

BLACK LAW STUDENT ATTRITION IN THE AGE OF AFFIRMATIVE ACTION: WHY AMERICA'S CURRENT DIVERSITY FRAMEWORK IS FAILING

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INTRODUCTION

Black law students encounter unique obstacles that leave them with some of the highest non-transfer attrition rates among all groups. Theories have emerged alleging that Black law students are simply ill-suited for the educational environments they are accepted into. However, these theories fail to acknowledge the added pressures that accompany being a Black law student. The systems of racial discrimination present today, created in slavery and written into the laws Americans live by, have long been present in America's educational history. These systems create atmospheres where Black law students struggle to integrate. Without more, Affirmative Action as it stands is ill-equipped to fix the existing systems. As a result, the racially discriminatory effects Affirmative Action programs are trying to eradicate are cited as justifications for removing "unnecessary" Affirmative Action policies.

Indeed, when more than one out of every ten Black, first-year, law students drops out,¹ the solution is not to end Affirmative Action; when 9% of the first-year population is Black,² and 15.5% of all first-year attrition is by Black students,³ the solution is not to send Black law students to substandard schools; and when the attrition rate for White students is less than half of the attrition rate for Black students,⁴ the solution is not to "do nothing" with them.⁵

The implementation of Affirmative Action is not the reason why attrition rates are so high, but rather, it is because of the lack of continued support to bolster the program. On its own, Affirmative Action cannot cure the isolation of a Black law student; it cannot speak up for Black law students who fall victim to implicit

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1. Kylie Thomas & Tiffane Cochran, *ABA Data Reveals Minority Students Are Disproportionately Represented in Attrition Figures*, ACCESSLEX (Sep.18, 2018), <https://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting).

biases or overt acts of discrimination; it cannot fix racially skewed LSAT questions⁶ or U.S. News rankings-driven school administrator tendencies⁷. A plan that truly desires to reduce the racial divide in American law schools requires a collaborative effort from all parties involved, starting with open discussion.

This article begins this discussion by outlining the history behind the creation and implementation of Affirmative Action in the school setting, followed by a detailed look into the statistical discrepancies that highlight the issues. Finally, a discussion of the extracurricular pressures on law students will inform the conclusion that the current diversity framework is tailored to fail and is directly responsible for the high attrition rates observed among Black law students.

I. HISTORY OF SEGREGATION AND AFFIRMATIVE ACTION IN THE UNITED STATES

A. *Separate but Equal*

The history of racial inequality in America dates back to America's very first day. It is impossible to explain the dynamics of modern racial inequality without mentioning the roots of the struggles; struggles that left the Blacks in America beaten-down and demoralized. This history provides context surrounding the viewpoints espoused currently in American politics and public policy. In the interest of efficiency, this paper will provide a brief synopsis.

When the Declaration was signed in 1776, Blacks were anything but free. Slavery was an important issue and its approval within the Constitution was vital to draw southern support. Relevant constitutional provisions include: Article I, Section 2, which counts slaves as three-fifths of a person⁸; Article I, Section 9, which expressly allowed slave importation until 1808⁹; and Article IV, Section 2 which contains the Fugitive Slave Clause.¹⁰ The Fugitive Slave Act of 1793 further cemented the idea that Blacks were property by mandating judicial support.¹¹ *Prigg v. Pennsylvania* (1842)¹² and *State v. Post* (1845)¹³, decided by the Supreme Court and the New Jersey Supreme Court, respectively, both rejected state attempts to soften or abolish slavery.

The *Dred Scott v. Sandford* decision of 1857 ended the debate as to the legal rights of Blacks in America: "[I]t is too clear for dispute, that the enslaved African race were not intended to be included and formed no part of the people who framed and adopted this declaration. . . ."¹⁴ This holding was eventually overruled at the conclusion of the Civil War with the ratification of the Thirteenth Amendment in

6. Harvey Gilmore, *The SAT, LSAT, and Discrimination: Professor Gilmore Again Responds to Professor Subotnik*, 34 L. & INEQ. 153, 153 & 170-71 (2016).

7. *Id.*

8. U.S. CONST. art. I, § 2, cl. 3.

9. *Id.* art. I, § 9, cl. 1.

10. *Id.* art. IV, § 2, cl. 3.

11. Fugitive Slave Act of 1793, ch. 7, 1 Stat 302.

12. *Prigg v. Pennsylvania*, 41 U.S. 539, 673 (1842).

13. *State v. Post*, 20 N.J.L. 368, 377-78 (1845).

14. *Scott v. Sandford*, 60 U.S. 393, 410 (1857).

1865.¹⁵ The Fourteenth Amendment¹⁶, adopted in 1868, helped to reinforce the departure from *Dred Scott* and buttressed many race-conscious attempts by Congress to provide assistance to African-Americans.¹⁷ Two years later, the Fifteenth Amendment was ratified,¹⁸ giving Black men the opportunity to vote and fight for their rights through elected government. The Civil Rights Act of 1875 further pushed the needle, prohibiting discrimination by places of public accommodation and public transportation, while also granting Black men the ability to serve on juries.¹⁹ In 1882, Alabama was disallowed from penalizing adulterous interracial couples more strictly than same-race couples in *Pace v. Alabama*.²⁰ These few actions began to move the country away from unequal treatment of Blacks.

The *Civil Rights Cases* of 1883 halted the progress and set the framework for *Plessy v. Ferguson*, decided 13 years later. The *Civil Rights Cases* held the Civil Rights Act of 1875 unconstitutional.²¹ *Plessy*, in 1896, upheld segregation laws, often called Jim Crow laws:²² “Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.”²³ The Black race was once again held to be inferior, with no end in sight for the pernicious view of many Americans towards Blacks. “If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”²⁴ And with that, the nation was literally separated; a physical divide had been put in place where an imaginary line had been drawn.

