

CHAPTER NINE

ADDRESSING THE THREAT OF RESEGREGATION

An argument often cited by those who support the use of racial preferences in university admissions is that however much they dislike the practice,¹ the effect of ending such preferences will result in the resegregation of the nation's elite educational institutions.

It is an important and troubling allegation and one which deserves analysis.

Beginning with the doomsayers, proponents of race preference policies inevitably cite the precipitous drop in black enrollments at the University of California's two flagship law schools (Boalt Hall at UC Berkeley and UCLA) following the 1996 passage of Proposition 209² as "proof" that resegregation will occur if these policies end.

Their argument begins with these facts: In the fall of 1996 *before* the November 1996 California state referendum (Proposition 209) which eliminated the use of race as a factor in university admissions, twenty black law students enrolled in the first-year class at UC Berkeley. The very next year, after Prop. 209 took effect, only one black student enrolled in the first-year class. The lone black enrollee in the fall of 1997 was, in fact, a student who was accepted in 1996 and had deferred his admission.

Now, it is true that eliminating the use of race—in the face of an otherwise static³ system—will cause some immediate reduction in both the admission and (to a lesser extent) the enrollment⁴ of persons from racial groups who heretofore had been given racially preferential treatment. In the context of what happened after the passage of Prop. 209, however, the important questions were the following:

Did the *initial* reduction in black (and Latino/Latina) law school enrollment at Berkeley and UCLA foreshadow a *permanent* reduction in black (and Hispanic) enrollment at the UC law schools?

If so, were these reductions *solely* related to the elimination of the racial preferences previously practiced in admissions at each of these law schools?

Does California's experience "prove" that there will be significant and permanent reductions in minority enrollment nationwide if racial preferences are banned throughout the country?

And most importantly, are there other color-blind methods by which these declines, if they were to occur, can be reversed or avoided altogether?

The answer to each of the first three questions, based on all of the available evidence, is "no."⁵ The answer to the last is undeniably "yes."

As for the scenario which race preference proponents argue is represented by the experience at UC Berkeley in 1997, and confirmed (or so they argue) by the chronically low numbers of black students who have enrolled at Berkeley and UCLA in more recent years, the facts simply don't prove their argument. Nor do the facts support their argument that eliminating race as a factor in admissions will result in a return to all-white classrooms.

The latter is a particularly pernicious argument because (a) it demeans members of certain minority groups by suggesting that unless their race is given positive weight in the admissions process, they are otherwise incapable of competing for seats in the nation's colleges, universities, and law schools with members of other groups—including other racial and ethnic minorities; and (b) it is demonstrably false based on the experiences in several states, including California.

Setting California aside for the moment, consider what happened in the State of Washington whose voters passed, in 1998, an initiative (I-200) similar to Prop. 209. According to the JOURNAL OF BLACKS IN HIGHER EDUCATION, "[t]here has been little impact from

the ban on race-sensitive admissions on black enrollments at the law and medical schools at the University of Washington.”⁶

The same can be said for the University of Washington’s flagship undergraduate school. In the fall of 1998, when race was still being considered, 124 black students enrolled in the University’s freshman class. Despite an initial, and admittedly large, drop in the fall of 1999 (described by one black educational journal as being caused, at least in part, by the message “that black students are not especially welcome” at the University of Washington), by the very next year, black enrollment rebounded to 119 first-year students.⁷

A similar trend played out at the University of Texas’ flagship Austin campus where race preferences were banned in 1996 by a federal appeals court ruling (*Hopwood*).⁸ In the fall of 1996, with race still being used, 266 (4.1 percent) of the first-time UT-Austin undergraduate freshmen were black students; 832 were Hispanic students (14.7 percent). By the fall of 1999, with racial preferences eliminated and replaced by a program which granted admission to every Texas high school student, *regardless of race*, who finished in the top 10 percent of his or her high school class, admissions returned to pre-*Hopwood* levels on a percentage basis and actually increased in terms of the sheer numbers of minority students who matriculated: specifically, 286 black students (4.1 percent of the first year class); and 976 Hispanic students (13.9 percent).⁹

