, prosecutors, and judges.²⁴⁹ The result was what we might call a common-law system of controlling African Americans. The problem with the narrow-tailoring requirement here is that it is impossible to determine in advance what number or percentage of African Americans among a judiciary, in a prosecutor's office, or on a police force — what critical mass — is sufficient to minimize the racist use of facially non-racist substantive and procedural laws.²⁵⁰ Certainly the on-going problems of disproportionate minority incarceration generally,²⁵¹ and repeated exonerations of African Americans whom judges have sentenced to death,²⁵² suggest that we have yet to solve the problem. This approach could provide a more robust justification for the University of Michigan Law School's desire to achieve a critical mass of racial and ethnic minorities in its classes, which concept all of the dissenters roundly criticized in *Grutter*.²⁵³

Marshall speaking at Dillard University in 1969 ("I am a man of the law, and in my book, anarchy is anarchy.").

247. See *supra* note 183.

248. See *supra* notes 99-104 and accompanying text.

249. Frith, *supra* note 44, at 21.

250. See DAVIS, *supra* note 245, at 5 ("Although I saw no evidence of intentional discrimination based on race or class, the consideration of class- and race-neutral factors in the prosecutorial process often produced disparate results along class and race lines.").

251. See Derek Neal, *How Families and Schools Shape the Achievement Gap*, in GENERATIONAL CHANGE: CLOSING THE TEST SCORE GAP, *supra* note 127, at 26 (correlating poor educational performance with likelihood of unemployment and imprisonment).

252. Recent titles on the issue of disproportionate minority prosecutions and sentencing include Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006-2007); Michael Millemann & Gary W. Christopher, *Preferring White Lives: The Racial Administration of the Death Penalty in Maryland*, 5 U. MD. L.J. RACE, RELIGION, AND GENDER 1 (2005); Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2003-2004).

253. See *supra* note 193.

Dissenting in *Grutter*, Justices Scalia²⁵⁴ and Kennedy²⁵⁵ express concern for the cultivation of resentment between the races that affirmative action can produce. Justices Rehnquist²⁵⁶ and Thomas²⁵⁷ lecture law school administrators, asserting that other methods exist to achieve the goals that those administrators offer to justify their affirmative action policies. Ben Johnson offers the example of a law school administrator who could see racial resentment in action in his own city, even in his own church,²⁵⁸ who risked personal and professional reputation in order to bring about the racial integration of the university where he taught. Johnson saw affirmative action in law school admissions as part of the solution to the problem. Times change. What worked from 1966 to 1972 may not work in 2007. But Johnson's example is one that the rest of us should take seriously, given his status as a relatively privileged²⁵⁹ white southern man whose direct experience as a law school dean led him to the conclusion that affirmative action was necessary and beneficial.

B. "Diversity" v. Representation

Dissenting in *Grutter*, Justice Thomas was withering in his denunciation of "diversity" in the student population as a compelling state interest that could justify race-based affirmative action by public universities. Writing for the majority, Justice O'Connor characterized the educational benefits of diversity among

254. *Grutter*, 539 U.S. at 348 (Scalia, J., dissenting).

255. *Id.* at 388 (Kennedy, J., dissenting).

256. *Id.* at 379-86 (Rehnquist, J., dissenting).

257. *Id.* at 350 (Thomas, J., dissenting). "One must also consider the Law School's refusal to entertain changes to its current admissions system that might produce the same educational benefits. The Law School adamantly disclaims any race-neutral alternative that would reduce 'academic selectivity,' which would in turn 'require the Law School to become a very different institution, and to sacrifice a core part of its educational mission.' . . . In other words, the Law School seeks to improve marginally the education it offers without sacrificing too much of its exclusivity and elite status." *Id.* at 355. It is worth noting that two Justices who often represent themselves as champions of judicial deference, Thomas and Scalia (*see Grutter*, 539 U.S. at 346 (Scalia, J., dissenting) (expressly joining Thomas's critique of the University of Michigan Law School's desire to remain elite)), suddenly feel quite free to lecture not only university administrators, but the Michigan legislature and, by implication, all of the state's residents. *See id.* at 360 (Thomas, J., dissenting) ("The Law School's decision to be an elite institution does little to advance the welfare of the people of Michigan or any cognizable interest of the State of Michigan."). This sounds suspiciously like a policy decision.

258. *See supra* note 191.

259. Johnson's son, Ben F. Johnson III, explains that his father continued working for the Georgia attorney general's office during his first years as a law professor at Emory because his Emory salary was insufficient to support the family. Interview with Ben F. Johnson III, in Atlanta, Ga. (Mar. 6, 2007).

the student body as compelling and well supported by the respondents.²⁶⁰ Thomas replied to this claim, and the legal implications of it, as follows.

The Law School believes both that the educational benefits of a racially engineered student body are large and that adjusting its overall admissions standards to achieve the same racial mix would require it to sacrifice its elite status. If the Law School is correct that the educational benefits of "diversity" are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law School's reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all.²⁶¹

Several authors agree with Thomas' argument that the alleged educational benefits of student diversity are badly overblown.²⁶²

Ben Johnson wrote to explain Pre-Start before the Supreme Court applied strict scrutiny to affirmative action programs in *Bakke*. But this fact makes his reasoning all the more compelling, especially against the implication in the *Grutter* dissents that the University of Michigan Law School's "critical mass" of diversity rationale was a mere pretext.²⁶³ Johnson cannot have tailored his claims to anticipate, or avoid, litigation under *Bakke*. More importantly, Johnson's rationale for Pre-Start at Emory has direct support in the text of the Constitution: the guarantee that every state shall have a republican form of government.²⁶⁴ A republic, as James Madison explained in Federalist Number Ten, differs from a democracy only

260. *Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.").

261. *Id.* at 356 n.4.

262. Brian N. Lizotte, Note: *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625 (2006); Darnell Weeden, *After Grutter v. Bollinger, Higher Education Must Keep Its Eyes on the Tainted Diversity Prize Legacy*, 19 B.Y.U. J. PUB. L. 161 (2004); Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003). See also Sharon Elizabeth Rush, *Diversity: The Red Herring of Equal Protection*, 6 AM. U.J. GENDER & LAW 43 (1997) (exploring state's use of diversity as rationale for sex segregation in *United States v. Virginia*, 116 S. Ct. 2264 (1996)). But see Matthew S. Lerner, Comment: *When Diversity Leads to Adversity: The Principles of Promoting Diversity in Educational Institutions, Premonitions of the Taxman v. Board of Education Settlement*, 47 BUFF. L. REV. 1035 (1999) (arguing that diversity is as valuable among teachers and administrators as among students).

263. See *supra* note 117-120.

264. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government.").

in that the people choose representatives to make their decisions for them, rather than trying to decide every public issue directly. We should understand the term "representative" broadly here, to include legislators, but also executive-branch officials and judges (at least to the extent that we take seriously the definition of all three types of official in the United States Constitution, which Madison wrote to advocate the ratification of), prosecutors,²⁶⁵ and even such private representatives as attorneys.²⁶⁶

Justice O'Connor at least gestured at this rationale in her *Grutter* opinion.