B. Upholding Separate but Equal

A series of cases affirmed the court’s holding in *Plessy*, at least with respect to education. In 1899, the Supreme Court showed its commitment to *Plessy* in *Cumming v. Richmond County* when they allowed the government to operate a Whites-only high school with no high school for Black students.²⁵ For the next forty years this holding would stand, and the Court would expressly follow it.

15. U.S. CONST. amend. XIII.

16. *Id.* amend. XIV.

17. Dennis Parker, *The 14th Amendment Was Intended to Achieve Racial Justice — And We Must Keep It That Way*, ACLU (July 9, 2018, 5:45 PM), <https://www.aclu.org/blog/racial-justice/race-and-inequality-education/14th-amendment-was-intended-achieve-racial-justice>; *see also* Freedman’s Bureau Act, ch. 200, 14 Stat. 173 (1866).

18. U.S. Const. amend. XV.

19. Civil Rights Act of 1875, Pub. L. No. 43-114, 18 Stat. 335 *declared unconstitutional* by Civil Rights Cases, 109 U.S. 3 (1883).

20. *Pace v. Alabama*, 106 U.S. 583, 585 (1882).

21. Civil Rights Cases, 109 U.S. 3, 7 (1883).

22. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

23. *Id.* at 551.

24. *Id.* at 552.

25. *Cumming v. Richmond Cty. Bd. of Educ.*, 175 U.S. 528 (1899).

*Berea College v. Kentucky*²⁶ and *Gong Lum v. Rice*²⁷ both confirmed the superiority of the White race. The *Gong Lum* court expressly stated, in relation to exclusion of Blacks and Asians, that it did not “think that the question is any different or that any different result can be reached . . . where the issue is as between White pupils and the pupils of the yellow races.”²⁸

C. Moving Away from Jim Crow

Dissatisfied with the current systems, Blacks began to protest Jim Crow laws. In the 1930s, this pushback against Jim Crow laws began to have some effect. *Missouri ex rel. Gaines v. Canada* set the stage by holding it unconstitutional, under the Equal Protection Clause of the Fourteenth Amendment, to pay to send a Black law student to a law school out of state.²⁹ *Sipuel v. Bd. Of Regents*, an Oklahoma Supreme Court case, had a similar holding, requiring Oklahoma to provide Ada Sipuel a seat in a state law school.³⁰ Two 1950 cases provided extra footing for what would later become *Brown v. Board*.³¹ *Sweatt v. Painter* had essentially the same holding as *Sipuel*, however *Sweatt* was decided by the Supreme Court.³² Almost predictably, in *McLaurin v. Oklahoma State Regents*, the Supreme Court struck down the next best restriction: the isolation of Black students in primarily White schools.³³

All of these judicial decisions led up to *Brown v. Board of Education*.³⁴ *Brown* completely changed the educational landscape. It was held that separate but equal did not belong in the educational system.³⁵ The case was argued by soon-to-be Supreme Court Justice, Thurgood Marshall. Part of Marshall’s case was a demonstration from a study run by Mamie and Kenneth Clark.³⁶ The study revealed that a majority of African American children preferred White dolls over Black dolls, indicating the engrained racial attitudes of the time.³⁷

Brown was monumental in the fight to achieve racial equality in the school setting. The Court was clear about its intentions and clearly explained why racial discrimination within schools matters so much: “Today, education is perhaps the most important function of state and local governments . . . It is required in the performance of our most basic public responsibilities, even service in the armed

26. *Berea Coll. v. Commonwealth of Kentucky*, 211 U.S. 45 (1908).

27. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

28. *Id.* at 87.

29. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

30. *Sipuel v. Board of Regents*, 190 P.2d 437, 438 (1948) (Ada Sipuel was represented by Thurgood Marshall who would end up representing the plaintiffs in *Brown v. Board of Education* and serving on the Supreme Court.).

31. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)

32. *Sweatt v. Painter*, 339 U.S. 629, 636 (1950).

33. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641-42 (1950).

34. *Brown*, 347 U.S. 483.

35. *Id.* at 495.

36. Erin Blakemore, *How Dolls Helped Win Brown v. Board of Education*, HISTORY (Mar. 27, 2018), <https://www.history.com/news/brown-v-board-of-education-doll-experiment>.

37. *Id.*

forces. It is the very foundation of good citizenship.”³⁸ Education continues to be one of the most important functions in our society, and it is this foundation, required for success in America, that drives the need for fairness.

D. Civil Rights Background During the Inception of Affirmative Action

During the formation of modern-day Affirmative Action, many civil rights battles were decided. In 1967, the Supreme Court tackled *Loving v. Virginia*, extending the right to marry to interracial couples.³⁹ *Palmore v. Sidoti* shot down the process of using marriage to a minority race as a justification for loss of custody.⁴⁰ This path forward was not seamless. Racially-based layoff procedures,⁴¹ racially-based selection of construction contracts,⁴² and minority business preferences⁴³ were all struck down by the Supreme Court. Yet, within the same area, the Supreme Court upheld a one-for-one, racially-based promotion plan in *United States v. Paradise*,⁴⁴ and confirmed the constitutionality of a minority set-aside program for minority business owners receiving federal funds in *Fullilove v. Klutznick*.⁴⁵ While the general direction of the legislation was pointed toward minority advancement, the decisions vacillated.

E. Affirmative Action's Roots

Affirmative Action was borrowed from the fight for employment equality. In 1961, President John F. Kennedy utilized the term in Executive Order 10925.⁴⁶ Borrowing the term from the National Labor Relations Act of 1935, the Order required federal contractors to “take Affirmative Action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”⁴⁷ Three years later, Title VII of the 1964 Civil Rights Act⁴⁸ prohibited discrimination in private employment, stating the court could “order such Affirmative Action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.”⁴⁹

38. *Brown*, 347 U.S. at 493.

39. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

40. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984).

41. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986).

42. *Richmond v. J.A. Croson*, 488 U.S. 469, 511 (1989).

43. *Adarand v. Peña*, 515 U.S. 200, 237-38 (1995) (overruling *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990)).

44. *United States v. Paradise*, 480 U.S. 149, 185-86 (1987).

45. *Fullilove v. Klutznick*, 448 U.S. 448, 491-92 (1980).

46. Exec. Order No. 10925, 26 Fed. Reg. 1977 (March 8, 1961).

47. *Id.* § 301 (1961) (See Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. LAW JOURNAL 607 (1996)).

48. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)).

49. *Id.* § 706(g)(1), codified at 42 U.S.C. §2000e-5(g)(1).

Academics have noted that, while President Kennedy introduced the term, “[i]t was President Lyndon Johnson’s Executive Order 11246⁵⁰ issued in 1965, one year after the passage of the Civil Rights Act, which led directly to our contemporary usage of the term Affirmative Action.”⁵¹ This language of “taking Affirmative Action” transferred into higher education, where it would become one of the most controversial topics in all of Supreme Court jurisprudence. *Regents of the University of California v. Bakke* was the controlling case for more than two decades.⁵² The University of California-Davis Medical School had reserved 16 of the 100 slots of the entering class for minority students.⁵³ There was no majority opinion and the justices disagreed on the level of scrutiny that should apply.⁵⁴ The set-aside provision was disallowed while racial diversity was upheld as a compelling governmental interest.⁵⁵ As will be discussed, labeling racial diversity as a compelling governmental interest had a significant impact on the trajectory of Affirmative Action legislation.

There were several attempts to change *Bakke*’s ruling, including *Hopwood v. Texas*, in 1996.⁵⁶ *Hopwood* involved students who were denied admission into the University of Texas School of Law.⁵⁷ The Fifth Circuit held that racial preferences could not be used in law school admissions, despite the University of Texas’s stated goals to create greater diversity and correct past discrimination.⁵⁸ The Supreme Court denied certiorari and pushed the issue down the road for later disposition.⁵⁹

F. Gratz and Grutter: Racial Diversity as a Compelling Governmental Interest

Hopwood would eventually be overturned by a pair of cases involving the University of Michigan that were handed down simultaneously, *Gratz* and *Grutter*.⁶⁰ As companion cases, handed down together on June 23, 2003, *Grutter* and *Gratz* confirmed the idea that race, as a compelling governmental interest, could be used as a factor in educational admission policies.⁶¹

Grutter v. Bollinger involved the University of Michigan Law School.⁶² The case was brought by Barbara Grutter, a White Michigan student who believed she was impermissibly denied admission into the law school.⁶³ As a program that

50. Exec. Order No. 11246, 3 C.F.R. § 339 (1965).

51. Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. LAW JOURNAL 607 (1996).

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

53. *Id.*

54. *Id.* See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (5th ed. 2017).

55. *Id.*

56. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

57. *Id.*

58. *Id.*

59. *Id.*

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

61. *Id.*

62. See generally *Grutter*, 539 U.S. 306.

63. *Id.* at 316-17.

created a racial classification, it was subject to strict scrutiny, but was ultimately held to be narrowly tailored to achieve a compelling governmental interest.⁶⁴ The majority was able to rely on *Bakke* to show the importance of racial diversity.⁶⁵ Speaking to the reasoning behind the insistence on racial diversity, Justice Ginsburg, in a concurring opinion noted that, “[h]owever strong the public’s desire for improved education systems may be, it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.”⁶⁶

The Court emphasized the need for the program to be “narrowly framed” to accomplish its purpose which, in turn, meant free from quotas.⁶⁷ “Quotas ‘impose a fixed number or percentage which must be attained, or which cannot be exceeded,’ and ‘insulate the individual from comparison with all other candidates for the available seats.’”⁶⁸ The Court also emphasized the need for an end point, noting that “race-conscious admissions policies must be limited in time,” as one of the “core” purposes of the Fourteenth Amendment was ending all racially-based governmental programs.⁶⁹ Despite the Court’s uneasiness surrounding race-based programs and their interaction with the Equal Protection Clause, racial diversity was championed as valuable and necessary.⁷⁰

Gratz v. Bollinger was similar to *Grutter* and was primarily based on the same understanding of the law. The admissions policy in *Gratz* was created by the University of Michigan’s College of Literature, Science, and the Arts.⁷¹ The distinction drawn between the two policies was the use of automatic points in *Gratz*; an applicant was automatically given a 20-point boost if found to be a member of an underrepresented minority group.⁷² The Court emphasized the need for “individualized consideration,” in order for the program to be narrowly tailored to achieve a compelling governmental interest.⁷³

While the holdings seem to be mirror images, rationally drawn to show the logical line where strict scrutiny is satisfied, the dissenting opinions for each respective case show the inherent differences in Americans’ opinions on Affirmative Action. In his dissenting opinion in *Grutter*, Justice Scalia disparagingly compared the educational benefits to be gained from racial diversity in law schools to the lessons to be learned by “Boy Scout troops” and “public-school kindergarten[ers].”⁷⁴ This reasoning is misplaced and incorrect.

As mentioned in the *Grutter* majority opinion,

64. *Id.* at 334.

65. *Id.*

66. *Id.* at 346 (Ginsburg, J., concurring).

67. *Id.* at 333.