[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. *Sweatt v. Painter*, 339 U.S. 629, 634, 94 L. Ed. 1114, 70 S. Ct. 848 (1950) (describing law school as a "proving ground for legal learning and practice"). Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. See Brief for Association of American Law Schools as *Amicus Curiae* 5-6. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges. *Id.* at 6.²⁶⁷

That is, not all "representatives," broadly defined, in our culture have law degrees, but they are disproportionately likely to do so.²⁶⁸

265. DAVIS, *supra* note 245.

266. See, e.g., *Sole v. Wyner*, 127 S. Ct. 2188 (2007) (holding plaintiff not entitled to recover attorney's fees under 42 U.S.C. sec. 1988 where judge issued preliminary injunction allowing contested event to occur, but later found for defendant); *Long v. Bonnes*, 455 U.S. 961 (1982) (Rehnquist, J., dissenting from denial of certiorari, discussing fee-shifting as Congressional method of encouraging enforcement of certain statutes through use of private attorneys general); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) (holding fee shifting available only where statute makes it so expressly).

267. *Grutter*, 539 U.S. at 332. What O'Connor carefully failed to note is that, among the Justices of the Court when she wrote, five attended Harvard Law School (Breyer, Ginsburg, Kennedy, Scalia, Souter), one attended Yale Law School (Thomas), and two attended Stanford Law School (O'Connor, Rehnquist). The ninth, Justice Stevens, attended Northwestern. Clearly, for anyone who wishes to serve as a representative at the pinnacle of the American legal system, attending a "highly selective" law school is essential. It is puzzling that Justice Thomas also carefully avoided addressing this point in his disquisition on the absence of a compelling state interest in maintaining an elite law school. *Grutter*, 539 U.S. at 359-61 (Thomas, J., dissenting).

268. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("The interest of States

That O'Connor subordinates this point to the argument on behalf of "diversity" in education, rather than asserting it on its own merits as a justification for race-based affirmative action in law school admissions, is perverse, and an enormous missed opportunity. That the lack of adequate representation, at least in legislatures, has consistently been a key part of the problem for African Americans in the United States is obvious from the various efforts the nation has made to fix it: section 2 of the Fourteenth Amendment;²⁶⁹ the Fifteenth Amendment;²⁷⁰ the Twenty-Fourth Amendment; and²⁷¹ the 1965 Voting Rights Act.²⁷² That we must define "representation" broadly for these purposes is clear from the provisions of the Voting Rights Act giving the Attorney General of the United States a substantial role in enforcing it.²⁷³ Historical

in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"). *But see* MERIDA & FLETCHER, *supra* note 60, at 247 (quoting Justice Thomas speaking at James Madison University in 2001) ("The point that I'd like to stress here is that the court is not a representative body. The court should be the least representative body. . . . That doesn't mean you shouldn't have people from different groups there; I think that's very important. But this is not a representative body. To the extent that it is, then law isn't law. It's not a discipline. It's something that changes based on your pigmentation.").

269. U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."). Note that this amendment modifies, *inter alia*, the original denial of representation to slaves that appears in U.S. CONST. art. I, § 5 (stating the three-fifths compromise).

270. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.").

271. U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax."). *See also* Shaw v. Reno, 509 U.S. 630, 639-41 (1993) (presenting overview of voting rights legislation and its purpose).

272. Pub. L. 89-110, Aug. 6, 1965, 79 Stat. 437, 42 U.S.C. 1971, 1973 et seq., as amended.

273. 42 U.S.C. 1973a, 1973c(a). *See* Branch v. Smith, 538 U.S. 254 (2003) (evaluating role of federal courts in creating legislative districts where state government has failed to secure statutory pre-clearance for changes). *But see* League of United Latin American Citizens v. Perry, 548 U.S. 399, at 629-30 ("Quite apart from the risk of acting without a legislature's expertise, and quite apart from the difficulties a court faces in drawing a map that is fair and rational . . . the obligation placed upon the Federal Judiciary is

experience demonstrates that the executive and judicial branches must sometimes cooperate to ensure that segments of the population do not suffer infringement of their right to representation in the legislative branch.

Historian Hugh Graham notes one reason to justify affirmative action in law school admissions in terms of the right to representation in our Republic. Graham writes, "unlike the issues generated by affirmative action in employment or higher education, which have precipitated sharp disputes in election campaigns and courtrooms, and on talk shows and college campuses, voting rights policy has seemed immune from widespread public distemper."²⁷⁴ The problem with affirmative action is that it looks like a zero-sum game. Petitioners in *DeFunis*, *Bakke*, *Hopwood*, *Smith*, *Gratz*, and *Grutter*²⁷⁵ all saw programs for increasing the admission of racial and ethnic minorities as the cause but for which they would have secured admission themselves.²⁷⁶ Pre-Start necessarily displaced some qualified white students in favor of African Americans. Policy outcomes based on representation can sometimes seem like a zero-sum game, but by definition, representation in our Republic cannot be zero-sum.²⁷⁷ Everyone has a right to it.

Similarly, in many areas of American law we rely on the concept of the private attorney general, reflecting the potential for

unwelcome because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance. That Congress is the federal body explicitly given constitutional power over elections is also a noteworthy statement of preference for the democratic process. As the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress, a lawful, legislatively enacted plan should be preferable to one drawn by the courts.").

274. Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 177 (Bernard Grofman & Chandler Davis, eds. 1992).

275. See *supra*, note 57 for citations to cases.

276. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 36 (Princeton University Press 1998) (explaining why, mathematically, elimination of affirmative action would have minimal effect on the admissions chances of any given white applicant). But see Swain, et al., *supra* note 28, at 149 (noting that the public still disapproves of racial preferences in university admissions). The mathematical logic of Bowen and Bok likely does not apply, at least not with the same force, to law school admissions simply because the numbers are much smaller. See also, Joseph Berger, *The Man Behind the V.*, N.Y. TIMES, April 13, 2003, at sec. 4A, p.23 (presenting an interview with Lee Bollinger, lead defendant in *Grutter* and *Gratz* as President of the University of Michigan, asserting of the undergraduate program that it awarded points for so many different characteristics that singling out race as the cause of any student's rejection is tendentious).

277. But see *Branch*, 538 U.S. at 258 (involving Miss. legislature's failure to redistrict the state after 2000 census resulted in loss of one seat in the House of Representatives).

overlap between private and public representatives, especially for persons who have suffered denial of their civil rights.²⁷⁸ The potential significance of making legal representation available for civil rights challenges is clear from the efforts of some state governments to stop it.²⁷⁹ It is the case neither that only African Americans can effectively represent other African Americans, nor that all African Americans who hold law degrees choose to represent other African Americans. But compelling state interest does not require such precision. The historical evidence clearly demonstrates that African Americans are much more likely than anyone else to take on the tasks of providing effective representation to other African Americans.²⁸⁰

The career of Thurgood Marshall is only the most famous example of a lawyer who started out as a private attorney general of sorts, during his work for the NAACP, and later became a very public defender of civil rights during his tenure as a Justice of the United States Supreme Court.²⁸¹ Narrowly tailoring an affirmative action program to produce the next Thurgood Marshall is impossible. Sander's critique of affirmative action, by contrast, succeeds against this argument for the benefit to African Americans of having more attorneys available to represent them only to the extent that he is willing to argue that the alleged reduction in the number of African-American attorneys that he claims as the result of current policies would actually preclude the training of the next Thurgood Marshall.