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

69. *Id.* at 309.

70. *Id.* at 338.

71. *See generally Gratz*, 539 U.S. 244.

72. *Id.* at 244.

73. *Id.* at 247.

74. *Grutter*, 539 U.S. at 347 (Scalia, J., dissenting).

[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. 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. The pattern is even more striking when it comes to the 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.⁷⁵

It is simply juvenile to equate the need for racial diversity in law schools with the need for Boy Scouts to learn to be nice to each other.

Justice Thomas, in his own dissent, relayed the famous "Do nothing with us!" quote by Frederick Douglass.⁷⁶ This, also, is wholly misplaced. Douglass's words were said close to 155 years ago to a group of abolitionists. At that time, "Do nothing with us!" would have been an entirely appropriate request. Abolitionists were concerned with the need to end slavery, not with the need for minority educational advancement. At that time, White involvement did equate to positive injury, but today, rather, it is *lack* of involvement that produces the injury. Despite universities' best attempts at creating admission policies to mend the wounds, Black law student admission rates and non-transfer attrition rates worsen year after year.⁷⁷ Today, it is the inaction of the United States that is leading the demise of Black law students. While the opposition continues to push for consistency in the admissions system, Affirmative Action is slowly dwindling away⁷⁸ and Blacks are paying the price. Justice Ginsburg noted the issue well in her dissent in the *Gratz* case: "This insistence on 'consistency' would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law...but we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools."⁷⁹

75. *Id.* at 333.

76. *Id.* at 349-50 (Thomas, J., dissenting). ("[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us... I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! ... And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! ... [Y]our interference is doing him positive injury." Frederick Douglass, *What the Black Man Wants*, Address Before the Massachusetts Anti-Slavery Society (Apr. 1865) in *THE FREDERICK DOUGLASS PAPERS*, 59, 68 (J. Bassingame & McKivigan eds., 1991).

77. See Law School Enrollment by Race & Ethnicity (2018), ENJURIS, <https://www.enjuris.com/students/law-school-race-2018.html> (last visited Nov. 5, 2019); see also Kylie Thomas & Tiffane Cochran, ABA Data Reveals Minority Students Are Disproportionately Represented in Attrition Figures, ACCESSLEX (Sep. 18, 2018), <https://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures>.

78. Jordan Weissman, *Outside of Elite Colleges, Affirmative Action is Already Disappearing*, SLATE (Aug. 3, 2017), <https://slate.com/business/2017/08/outside-of-elite-colleges-affirmative-action-is-already-disappearing.html>.

79. *Gratz v. Bollinger*, 539 U.S. 244, 289 (2003) (Ginsburg, J., dissenting).

G. Pushback against Affirmative Action

Schuette v. Coalition to Defend Affirmative Action constituted a major step backwards regarding viability of Affirmative Action.⁸⁰ Proposal 2 was passed by Michigan voters in 2006, which disallowed the use of race or gender as a discriminatory or preferential consideration in education and employment.⁸¹ The Supreme Court held that this proposal was permissible because no state was required to have Affirmative Action.⁸² Justice Sotomayor wrote a dissenting opinion explaining how the proposal impermissibly restructured the political process to the detriment of racial minorities.⁸³

In 2013, the University of Texas once again came under fire for its use of racial considerations in its admission policy. As mentioned earlier, the case centered on a White Texas student who had been denied admission to the university. The Court held that in order to implement a race-based preference in admissions, there must be a showing of no race-neutral alternatives.⁸⁴ In particular, it needed to be demonstrated that any “available, workable race-neutral alternatives do not suffice.”⁸⁵

The case was sent back down to the U.S. Court of Appeals before eventually returning to the Supreme Court. The university’s lack of a definition for “critical mass” was acceptable since they were not allowed to have a definition.⁸⁶ The previous program to increase diversity among students had been unsuccessful in obtaining its racial diversity goal, so a new plan was warranted.⁸⁷ Also, the Top 10% provision implemented by the university would not have achieved the level of racial diversity sought.⁸⁸ While the University of Texas’ programs were ultimately upheld, the Court chipped away at Affirmative Action along the way, making it even more difficult for universities to achieve racial diversity.⁸⁹

II. AFFIRMATIVE ACTION IN NUMBERS: RACIAL DISPARITY AND ATTRITION

Current statistics are illustrative of the problem. In 2018, 111,561 students enrolled in J.D. programs;⁹⁰ 38.75% of all law students in these ABA-accredited

80. See generally *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014).

81. *Id.* at 299.

82. *Id.* at 314-15. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (5th ed. 2017).

83. *Id.* at 338.

84. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 312 (2013).

85. *Id.*

86. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208-2216 (2016).

87. *Id.* at 2213.

88. *Id.* at 2216.

89. *Id.* at 2208 (2016) (The Court refused to grant the University of Texas any deference in their application of the Affirmative Action project. It re-emphasized the need for an Affirmative Action program to satisfy strict scrutiny: narrowly tailored to achieve a compelling governmental interest. The Court also placed a significant amount of emphasis on the need for the University to show that there was no race-neutral alternative that could have been implemented in its stead.)

90. 2018 Standard 509 Information Report Data Overview, AMERICAN BAR ASSOC. (Dec. 14, 2018),

schools were minorities.⁹¹ This is generally consistent with the United States population that year, as 39.3% of all U.S. citizens were minorities.⁹² However, the disparity between minorities in law school and in the population expands drastically for Hispanic and Black students. People who identify as Black or Hispanic compose 13.4% and 18.1% of the population, respectively.⁹³ In law schools, Black students represent only 8.11% of the student body, and Hispanic students represent only 12.8% of the student body.⁹⁴ This leaves Hispanic students approximately 30% less represented and Black students approximately 40% less represented in comparison to the general population.

Unfortunately, these statistics are not reserved only for law schools. The ABA reported that African American and Hispanic attorneys each represented only 5% of the active attorneys in the United States from 2015 through 2019.⁹⁵ African-American and Hispanic lawyers represented 4.48% and 4.71%, respectively, of all associates at law firms registered with the NALP Directory of Legal Employers in 2018.⁹⁶ Further, only 2.49% of law firm partners were Hispanic and an astounding 1.83% of law firm partners were African-American.⁹⁷

Lawyers and law students of Asian descent have been subjected to different expectations and pressures. The Asian population constitutes 5.8% of the entire U.S. population.⁹⁸ Asian law students represent 6.17% of law students enrolled in ABA-accredited law schools.⁹⁹ This represents a 6% increase in representation compared to the general population. In 2018, lawyers who identified as Asian made up 3.63% of all law firm partners and 11.69% of all law firm associates at firms registered with the NALP Directory of Legal Employers.¹⁰⁰ Asian representation in the law field has outgrown the general population numbers of the United States in all categories except law firm partners, partly due to the stereotypical application of the *model minority* framework.¹⁰¹ This framework holds many Asians to be the *model* in that they perform at higher levels than many White students and have less encounters with law enforcement. This magnitude of growth does not evenly transfer to other minority groups.

The trends for African Americans have been alarming. From 1997 to 2017, African-American representation among law firm partners had only increased

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2018-509-enrollment-summary-report.pdf.

91. ENJURIS, *supra* note 75.

92. *Id.*

93. *Id.*

94. *Id.*

95. ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics, AMERICAN BAR ASSOC. (2019), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf.

96. NAT'L ASS'N FOR LAW PLACEMENT, 2018 REPORT ON DIVERSITY IN U.S. LAW FIRMS 9 (2019), https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf.

97. *Id.*

98. ENJURIS, *supra* note 75.

99. *Id.*

100. 2018 REPORT ON DIVERSITY IN U.S. LAW FIRMS, *supra* note 94, at 9.

101. *Id.*

0.75%.¹⁰² In that same time span, Hispanic and Asian representation had risen 1.55% and 2.37%, respectively.¹⁰³ “Among partners, interestingly, prior to 2005 African American/Blacks had the largest minority representation among partners, albeit, at just over 1% of partners, a tiny one. Things began to change in the mid-2000’s, at which point growth in the share of partners who are African-American/Black essentially stalled out, while the share of partners who are Asian or Hispanic kept increasing.”¹⁰⁴ Among associates, the trends worsened for African Americans. In the same time period, 1997 to 2017, African American associate percentages increased by a mere 0.51%, including a seven-year decline from 2008 to 2015.¹⁰⁵ Meanwhile, Hispanic lawyers increased by 2%, and Asian lawyers increased by 6.83%.¹⁰⁶ Because of this increase, “Asians account for over half of minority associates.”¹⁰⁷

Black law students are severely underrepresented in the legal community, as illustrated by the above statistics. From law schools to law firms, Blacks are struggling to gain access to the continuing Caucasian-dominated legal field. On top of the already discouraging numbers, Blacks also constitute a huge share of first-year (1L) non-transfer attrition.¹⁰⁸ 1L non-transfer attrition refers to first-year students “who discontinue their legal education for any reason other than transfer to another law school.”¹⁰⁹ This “often occurs for academic reasons, but can also result from financial and other circumstantial challenges.”¹¹⁰ Black 1L students accounted for 9% of 1L enrollment for the 2016-17 academic year.¹¹¹ 15.5% of all 1L non-transfer attrition was attributable to Black law students.¹¹² Also, the rate of non-transfer attrition for Black students was 11%, meaning more than 1 out of every 10 Black law students would discontinue their legal education.¹¹³ This rate is more than double the rate for White law students (5.1%), and significantly higher than both Asian (6.4%) and Hispanic (8.7%) attrition rates.¹¹⁴ These statistics have the ability to tell two separate stories. The first, a theory created by Richard Sandler and Stuart Taylor Jr., but championed by anti-Affirmative Action advocates across the country, concludes that minority students are a “Mismatch” for law schools. The second is much more palatable.

102. *Women and Minorities at Law Firms — What Has Changed and What Has Not in the Past 25 Years*, NAT’L ASS’N FOR LAW PLACEMENT (Feb. 2018), <https://www.nalp.org/0218research>.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Thomas & Cochran, *supra* note 75.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

III. THE RISE OF “MISMATCH” ANTI-AFFIRMATIVE ACTION THEORY

Not everyone believes diversity is a compelling interest. Justice Antonin Scalia was an outspoken opponent of Affirmative Action. He wrote,

[T]here are those who contend that it does not benefit African-Americans... to get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school,...a slower-track school where they do well... I'm just not impressed by the fact... that the University of Texas may have fewer [African American students]. Maybe it ought to have fewer...I don't think... it stands to reason that it's a good thing for the University of Texas to admit as many Blacks as possible.¹¹⁵

Justice Scalia's views are indicative of the Mismatch theory.