One could offer Marshall himself as proof that affirmative action is unnecessary. Certainly no such program existed when he

278. See *supra*, note 247. See also, *Bakke*, 438 U.S. at 281-84 (discussing whether private right of action exists in Title VI, as it does in other titles, of the 1964 Civil Rights Act).

279. See, e.g., *In re Primus*, 436 U.S. 412 (1978) (state's attempt to punish attorney for barratry because she sent a letter offering free legal representation to woman sterilized as condition of receiving medical attention violated first and fourteenth amendments); *NAACP v. Button*, 371 U.S. 415 (1963) (state regulation designed to prohibit offers of legal assistance violated petitioner's first amendment rights).

280. MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (University of North Carolina Press 2005) (1987). See also, Brett Gadsden, "He Said He Wouldn't Help Me Get a Jim Crow Bus": *The Shifting Terms of the Challenge to Segregated Public Education, 1950-1954*, 90 J. AFR. AM. HIST. 9 (2005) (presenting an examination of differing, sometimes conflicting, priorities between potential African-American plaintiffs in civil rights suits and the attorneys who set the agenda for the movement in part by deciding what suits to file). But see, MICHAEL MELTSNER, *THE MAKING OF A CIVIL RIGHTS LAWYER* (University of Virginia Press 2006) (presenting a memoir of a "white civil rights lawyer").

281. TUSHNET, *supra* note 280; JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (Three Rivers Press 1998); MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991* (Oxford University Press 1997).

applied to law schools. But the history of enforcement that followed *Brown v. Board of Education* demonstrates that the big, famous victories set the stage for many smaller, less famous battles.²⁸² Adequate representation for African Americans requires attorneys who will fight those battles. Further, insofar as the point of adequate representation for African Americans is to enable them to enjoy the benefits of American life that others take for granted, they need attorneys who can provide them with estate plans and real estate contracts, adoptions and divorces, and every other type of legal service. Again, this argument does not depend on a one-to-one correlation between African-American attorneys and African-American clients. It depends only on the proposition that African-American attorneys are significantly more likely to have African-American clients.

Or one could return to the example of Marvin Arrington, whose career has included representing clients as an attorney, representation in the legislative branch of Atlanta municipal government, and now service as a county judge.²⁸³ Post hoc, the individualized consideration that O'Connor so prized might also mean that, although the law school should have some basis for predicting that a given student will succeed in law school, it may have little or no way of predicting what "success" will mean for students after they graduate. Paul Peterson, a scholar of education at Harvard, argues for the importance of role models, especially for adolescents.²⁸⁴ He contrasts an earlier period when prominent African Americans included well educated, hard-working persons such as Marshall and Martin Luther King, Jr., with a later period when the most famous African Americans were sports and rap stars as part of his explanation for the declining performance of African-American high school students during the 1990s.²⁸⁵ They did not all participate in Pre-Start, but African-American graduates of Emory

282. See, e.g., *Brown v. Board of Education*, 349 U.S. 294 (1955) (holding federal district courts are proper entities to decide individual remedies reflecting broad principle that racial segregation in public education violates U.S. Constitution). See also, Adam Liptak, *The Same Words, but Differing Views*, NY TIMES, June 29, 2007, at A24. (reporting conflicting opinions among Justices and among observers over the relationship between the recent decision involving the Seattle and Louisville schools and *Brown*).

283. Arrington asserts emphatically that he is not a "civil rights lawyer." His private practice focused on representing corporations. See Nwaku interview, *supra* note 1. He might, however, prove to be exactly the sort of "sympathetically effective" judge whom Patricia Williams sees the occupants of the courthouse hallways as looking for. Williams, *supra* note 182, at 403.

284. Peterson, *supra* note 127, at 16. See also, Wilkins, *supra* note 12.

285. Wilkins, *supra* note 12.

Law School include business leader Felker Ward,²⁸⁶ Georgia Supreme Court Chief Justice Leah Ward Sears,²⁸⁷ Georgia Attorney General Thurbert Baker,²⁸⁸ and Federal District Judge Clarence Cooper,²⁸⁹ in addition to Judge Arrington. Pre-Start is just one indication of Emory Law School's efforts to increase the number of African-American attorneys who, in addition to their professional work, contribute to the larger community by serving as role models.

C. Remediating Past Discrimination

In announcing its decision to seek the demise of the state statute requiring racial segregation as a condition for state tax exemption, Emory administrators asserted that the university had never had a formal policy of selecting students on the basis of race.²⁹⁰ The implication was that the state statute was the only reason for its refusal to admit African Americans. Ironically, this assertion might seem to defeat any claim by Emory that it would use affirmative action to compensate for past discrimination. The Court has recently reiterated that "'proof of racially discriminatory intent or purpose is required' to show a violation of the Equal Protection Clause."²⁹¹

Of course, there is something legalistic,²⁹² not to say disingenuous, about the assertion that Emory never had an official

286. Tuskegee University, Businessman Makes Grand Appearance as Parade Marshal, <http://www.tuskegee.edu/Global/story.asp?S=4086118> (last visited Apr. 12, 2008).

287. Supreme Court of Georgia, Justices Biographies, http://www.gasupreme.us/justices_bios.php (last visited Apr. 12, 2008).

288. Office of Attorney General of Georgia, Thurbert E. Baker, <http://www.state.ga.us/ago/biography.html> (last visited Apr. 12, 2008).

289. Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (click "C", follow "Clarence Cooper" hyperlink) (last visited Apr. 12, 2008).

290. Randolph Thrower, *Report of Special Committee to Review University Policy on Admissions*, May 3, 1961, in box 1, Desegregation Documentation, EUA.

291. *City of Cuyahoga Falls v. Buckeye Community Hope Fdn.*, 538 U.S. 188, 194 (2003) (citing *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977) & *Washington v. Davis*, 426 U.S. 229 (1976)).