Modern mismatch theory arose from a 2012 study by Richard Sandler and Stuart Taylor Jr.¹¹⁶ The overall conclusion of the study is that minority students, especially Black students, are unqualified for the environment that awaits them in higher ranked, highly praised schools.¹¹⁷ The authors explain that “mismatch” is “a word that largely explains why, even though Blacks are more likely to enter college than are Whites with similar backgrounds, they will usually get much lower grades, rank toward the bottom of the class, and far more often drop out.”¹¹⁸ The authors further explain that the process of giving an admissions preference to a minority student has the effect of putting the student in an environment where they are ill-prepared.¹¹⁹ “The student who would flourish at, say, Wake Forest or the University of Richmond, instead finds himself at Duke, where the professors are not teaching at a pace designed for him.”¹²⁰

Scholars who promote Mismatch theory believe that “[i]t's become increasingly clear that Affirmative Action is doing more harm than good to the very people it is intended to help.”¹²¹ This “mismatch,” it is argued, “perpetuates low grades and high dropout rates for minority students who need a racial preference to gain admission,”¹²² “consolidating the stereotype that they are inherently poor students.”¹²³ While not expressly reserved for law school students, Mismatch theory has commonly been applied in the law school setting. When

115. Transcript of Oral Argument at 67-68, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

116. See generally RICHARD H. SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT* (2012).

117. Richard Sander & Stuart Taylor, Jr., *The Painful Truth About Affirmative Action*, THE ATLANTIC (Oct. 2, 2012), <https://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/>.

118. *Id.*

119. *Id.*

120. *Id.*

121. Elizabeth Slattery, *How Affirmative Action at Colleges Hurts Minority Students*, THE HERITAGE FOUNDATION (Dec. 2, 2015), <https://www.heritage.org/courts/commentary/how-affirmative-action-colleges-hurts-minority-students>.

122. *Id.*

123. Sandler & Taylor, *supra* note 117.

interpreted with an anti-Affirmative Action lens, diminishing representation percentages among law firm partners and associates, high non-transfer attrition rates for minority law school students, and low overall minority law school participation rates, can all lend credence to the argument that minority students and law schools are being disserved by admission practices with racial preferences.

A. *Students for Fair Admissions*

The culmination of all of these factors led to the inception of *Students for Fair Admissions, Inc. v. Harvard* which was decided in favor of Harvard with an opinion by Justice Burroughs of the United States District Court of the District of Massachusetts.¹²⁴ The case was largely spawned by two individuals, Michael Wang and Edward Blum. Wang is an Asian student who graduated from James Logan High School in the San Francisco Bay Area and was denied entry into Harvard, as well as many other ivy-league schools, despite having stellar academic achievements, including a 4.67 grade point average.¹²⁵ Edward Blum is a well-known conservative activist and financial adviser who is known for heading the Project on Fair Representation, the nonprofit that worked with Abigail Fisher for the purposes of the very controversial case, *Fisher v. University of Texas*, a crucial case in the Affirmative Action sphere that chipped away at the viability of the doctrine.¹²⁶

Spectators have noted that, “[u]p until now, most cases about race in college admissions have been brought by White plaintiffs like Fisher, who argue that they are harmed by ‘reverse discrimination’ and therefore pushed out of colleges by less-qualified applicants of color.”¹²⁷ In addition to the change in demographics, the Trump administration and the Department of Justice have spoken out against Harvard in the case.¹²⁸ This has led spectators to believe that this case, if taken on appeal by a conservative majority Supreme Court, could end the era of diversity as a compelling governmental interest. By bringing a case with a minority plaintiff, the opposition to Affirmative Action is hoping to give the appearance of a racially neutral justification for the end of Affirmative Action. It is harder to characterize an anti-Affirmative Action case as racially charged when America’s majority race, who subsequently has the discriminatory influence, is not represented within the parties.

124. See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019).

125. Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (October 8, 2018), <https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action>.

126. *Id.*

127. Alexia Fernandez Campbell & P.R. Lockhart, *The Harvard Admissions Case That Could End Affirmative Action, Explained*, VOX (Oct. 2, 2019), <https://www.vox.com/identities/2019/10/2/20894934/harvard-admissions-case-affirmative-action>.

128. *Id.*; See Press Release, Dep’t of Justice, Justice Department Files Statement of Interest in Harvard Discrimination Case Defending Claim that Harvard Intentionally Discriminates on the Basis of Race in Admissions (Aug. 30, 2018), <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-harvard-discrimination-case-defending-claim-0>.

Students for Fair Admissions, Inc. v. Harvard has also stirred up discussion on race-based admission practices. Blum has been able to garner a significantly large number of Asian-Americans in support.¹²⁹ Many commentators on the opposite side have viewed this support as Blum's manipulative workings, in order to bring a case from non-White plaintiffs.¹³⁰ As discussed earlier, Asian students are the only minority group that is represented in law school at a higher rate than their proportion in the United States. While these stellar results from Asian students are often stereotypically explained as being due to their *model minority* status, studies have shown the success stemming from their access to resources and an environment where they are constantly surrounded by other high achievers.¹³¹ Regardless, many high achieving Asian students are denied admissions to top tier schools, leading many Asian students to believe they have to beat out other Asian students or appear to be "less Asian" on their applications.¹³²

While anti-Affirmative Action beliefs are a seemingly logical conclusions based on the observed rates for Asian-American students, Affirmative Action is the wrong target. Asian applicants "were admitted at lower rates than Whites, even though Asian applicants were rated higher than White applicants in most of the categories used in the admissions process, including academics, extracurriculars, and test scores. One exception was the 'personal rating.'"¹³³ What happened at Harvard, and potentially many other law schools around the country, is simply anti-Asian bias. As Jeannie Suk Gersen, a professor at Harvard Law School, pointed out, if "Harvard has in fact engaged in discrimination against Asians, one can safely root against Harvard and in favor of race-conscious Affirmative Action at the same time."¹³⁴ The Harvard Affirmative Action case, as it has affectionately been labeled, is a prime example of how Mismatch theory and anti-Affirmative Action beliefs fail to accurately convey the entirety of the situation.