292. This claim was actually part of Emory's legal strategy. See *Petition for Declaratory Judgment and Injunction, Emory v. Nash*, (Superior Court, DeKalb County, Georgia, May 1962), Desegregation Documentation. The statute in question granted a tax exemption to all private educational institutions with the proviso that funds at institutions "for white people" could only be used for white people, and vice versa. GA. CONST. Const. art. VII, § 1, ¶ IV; GA. CODE ANN. § 2-5404. Emory's observation that nothing in its founding or other documents identified it as "for white people" was part of the claim that the segregation proviso literally did not apply to Emory because the institution did not meet the proviso's condition. *Petition for Declaratory Judgment and Injunction, supra* at ¶ 9.

policy of selecting students on the basis of race. Its administrators responded more constructively than most to the demand for integration, and their actions in the 1960s reflected a long tradition of raising serious questions about the wisdom of segregation.²⁹³ But Goodrich White was no supporter of integration during his stint as President of Emory. Examining Emory's history of racial segregation only throws more doubt on the legal — not to say legalistic — framework for analyzing discrimination claims since *Washington v. Davis*.²⁹⁴ The intent requirement is as badly misplaced in evaluating discrimination by educational institutions as it is in evaluating discrimination by employers.²⁹⁵

The concern to limit affirmative action programs to entities that have discriminated in the past seems to stem from the Court's desire to cabin such programs in a way that is consistent with the theory of individual responsibility that underlies much of the Court's thinking, and apparently many Americans' thinking as well.²⁹⁶ Powell originally criticized the idea of remedying "societal" discrimination because it threatened to inflict harm on individuals, such as Bakke himself, who bore no particular responsibility for the discrimination.²⁹⁷ O'Connor endorsed this proposition with her summary in *Grutter* of Powell's *Bakke* opinion.²⁹⁸

D. Individualized Consideration

In *Gratz*, Justice Rehnquist makes much of the claim that

293. See, e.g., Andrew Sledd, *The Negro: Another View*, 90 ATLANTIC MONTHLY 65 (1902); Henry Y. Warnock, *Andrew Sledd, Southern Methodists, and the Negro: A Case History*, 31 J. SOUTHERN HIST. 251 (1965). See also, Terry L. Matthews, *The Voice of a Prophet: Andrew Sledd Revisited*, 6 J. SOUTHERN RELIGION 2 (2003). Sledd was a professor of Latin at Emory when he published his *Atlantic Monthly* article accepting white supremacy, but condemning the practice of lynching and generally calling for better treatment of African Americans. The College (as it was then) fired him as a result of public outcry. See also, ATTICUS GREENE HAYGOOD, OUR BROTHER IN BLACK (Phillips & Hunt 1881); Allison O. Adams, *Where "The New South" Was Born*, EMORY MAG., Summer 1998, (explaining Emory President Haygood's use of the term, "The New South" to indicate increased emphasis on economic production and improved race relations before Henry Grady, editor of ATLANTA CONSTITUTION, gained fame for using it), available at http://www.emory.edu/EMORY_MAGAZINE/summer98/enigma.html.

294. *Davis*, 426 U.S. at 229 (holding discriminatory intent necessary to find violation of the equal protection clause of the fourteenth amendment).

295. Krieger, *supra* note 51.

296. See WILLIAM HALTOM AND MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (University of Chicago Press 2004) (presenting an excellent discussion of how popular ideas about responsibility influence perceptions of the alleged "litigation crisis," focusing on tort law).

297. But see Ross, *Innocence and Affirmative Action*, *supra* note 67.

298. *Supra* note 83 and accompanying text.

undergraduates in the Michigan system did not receive individualized consideration because that system automatically added twenty points to the score of any "underrepresented minority."²⁹⁹ Similarly, Justice Roberts emphasized individualized consideration in *Parents Involved in Community Schools v. Seattle School District No. 1*.³⁰⁰ Again, this was the issue that led Justice O'Connor to vote for upholding the law school's program in *Grutter*, but for striking down the undergraduate program in *Gratz*.

Pre-Start again provides an interesting comparison. Pre-Start students took law classes that were as ordinary as the circumstances allowed. Although in some respects the instruction was more individualized than usual, the more important point is that it was the closest possible facsimile of what the students would have to do in order to succeed in law school. This is narrow tailoring in the best sense. Further, Johnson asked the pre-law advisors at the sending institutions to choose the participants. No evaluation could be more individualized. Such a system also allows for the receiving institution to choose which sending institutions to recruit from. Is it racial discrimination for Emory to focus recruitment efforts on Morris Brown or Talladega Colleges? Certainly the existence of HBCUs is the result of segregation. Can recruiting at HBCUs then be an example of remedying past discrimination?

O'Connor's position allows, if it does not require, the inference that individualized consideration increases the legitimacy of race-based affirmative action because it achieves a greater correspondence between the goal of the program and the history of the individual. If the institution is really trying to achieve diversity or give opportunities to persons who otherwise would not have them, then admissions officials need to look carefully at individual applications. Pre-Start demonstrates that the most individualized consideration is consistent with a policy of recruiting only African Americans, at least so long as historically black colleges exist to recruit from and remain overwhelmingly African American in their student bodies.

E. Harm to African-American Students

In an important sense, none of these arguments addresses Sander's main claim: that affirmative action does more harm than good to its supposed beneficiaries. We are in the process of asking

299. *Gratz*, 538 U.S. at 271-73.

300. *Parents Involved*, 127 S. Ct. at 2763 ("The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group.").

Emory Law School's African-American graduates if they agree.³⁰¹ In the meantime, one of the great virtues of historical research for policy debates is that it can allow us to discern how much past policies achieved their goals, and how much the terms of the debate have changed, or not changed, since. In the present instance, it is striking, and disheartening, to see the extent to which Sander's argument echoes the arguments of fifty years ago about racial integration. I should note here emphatically that this is not a claim about Sander's personal attitudes toward the issue. The point is not to suggest that Sander harbors segregationist impulses. The point is a more structural one about how particular types of argument continue to assert themselves even as the specific terms of their articulation change with the times.

One of Sander's key claims is that affirmative action harms African-American law students because of "mismatch."³⁰² According to this theory, by gaining admission to significantly better law schools than they otherwise would because of boosts to their admissions scores, African Americans find themselves unable to keep up with the other, better qualified students in their classes.³⁰³ The result is that they perform poorly as law students, thereby harming their prospects on the bar exam.³⁰⁴

Compare this theory to historian Melissa Kean's account of what Vanderbilt University Chancellor Harvie Branscomb thought about segregation.

Branscomb specifically rejected the mixing of black and white children in the public schools on the ground that most blacks had capabilities so much lower than even poor whites that it simply made no sense. 'Opportunities,' he wrote, 'must be given in some sort of relationship to capacities to use them and the mixing of populations must be on some general levels of approximately equal and similar social backgrounds and mores.'³⁰⁵

The implication of Branscomb's statement seems to be that class mobility, to say nothing of racial integration, or even the admission of women, is essentially impossible, since one must only educate like with like.

301. This article is only part of a larger research project that includes interviewing the first generation of African-American graduates of Emory Law School. As part of the interviews, I summarize Sander's argument and ask the interviewees what they think about it.

302. Sander, *supra* note 12, at 450-54.

303. *Id.*

304. *Id.*

305. Kean, *supra* note 22, at 20.

More importantly, the congruence between Branscomb's position on segregation and the mismatch theory of affirmative action is unmistakable and horrifying. Again, the point is not to suggest that anyone who opposes affirmative action thereby also supports segregation. The point is that any discussion of affirmative action must proceed with the history of segregation, and race relations generally, well in mind in order to avoid perpetuating the injustice of the past. According to Branscomb, "We have had two patterns of dealing with Negroes in the South. The first was the slavery pattern, the second the one which grew up under the unrealistic idealism and sheer cynicism of the carpetbagger governments."³⁰⁶ While the victors proverbially write most histories, in the American South, the losers' story of the past has prevailed. With this statement, Branscomb accepted uncritically the widespread, wildly inaccurate but highly influential account of Reconstruction according to which northerners who simply did not understand the former slaves tried to rush political and social change in ways that did more harm than good.³⁰⁷

Branscomb's reference to carpetbagger governments resonates with the various conservative denunciations, especially those by Justices Thomas and Scalia, of efforts to remedy the ongoing effects of slavery and segregation. No modern Supreme Court justice uses the term "carpetbagger," not least because the issue is no longer so geographically defined. But the logic is essentially the same. According to this logic, overly idealistic efforts to push African Americans ahead before they are ready do disservice to the African Americans themselves because they lack the necessary skills to

306. *Id.* at 21.

307. See, e.g., W. FITZHUGH BRUNDAGE, *THE SOUTHERN PAST: A CLASH OF RACE AND MEMORY* (Harvard University Press 2005) (examining content of and methods for producing competing Black and White versions of southern history, and therefore of southern identity); JAMES C. COBB, *AWAY DOWN SOUTH: A HISTORY OF SOUTHERN IDENTITY* (Oxford University Press 2005). See also, ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* (Knopf 2005) (presenting a recent synthesis by current leading scholar of Reconstruction); ULRICH BONNELL PHILLIPS: *A SOUTHERN HISTORIAN AND HIS CRITICS* (John David Smith and John C. Inscoe, eds., 1990) (presenting a study of historian whose work in early twentieth century helped cement white-supremacist view of Reconstruction); Peter Kolchin, *Race, Slavery, and History*, 18 *REVIEWS AM. HIST.* 466, 471 (1990) (presenting an overview of developments in history of slavery and African Americans) ("Although most historians have, since the 1950s, rejected the once-dominant racist interpretations of slavery and Reconstruction, their views have only very partially breached the walls of academe to penetrate society at large. Particularly with respect to Reconstruction, students still routinely bring to college belief in a watered-down version of almost all the old shibboleths of the 'tragic era' — evidently absorbed practically by osmosis at home and school — from the humiliation of the already suffering South by hateful carpetbaggers to the restoration of 'home rule.'").

succeed, and they invite white backlash. This was the position that Goodrich White, President of Emory from 1942 to 1957, also took in arguing for increased education for African Americans, but only in segregated institutions.³⁰⁸

It is interesting and instructive to note the apparent parallel between the attitudes of white southerners such as Branscomb and White, on one hand, and modern law school administrators on the other. Thomas begins his *Grutter* dissent with a quotation from Frederick Douglass the primary point of which is that African Americans would be much better off if white people just left them alone, instead of trying to "help."³⁰⁹ Sander accuses law school administrators of hiding their admission practices, perhaps even engaging in deception, in order to reconcile their devotion to affirmative action with the rules of *Bakke*.³¹⁰ On this view, efforts by white university officials to direct the educational uplift of African Americans are no more acceptable today than they were in the middle of the twentieth century.

One obvious and important difference is that African Americans play a much larger role in this debate in the early twenty-first century than they did in the mid twentieth century, not least because they have much greater access to the institutions in question, and concomitantly occupy many more prominent positions from which to address the issue.³¹¹ Not all African Americans support affirmative action.³¹² Thomas is not alone in denouncing the practice. But, as Orlando Patterson asserted in reviewing a biography of Thomas, "he is arguably one of the most

308. Kean, *supra* note 22, at 37-38.

309. *Grutter*, 539 U.S. at 349-50 (Thomas, J., dissenting). *But see* MERIDA & FLETCHER, *supra* note 60, at 278 (giving the parts of the quotation that Thomas omitted, suggesting that those parts significantly change the meaning from Thomas's version).

310. Sander, *supra* note 12, at 372 ("I try to make clear how *Bakke*, while legitimating affirmative action, created distinctions that produced a code of silence among law schools about their racial preference programs, and deterred meaningful research."). *See also*, Gratz, 539 U.S. at 275 n.22 (Rehnquist responding to Ginsburg's dissenting observation, *id.* at 304, that universities will continue to find ways to achieve diversity in their student bodies regardless of what the Supreme Court decides).

311. *But see*, LANI GUINIER, LIFT EVERY VOICE AND SING: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE 18 (Simon & Schuster 1998) ("These are people whose voices are too often missing from public debate about issues on which they are expert. Their voices are missing not because they don't want to speak but because they don't get a hearing.") I have no desire to dispute Guinier's observation that many potential experts fail to get a hearing in contemporary legal and political debates because of their race and/or class. My point is more that a large and growing body of scholarship now strives to remind us of this problem more frequently (and more effectively?) than at any time in the history of the Republic.

312. *See, e.g.*, Ward Connerly, *U.C. Must End Affirmative Action*, S.F. CHRONICLE, May 3, 1995, reprinted in Crosby & VanDeVeer, *supra* note 28, at 29-31.

viscerally despised people in black America. It is incontestable that he has benefited from affirmative action at critical moments in his life, yet he denounces the policy and has persuaded himself that it played little part in his success.”³¹³ The great virtue of statistical analysis, like any form of abstraction, is that it can allow us to see patterns that we would otherwise miss. It is by no means impossible that Thomas has been right about affirmative action all along, and that Sander’s study only provides the empirical proof that we had hitherto lacked. It is not racist to suggest that African Americans’ and others’ widespread support for affirmative action has been misplaced for want of sufficient data.

But historical research can play a similar role, and it is not difficult to compile historical evidence for the point that scholars in the United States have a long tradition of using “objective” research methods in the service of racism, whether deliberately or not. The significance of statistical data depends on one’s frame of reference, and the historical data suggests that Justice Thomas, Sander, and others continue to interpret their data in light of the popular but erroneous tale of foolish carpetbaggers cynically claiming to help African Americans but actually doing harm.

Judson Ward was a Vice President of Emory during the late 1950s and 1960s.³¹⁴ One of his responsibilities in this period was to coordinate planning for Emory’s response should the Georgia legislature follow through on its threat to close down all public schools in the state rather than comply with *Brown v. Board of Education*.³¹⁵ During that time, Ward received a flyer, addressed “[t]o the Emory faculty,” publicizing the views of the Federation for Constitutional Government.³¹⁶ It contained racist screed that was quite typical for the day. The argument was that “racial amalgamation” would “end in the destruction of the Caucasian civilization in this country” and “of this Republic as a sovereign nation.”³¹⁷ Two of the four pages in this flyer consist of references to seventeen studies that purportedly demonstrated the intellectual inferiority of African Americans.³¹⁸

313. Orlando Patterson, *Thomas Agonistes*, review of KEVIN MERIDA & MICHAEL A. FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* (2007), N.Y. TIMES, June 17, 2007, available at http://www.nytimes.com/2007/06/17/books/review/Patterson-html?_r=1&st=cse&sq=%22Book+REview%22+%22Thomas+Agonistes%22&scp=1&oref=slogin.

314. Biographical note, Ward papers, EUA.

315. Interview with Judson C. Ward, former Vice President of Emory University, Atlanta, GA (Dec. 12, 2006).

316. *The Effect of Negro Mental Inferiority and Racial Integration Upon Caucasian Civilization*, undated flyer, Ward files, EUA.