IV. HOW "MISMATCH" THEORY FAILS TO ENCOMPASS THE WHOLE PICTURE AND HOW AFFIRMATIVE ACTION CAN BE RE-TAILORED TO FIT BLACK AMERICANS' NEEDS

Mismatch theory makes a valid argument when considered in a vacuum. The entirety of the theory relies upon the assumption that the reader will ignore any factors related to minority academic success besides race and difficulty of study. It argues that because minority students perform poorly in highly ranked law schools, minority students must need to go to lower-ranked, substandard schools. Minority students are not the problem, despite the insistence of many within the United States. The schools that fail to fully integrate them, tests that are designed

129. Hsu, *supra* note 125.

130. *Id.*

131. Campbell & Lockhart, *supra* note 127.

132. Hsu, *supra* note 124-123.

133. Jeannie Suk Gersen, *Anti-Asian Bias, Not Affirmative Action, Is on Trial in the Harvard Case*, NEW YORKER (Oct. 11, 2018), <https://www.newyorker.com/news/our-columnists/anti-asian-bias-not-affirmative-action-is-on-trial-in-the-harvard-case>.

134. *Id.*

against them, environments that try to exclude them, lack of professors that look like them, law firms that will not hire them or promote them, and a government which refuses to take more steps than “a factor of a factor of a factor” to help them, all exacerbate the seemingly insurmountable situation.

A. LSAT Scores

Just as the LSAT has been shown to be flawed in relation to the blind,¹³⁵ it can be shown to be prejudicial to Blacks. “It isn’t that African Americans are not smart enough to do well on the LSAT — it’s that they don’t have access to people who know how to play the game,”¹³⁶ Melissa Harris Thirsk, Vice President and Chief Marketing Officer of LSAC, the Law School Admissions Council, has stated that the current overreliance on LSAT scores by law schools “is driven by too much focus on U.S. News & World Report rankings and, in some cases, a failure on the part of schools to understand that even if they choose to focus on rankings, they have room to admit a wider range of LSAT scores.”¹³⁷

The issue, in large part, are LSAT scores. Because the average LSAT score for Black test takers is 142, while the average for White and Asian test takers is 153,¹³⁸ Black test taker scores lead to the worst acceptance rate among any racial or ethnic group.¹³⁹ 49% of all Black law school applicants were not admitted to a single law school.¹⁴⁰ In addition, to amplify the problem, individuals within the LSAT score band of 135 and 149, where the majority of Black applicants reside, are more likely to be admitted if they are White.¹⁴¹ In that score band, 55% of Black applicants received no admission offers, compared to 39% of White applicants.¹⁴² It is unsurprising then, that in addition to the above-mentioned discrepancies, Black students are also less likely to receive non-need-based scholarships and financial aid.¹⁴³

135. Press Release, Nyman Turkish PC, Statement on the Amicable Resolution of Binno v. LSAC Lawsuit, (Oct. 7, 2019), <https://www.prnewswire.com/news-releases/statement-on-the-amicable-resolution-of-binno-v-lsac-lawsuit-300931402.html>.

136. Sheryl Jackson, *Addressing Inequities Precipitated by the LSAT: Schools and Nonprofits Strive to Develop Solutions to African Americans’ LSAT Struggles*, INSIGHT INTO DIVERSITY (June 29, 2018), <https://www.insightintodiversity.com/addressing-inequities-precipitated-by-the-lsat-schools-and-nonprofits-strive-to-develop-solutions-to-african-americans-lsat-struggles/>.

137. Scott Jaschik, *Do Law Schools Limit Black Enrollment with LSAT?*, INSIDE HIGHER ED, (Apr. 15, 2019), <https://www.insidehighered.com/admissions/article/2019/04/15/study-argues-law-schools-limit-black-enrollment-through-lsat>.

138. Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 490 (2019).

139. *Id.* at 496.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 506.

B. Over-reliance on U.S. News Rankings

Another facet of the problem is the over-reliance on U.S. News & World Report law school rankings by school administrators. Law school focalization on U.S. News rankings only leads to increased focalization on LSAT scores. A system has emerged where Deans, admissions staff, and professors all do what is necessary for the school to rise in rankings.¹⁴⁴ What is left behind is the dedication needed to serve all student groups. Law schools tailored to White student experiences, reaching for higher LSAT scores and U.S. News rankings, will inevitably begin to admit more White students than Black students. A system has been created that disadvantages Black law students and creates situations where they perform poorly and are forced to leave. That system is then, in turn, used to justify the need to admit less Black students in order to climb up the rankings. The problem is compounded upon itself, creating a scheme of recurrence, which no one is willing to address head-on.

Adding to the rankings problem, schools with the most minority students are also the schools with the lowest percentage of graduates with full-time jobs. “For example, in 2015, Charlotte School of Law had the fourth-highest percentage of African-American students among law schools (36 percent) and also the highest percentage of 2016 graduates who were either unemployed, employed in temporary or part-time work, or working in nonprofessional jobs (59.12 percent).”¹⁴⁵ Since Black law students are discriminated against in hiring practices, causing the amount of graduates with jobs to fall, the schools with the most Black students drop in the U.S. News rankings, providing another justification for their exclusion from the workforce. The argument, that going somewhere more affordable and better suited to one’s education is advantageous, does not necessarily hold up for Black lawyers either, since “[t]hree-quarters of current Black law firm partners went to one of the top twelve law schools, and nearly half went to either Harvard or Yale.”¹⁴⁶

There are legitimate justifications for the focus on LSAT scores. LSAT scores are supposed to correlate to bar passage rates. This correlation would give credence to school administrators’ increased reliance on LSAT scores, and in turn, U.S. News Rankings, which draw a significant amount of influence from average LSAT scores. However, if the LSAT is flawed, then surely it is not actually an accurate representation of bar examination passage and the skills required to be a successful attorney, unless of course, the exam is also flawed and underinclusive of minority life experiences and struggles. While the desire for standardization is valid, it may well be that the trade-off of equal treatment is more valuable.