317. *Id.*

318. *Id.*

Again, it is not necessary to characterize current critics of affirmative action as racists in order to appreciate the similarity between the arguments in favor of segregation in the 1950s and 1960s and the arguments against affirmative action today. We should not allow cheap accusations of racism to hinder full and frank debate. Neither, however, should we allow excess confidence that we have transcended our racist past to blind us to the striking congruence between the logic of then and the logic of now.

Social scientists often write as if their data provides a degree of certainty that would be impossible otherwise. Sander does so. John P. Jackson, Jr., has demonstrated vividly the problem with claims of scientific objectivity in the context of debates about law and public policy. He has written two books, one about the social scientists who supported *Brown v. Board of Education*,³¹⁹ and one about the social scientists who opposed it.³²⁰ The point is not that social scientific research contributes nothing useful to law and policy debates. The point is that we should be wary of the hope that social scientific data — or anything else — will serve as a *deus ex machina* that can resolve difficult issues for us.

Again, Ben Johnson provides a helpful example. He began teaching at Emory while Goodrich C. White was still President of the University, and while Harvie Branscomb was still Chancellor of Vanderbilt. It is ultimately impossible to explain fully why Johnson rejected White's and Branscomb's understanding of racial integration in education, but he did so. The path from 1962 to 2007 was decidedly bumpy in many ways, and a number of authors have asserted that we have yet to accomplish enough by way of ensuring equality for African Americans,³²¹ but the available evidence does not demonstrate that Ben Johnson was wrong to take the risk of offering African-American students the possibility of legal education at a historically white university, or that the students were wrong to pursue the option.

319. JOHN P. JACKSON, JR., *SOCIAL SCIENTISTS FOR SOCIAL JUSTICE: MAKING THE CASE AGAINST SEGREGATION* (NYU Press 2001).

320. JOHN P. JACKSON, JR., *SCIENCE FOR SEGREGATION: RACE, LAW, AND THE CASE AGAINST BROWN V. BOARD OF EDUCATION* (NYU Press 2005).

321. See, e.g., *Gratz*, 539 U.S. 304 (Ginsburg, J., dissenting) ("The stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital.") (citation omitted).

V. The LSAT and Legal Education

One of the key issues in the debate over race-based affirmative action in American law schools is the use of the Law School Admission Test ("LSAT") as a major factor in choosing which students to admit. According to Justice Thomas:

[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admissions Test (LSAT). Nevertheless, law schools continue to use the test and then attempt to 'correct' for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court.³²²

This statement cuts both ways with respect to Pre-Start. On the one hand, Johnson was clearly guilty — he touted the rising LSAT scores of the Emory Law School student body as a whole to indicate the rising quality of the school.³²³

On the other hand, instead of simply accepting lower LSAT scores (or, as Sander claims, applying a point boost to all racial minority applicants),³²⁴ Johnson decided to eliminate the LSAT as a factor in the admission of African Americans altogether. Given Thomas' implication that law school administrators are almost entirely cynical in their use of race-based affirmative action, Johnson's historical example becomes all the more relevant. With Pre-Start, Johnson demonstrated why law schools rely so heavily on the LSAT: Any reasonable substitute is hugely expensive.³²⁵ Johnson found external grant funds for Pre-Start, and the program ended when the funds ran out.³²⁶

What Thomas's *Grutter* dissent completely fails to take into account is the problem of institutional resource allocation. He is

322. *Grutter*, 539 U.S. at 369 (Thomas, J., dissenting). See also, Brown-Nagin, *supra* note 4.

323. See, e.g., *Law School Annual Report to the President, 1963-64*, at 11-12, EUA; *Law School Annual Report to the President, 1965-66*, at 20-21, EUA.

324. Sander, *supra* note 12, at 399-405.

325. In 1992, Congress appropriated \$7 million to support the Council for Legal Educational Opportunity. This is a national program, and it includes components that Pre-Start did not, but it indicates what a comparable program costs. See Conference Report, Higher Education Amendments of 1992, H.R. REP. NO. 102-630, at 332 (1992).

326. Sibley letter, *supra* note 142.

simply wrong to assert that the University of Michigan Law School could achieve the racial diversity it desires among its student body by lowering admissions standards.³²⁷ Its administrators, if they are rational, planned the current facilities with a certain size of student population in mind. The lowering of admissions standards that Thomas recommends would presumably overwhelm those facilities with a much larger population.³²⁸ He also fails to appreciate the extent to which managing a large institution often involves striving to balance competing demands. Michigan Law School administrators wish to maintain the academic quality of their institution, and they see admitting a critical mass of racial and ethnic minority students as part of achieving that goal. Here Thomas inadvertently demonstrates the favorite point of judicial conservatives: judges often lack the specific expertise necessary to evaluate policy decisions.³²⁹

A. The LSAT is Bad for African Americans

Thomas may be exactly right, however, in suggesting that heavy reliance on the LSAT in law school admissions is bad for African Americans. John Nussbaumer studied a set of law schools in California that were undergoing intensive accreditation review by the American Bar Association.³³⁰ He found that such schools typically increased the twenty-fifth percentile LSAT scores of their students during this process, and typically decreased significantly the number of African-American students they enrolled.³³¹ This is not a claim about intent. This is a claim about how otherwise rational decisions affect African Americans in a society that is far from eliminating the lingering effects of slavery and segregation.

Nussbaumer's claim is similar to that of Jay Rosner, Executive Director of the Princeton Review Foundation.³³² He asserts that the Educational Testing Service ("ETS"), which creates the Scholastic

327. *Grutter*, 539 U.S. at 350, 355 (Thomas, J., dissenting). See also, *id.* at 346 (Scalia joining in Thomas' dissent).

328. *Grutter*, 539 U.S. at 312-13 ("[The Law School] receives more than 3,500 applications each year for a class of around 350 students.").

329. See, e.g., *LULAC*, 126 S. Ct. 2594. See also, *Lawrence v. Texas*, 539 U.S. 558, 605 (Thomas, J., dissenting) ("I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to 'decide cases 'agreeably to the Constitution and laws of the United States.'") (citation omitted).

330. Nussbaumer, *supra* note 49.

331. *Id.* at 993.

332. Jeffrey R. Young, *Researchers Charge Racial Bias on the SAT*, CHRON. HIGHER EDUC., Oct. 10, 2003, at A34.

Aptitude Test ("SAT"), tracks performance by race and ethnicity on potential test questions during an evaluation phase.³³³ In doing so, they find that whites consistently do better on some questions, while African Americans and Hispanics consistently do better on others.³³⁴ In choosing which questions to include in actual tests, however, ETS relies solely on the percentage of test takers who get the answer right, without considering race or ethnicity.³³⁵ The problem is that, as a simple function of the numbers, the statistical evaluation of questions results in systematically discarding questions that racial and ethnic minority test-takers do well on while retaining questions that white test-takers do well on.³³⁶

This point illustrates the larger problem with Sander's claim: he carefully avoids any consideration of the larger literature, not just on the LSAT, but on standardized tests generally. Writing in 1993, psychologist Janet E. Helms noted that the historical phenomenon of African-American students attending anything other than historically black institutions in large numbers was so recent that comparative research on educational performance was still "exploratory."³³⁷ The situation must have changed somewhat after ten to twelve years have passed, but the level of certainty that Sander expresses on the topic still seems misplaced.

Sander asserts that the combination of undergraduate GPA ("UGPA") and LSAT explains 35 percent of an individual student's outcome on a bar exam.³³⁸ He explains that, while this number itself may seem unimpressive, it is far larger than any of the other variables he has studied.³³⁹ That is, UGPA combined with LSAT correlates significantly higher with bar passage rates than any other factors.³⁴⁰ An important premise underlying all of Sander's argument is that we live in an imperfect world where we have to make do with what we have, and the combination of UGPA and LSAT score, whatever its flaws, is better than any other option for choosing whom to admit to law schools.

Christopher Jencks and Meredith Phillips demonstrate the flaw in Sander's reasoning with respect to the LSAT in the introduction

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. Janet E. Helms, *Black or White Colleges: Which Path Leads to Academic Survival?*, 38 CONTEMPORARY PSYCHOLOGY: APA REVIEW OF BOOKS 510 (1993) (presenting review of WALTER R. ALLEN, ET AL., *COLLEGE IN BLACK AND WHITE: AFRICAN AMERICAN STUDENTS IN PREDOMINANTLY WHITE AND HISTORICALLY BLACK PUBLIC UNIVERSITIES* (1991)).

338. Sander, *supra* note 12, at 421.

339. *Id.*

340. *Id.*

to *The Black-White Test Score Gap*.³⁴¹ They note that African Americans' actual job performance tends to vary from that of whites by about two-fifths of a standard deviation, which is significantly less than the racial variation in performance on employment tests.³⁴² The reason for the difference between the racial variation in test scores and in actual job performance is that "test scores explain only about 10 to 20 percent of the variation in job performance."³⁴³ They then illustrate the dramatic impact that can result from choices about how to select employees.

Imagine a company that has 600 applicants for 100 openings. Half the applicants are black and half are white. If the firm hires all applicants as temporary workers and retains those who perform best on the job, and if the performance gap between blacks and whites averages 0.4 standard deviations, about 36 blacks will get permanent jobs. If the firm selects the 100 applicants with the highest scores, about 13 blacks will get permanent jobs.³⁴⁴

Manifestly, Pre-Start did not admit every African American who might want to go to Emory Law School.

But Pre-Start did do what Jencks and Phillips here describe in a broader sense: it eliminated the test that administrators knew African Americans fared poorly on in favor of "temporary employment" to see how well African-American prospects fared in actual law school classes, or a close facsimile of actual law school classes. By Sander's own account, if UGPA and LSAT explain 35 percent of law students' bar exam performance, that leaves 65

341. Jencks & Phillips, *supra* note 16, at 14-15.

342. *Id.*

343. *Id.* at 15.

344. *Id.* See also, Daniel Koresh, *Using Multiple Measures to Address Perverse Incentives and Score Inflation*, 22 EDUC. MEASUREMENT 18, 19 (2003) ("Unless the cut score is set extremely low or high, even highly reliable tests will result in considerable decision inconsistency. Even a test with a reliability of .9 will result in inconsistent decisions for 12 percent or more of students if the cut score is placed so as to pass anywhere between 30 percent and 70 percent of test takers."). This is a different point, but equally important—regardless of how many persons of a particular type gain admission using a given test, a different test might lead to the admission of the same number of persons, but not the same individuals. It would seem that law schools avoid this question insofar as they only use one test, but the variation that Koresh identifies among tests should make us wary of accepting uncritically any claim that the LSAT well measures the aptitude that law students need to have if only because we have nothing to compare the LSAT to. See Daniel M. Koretz, *Limitations in the Use of Achievement Tests as Measures of Educators' Productivity*, 37 J. HUMAN RESOURCES 752, 756 (2002) (tests that correlate 0.8, with cut-score set at mean for both tests, would still produce difference of half a standard deviation or more between scores on different tests by 40% of students). See also, William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975 (2004).

percent unexplained. Granting that some, perhaps much, of that 65 percent must be factors that law schools will never have much ability to measure or to influence, still it seems obvious that law school faculty and administrators (indeed, all faculty and administrators) would want to know as much as they can about the factors that conduce to success among their students in order to take whatever reasonable steps they can to increase that success. Pre-Start was a flawed experiment, not least because of the small number of individuals who participated, but it is certainly not devoid of probative value for this purpose.

What this point illustrates is the extent to which the problem is one of disparate impact³⁴⁵ — that otherwise rational, non-prejudicial, facially non-racial practices continue to have a disparate impact on racial and ethnic minorities, especially Hispanics and African Americans. To insist in the face of such evidence that legislators and judges cannot distinguish benign from invidious uses of racial classifications seems itself to reflect a purely aesthetic position³⁴⁶ — the Constitution as ideal, the keepers of which must prevent it from becoming sullied by association with real-world policy solutions.

B. The Role of the Professor in Law School

But there is a larger question here as well: what do law professors believe themselves to accomplish with their teaching, and how well do their methods serve their ends?³⁴⁷ One key, largely unexamined, problem with Sander's analysis is that his is an entirely closed system. He offers a "systemic" analysis in the sense of explaining how no individual law school can easily break from the

345. See *Azel P. Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005) (holding disparate-impact claims available under the Age Discrimination in Employment Act ("ADEA") just as they are under Title VII). The *Azel Smith* Court expressly couched the issue as whether the reasoning of the original disparate impact case, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), applied to age discrimination under the ADEA. 544 U.S. at 230. But see Michael Boucai, *Caught in a Web of Ignorances: How Black Americans are Denied Equal Protection of the Laws*, 18 NAT'L BLACK L.J. 239, 249 (2004) (discussing limitations *Washington v. Davis* imposes on disparate impact doctrine in terms of willful ignorance about racism).

346. *Grutter*, 539 U.S. at 371 (Thomas, J., dissenting).

347. See, e.g., WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 76 (Jossey-Bass 2007) ("Taken together with the LSSSE data, the findings reported in *After the JD* provide indirect support for our belief — a central contention of this book — that legal education could be significantly improved."). Note that the *After the JD* study is also an important source for Sander, who chooses to interpret it without considering its implications for the quality of teaching in law schools. Sander, *supra* note 12, at 456.

pack by abjuring race-based affirmative action.³⁴⁸ His account is entirely un-systemic, however, insofar as the only aspect of it that he seriously examines is the practice of race-based affirmative action in admissions. One could easily infer from Sander's article that no significant issues exist with respect to other aspects of legal education in the United States.

But even if he is correct to claim that the combination of UGPA and LSAT score is an accurate predictor of law school performance,³⁴⁹ that only begs the question: what does a student demonstrate when she, or, more likely, he, performs well in law school? Given data such as Lani Guinier's showing that women consistently underperform as law students relative to their admissions credentials,³⁵⁰ what reason do we have to doubt that a significant part of the problem for African-American law students, male or female, is the failure of their professors to think and act carefully toward the goal of ensuring that they use teaching techniques that will conduce to the success of those students?