144. Scott Jaschik, *Engines of Anxiety*, INSIDE HIGHER ED (April 28, 2016), <https://www.insidehighered.com/news/2016/04/28/new-book-based-interviews-law-deans-and-admissions-officers-details-impact-rankings>.

145. Erin Thompson, *Law Schools are Failing Students of Color*, THE NATION (June 5, 2018), <https://www.thenation.com/article/law-schools-failing-students-color/>.

146. *Id.*

C. Isolation and inability to integrate

African American law students deal with additional, school-adjacent pressures daily. “Sometimes the problem is another student, or group of students. Sometimes it’s the faculty. Sometimes it’s Antonin Scalia. Sometimes the issue is so inherent to ‘the system’ that it is hard to pin the blame on any particular person.”¹⁴⁷ It is infantile to assume that the passing of the Thirteenth and Fourteenth amendment ended all racial discrimination within America. The most effective and influential racial policies are the ones engrained in America’s systems. LSAT questions and exam prompts have been proven to be tailored toward White experiences. College admission policies and employer hiring processes can filter for addresses in Black neighborhoods. The scariest part is that these actions often are not done for the primary purpose of discrimination. An LSAT question with a fact pattern detailing a symphony performance at the local museum, most likely, was not tailored to be discriminatory. Yet, it still creates problems. The below dilemma highlights the problem more clearly.

Imagine there are two runners. When the gun goes off to signal the start of the race, both runners take off immediately. Runner A is free of any obstacles and can sprint down the track. Runner B has hurdles in her path. Some of the hurdles are red and some of them are blue. Halfway through the race, the red hurdles were removed. Runner A’s objective is simply to reach the end of the race as fast as possible. Often, Runner A is given assistance, during the race, by friends and acquaintances of his parents. Runner B’s objective is to catch up to Runner A and finish at the same time. At the end of the race, the spectators are dumbfounded that Runner B was unable to catch Runner A. While simple, this example is comparable to the fight for equal treatment by African Americans.

Runner A represents White students. These students are allowed to proceed at their full pace, clear of any racial “hurdles.” In addition, these White students often have extra help in the form of alumni connections, parents in the profession, and a comfortable environment. Why would Runner A and his supporters want to change the race? “It works for them, and their parents, and their alumni who are willing to buy buildings for the school.”¹⁴⁸ Despite Runner B’s valiant attempts to persuade Runner A’s supporters that the race is unfair, Runner B is mostly unsuccessful. Every time Runner B calls out Runner A, Runner A is “backed up by a cacophony of voices telling [her], ‘That’s not racist, you’re just overreacting.’ ‘That’s not racist, you just weren’t qualified.’ ‘That’s not racist, it’s just speech.’”¹⁴⁹

After decades of protest and lobbying, Runner B, the Black student, has won enough civil rights victories, in the form of the Thirteenth Amendment, Fourteenth Amendment, and Affirmative Action legislation, to get the red hurdles removed. The explicit and obvious racial preferences are removed, and once again, Runner

147. Ellie Mystal, *Open Letter to Black Law Students: It Doesn’t Get Better*, ABOVE THE LAW (Mar. 1, 2016), <https://abovethelaw.com/2016/03/open-letter-to-Black-emory-law-students-it-doesnt-get-better/>.

148. *Id.*

149. *Id.*

B is criticized for not catching up to Runner A. Proponents of theories like Mismatch theory believe that Runner B is unqualified to run in the race. They suggest that Runner B should join a different race, one that is more tailored to people like Runner B.

As is hopefully clear by now, the blue hurdles represent the systemic racial discrimination present within the American educational system. Black law students, or “Runner B,” will never be able to catch up unless the racial preferences embedded within the current system are removed. While Affirmative Action is a great first step in remedying the situation, it is not enough on its own. A thirsty person with half a cup will not be able to drink any water. The solution is not to take away the broken cup and expect them still to drink, but instead to provide them with a full cup.

What makes the situation even more difficult is the present climate, which makes it nearly impossible to speak up or gain any support. “It never gets any easier to play this game of whack-a-racist, personally or professionally. And with Trump ascendant right now, I can’t even say it gets better.”¹⁵⁰ Pulling yourself up by the bootstraps is a lot easier when you are born with a trust fund in your name, or at least born into a family that has a pair of boots you can strap up. Black students who manage to scrap their way into a law school are often greeted by an environment, based on the admission numbers previously explored, where very few others share their experiences. Students may struggle to fit in, and those that succeed in doing so, survive “by adapting to life in a majority White environment.”¹⁵¹

CONCLUSION

LSAT scores, U.S. News rankings, peer isolation, insistence on admissions policy consistency, and generally discriminatory attitudes, all create law school environments that are inherently detrimental to Black law students, making it nearly impossible to succeed. While some may argue that African American law students are simply ill-suited for the academic rigor, the more likely explanation, backed by the statistics, is that the law school system is flawed and designed in a detrimental way. The problem is not that Affirmative Action does not work within our American system of education, but rather, that the American system is poorly suited for Affirmative Action. Unless the country is willing to move forward and continue to strive for racial diversity in the law school setting, Affirmative Action will never be successful, and Black law students will continue to suffer at the hands of inaction.

150. *Id.*

151. David Sutphen, *What It Was Like to be That “One” Black Friend in Law School*, FORTUNE INSIDERS (Sep. 14, 2016), <https://insiders.fortune.com/what-it-was-like-to-be-that-one-Black-friend-in-law-school-6377a2fdbfbf>.