Again, this is a structuralist point, meaning that what law professors intend is only part of the issue, although law professors have more control over this situation than most small groups have over important social issues. Sander takes law professors' teaching techniques for granted,³⁵¹ and he takes various steps to try to insulate his analysis from obvious questions about the impact teaching techniques might have on the phenomena he claims to describe.³⁵² But the design of the law school classes that Sander takes as ordinary, in which the institution requires professors to

348. Sander, *supra* note 12, at 369.

349. *Id.* at 421.

350. *Id.* at 424 ("A number of careful studies, stretching back into the 1970s, have demonstrated that average black performance in the first year of law school does not exceed levels predicted by academic indicators. If anything, blacks tend to underperform in law school relative to their numbers, a trend that holds true for other graduate programs and undergraduate colleges."). See also, Johnson & Onwuachi-Willig, *supra* note 12.

351. Sander, *supra* note 12, at 432.

352. *Id.* at 424 ("While I would not completely discount the influence of personal biases among professors, I believe that in the generally progressive world of law schools the net effect of bias is unlikely to be a net disadvantage for blacks."). But see Krieger, *supra* note 51. Krieger uses empirical evidence from cognitive psychology to demonstrate that humans are capable of significant discrimination based on cognition, rather than motivation. *Id.* at 1164. One of the chief virtues she asserts for her approach is that it allows for more productive dialog between persons who claim discrimination and the persons who allegedly engaged in discrimination, not least because it offers an explanation for discriminatory conduct that does not require the attribution of malice to the persons who allegedly discriminated. *Id.* at 1163, 1165, 1213. Note also the studies Krieger reports that support Michigan Law's "critical mass" claim. *Id.* at 1193.

achieve a predetermined curve in assigning final grades,³⁵³ virtually assures that professors will rarely invest much energy in thinking about ways to improve the learning of the students at the left tail of the curve. One could point out that this creates a perverse incentive for affirmative action: a student population that will reliably occupy the left tail, pushing most of their peers upward on the curve.³⁵⁴

But one could equally ask if the purpose of classroom instruction in law schools is to help students learn, or to establish a quick-reference guide for potential employers. Just as abandoning the LSAT for a Pre-Start or similar program might be prohibitive for law schools, so finding some other way of evaluating job applicants might prove prohibitive for law firms. At the moment, anyway, most firms seem happy enough with the current system of ranking law students.

Conclusion

The continuing statistical underperformance on standardized tests and in university classes by African Americans that Sander and others have described could indicate some deficiency on the part of African Americans. It could as easily — indeed, given the history of slavery and segregation, it could much more plausibly — indicate some deficiency on the part of the testing and education systems. Or, it could indicate a form of on-going success by African Americans. In order to survive slavery and segregation, African Americans must have developed cultural forms that would allow them simultaneously to understand white people and to conceal important elements of their thinking from white people.³⁵⁵ Perhaps, only two generations after the end of legal segregation, the cultural divide continues to operate sufficiently to undermine African Americans' aggregate academic performance in predominantly white institutions.³⁵⁶

353. Sander, *supra* note 12, at 432.

354. Sander describes this as an outcome, if not an incentive. *Id.* at 481.

355. See PETER J. PARISH, *SLAVERY: HISTORY AND HISTORIANS* (Westview Press 1989) (presenting an overview of historians' changing understandings of how slaves and their descendants adapted to slavery).

356. See THE BLACK-WHITE TEST SCORE GAP, *supra* note 16, at 23 ("Upwardly mobile parents often raise their children the way they themselves were raised. Phillips and her colleagues find that racial differences in parenting practices are partly traceable to the fact that even when black and white parents have the same test scores, educational attainment, income, wealth, and number of children, black parents are likely to have grown up in less advantaged households. Phillips and her colleagues also find that this can lower black children's test scores. In other words, it can take more than one generation for successful families to adopt the 'middle-class' parenting practices that

Justice Thomas apparently believes that, whatever description of the problem one chooses, given the end of legal segregation, the only reasonable solution is to leave African Americans to compete on formally equal terms with everyone else and let them catch up gradually. Sander seems to provide specific evidence for Thomas' general argument in his *Grutter* dissent: white people's effort to make up for the harms of slavery and segregation through affirmative action do more harm than good. Sander's solution parallels Thomas's solution just as their critiques parallel: if affirmative action is the problem, then all we need to do is get rid of it.

Perhaps the most important limitation in Sander's statistical analysis is that it fails to capture the entirety of what affirmative action tries to accomplish and the fullness of its potential effects. The historical example of Pre-Start may indicate a significant inadequacy in modern affirmative action programs, but if it does, then it also indicates what such programs could become with the right motivation and creativity. Johnson saw that, as the site of the worst discrimination against African Americans, and the home to the largest population of African Americans, the South has a particular responsibility to remedy past wrongs, and that affirmative action in legal education at southern universities is a logical and, in all likelihood, highly effective means to achieve that remedy. The only real question is the date for the sunset.

In his *Grutter* dissent, Justice Thomas suggests that the University of Michigan Law School could achieve the racial mix it wants among its student population simply by lowering admission standards to the point at which a suitable percentage of racial and ethnic minority students would qualify for admission without affirmative action. Among the various problems with this argument is that it fails to appreciate the extent to which managing a law school, like managing any institution, is often a matter of balancing competing priorities. Perhaps the most important lesson from Pre-Start is the example of a law school dean who aspired to improve dramatically the stature of his law school, and saw that improving the credentials of the school's students was an essential part of that

seem most likely to increase children's cognitive skills"). "Family life is known to play a more important role in explaining a child's educational achievement than any school-related factors. Analyses have repeatedly found that mother's education, father's education, the number of siblings in the family (fewer is better), family income, family health care, the number of books in the home, and other, less easily measured characteristics (such as parental relationships with the child) together have a major impact on student achievement. Of all these factors, the educational attainment of the mother seems to be the single most important, because it so directly affects the care the child receives at home." Peterson, *supra* note 127, at 10.

goal, but who at the same time also instituted an affirmative action program that had the effect of admitting students with credentials that were well below the school's usual norms. This decision must have been either a reflection of Johnson's belief that universities meet their intellectual obligations only insofar as they also meet certain moral obligations, or that race-based affirmative action is consistent with increasing intellectual rigor, or both.

Justices Rehnquist and Kennedy, and Professor Sander, attribute duplicity to law school administrators in their use of affirmative action. Justices Thomas and Scalia attribute cynicism. Ben Johnson was neither duplicitous nor cynical. Even if we accept Sander's proposition that *Bakke* had the effect of leading law schools to continue using illegal methods of affirmative action, but to conceal that fact, such action was impossible for Johnson. Pre-Start ended well before the *Bakke* decision.

Thomas and Scalia assert that we cannot distinguish benign from invidious uses of racial classifications. They joined Rehnquist and Kennedy in asserting that the *Grutter* majority's scrutiny of Michigan Law School's affirmative action program was strict only in name, not in fact. This article effectively performs strict scrutiny post hoc on Pre-Start. Anyone who opposes affirmative action in principle will likely find the story of Pre-Start irrelevant. For anyone who is interested in using empirical evidence to evaluate the issue, however, Pre-Start demonstrates that law school administrators and faculty are capable of making good-faith use of racial classifications as part of the goal of correcting for the nation's sorry history of racial discrimination.