More recently, Texas A&M University—which has explicitly refused to reinstate race preference policies following *Grutter*—has demonstrated the ability to raise minority enrollments without using race-conscious admissions. “While many other colleges, including some staunch advocates of race-conscious admissions, were suffering declines in their minority enrollment, Texas A&M’s numbers were way up.”¹⁰ Black and Hispanic enrollments combined constituted over 15 percent of Texas A&M’s entering class for the fall of 2004,¹¹ a percentage which significantly exceeds comparable enrollment figures at highly race-conscious institutions like the University of Michigan (the latter annually claiming combined black and Hispanic enrollments of approximately 12 percent).

A similar, though less dramatic, and certainly incomplete, rebound also occurred at the University of Texas Law School. In 1996, black enrollment in the first-year class was 29 students (5.8

percent); Hispanic enrollment was 46 students (9.2 percent). In a scenario reminiscent of what occurred at UC Berkeley’s law school, black law school enrollment at UT dropped to four first-year students (0.9 percent) the first year following *Hopwood*. During this same period, Hispanic enrollment dropped to thirty-one students (6.7 percent). But by the fall of 2001, first-year black law school enrollment increased to sixteen students, largely due to UT’s implementation of a range of new recruiting and outreach programs.¹²

Total enrollment figures for UT’s law school in the fall of 2001 showed that almost three percent of the law school was made up of black students (40 students) while overall Hispanic enrollment had returned to pre-*Hopwood* levels (142 students or 9.8 percent of the law school student body).¹³ In fact, in 2002, UT’s law school was listed as the top program in the country for Hispanics by *Hispanic Business* magazine, a recognition which would be incomprehensible were the law school to be viewed as one which was “resegregating.”¹⁴

This same magazine listed the top four undergraduate institutions for Hispanics as Stanford University, Rice University, UC Berkeley, and the University of Texas at Austin (notwithstanding that Rice, UC Berkeley, and UT were prohibited from considering race in admissions at the time these rankings were released).¹⁵

As for the chronic reductions in black law school enrollments at UC Berkeley and UCLA, the evidence strongly suggests that the persistent decline was due less to the ending of racial preferences than it was to the successful effort on the part of Prop. 209’s opponents to actively discourage black students from applying to both schools. The effort to discourage black students from applying remained ongoing for years and continued to dampen black enrollment.

Again, consider the facts.

After Prop. 209 passed, students and administrators at Berkeley responded by alleging that the law school had become a hostile and unwelcoming environment for black students, an undeniably unhelpful and thoroughly unjustified attitude which even Bowen and Bok acknowledged was occurring.¹⁶ Despite the illogical nature of these accusations,¹⁷ black student groups and their allies began an overt effort to discourage future black enrollment at UC’s two flagship schools. Their success is measured by the fact that, as earlier noted, only one black student entered Berkeley’s law school in

the first year class beginning in the fall of 1997. What is never mentioned, however, is that eighteen black students were in fact *admitted* to Berkeley in the fall of 1997 under a race-blind system, yet none chose to enroll.¹⁸

The results initially were somewhat different at UCLA’s law school. In the fall of 1997, 21 black students were admitted and ten enrolled (a “yield” rate of almost 50%).¹⁹ As the evidence showed, however, the efforts to discourage black enrollment eventually took a toll at UCLA as well.²⁰

The effect of this message is sadly predictable. For example, between 1993 and 1996, inclusive, UC Berkeley’s law school received an average of 450 applications each year from black students. In the years following the passage of Prop. 209, the numbers of black law *applicants* were reduced by more than half.²¹ For the class entering Berkeley in the fall of 2000, there were 216 black law applicants as compared to 494 who applied for admission in the fall of 1993.²² Twenty-eight (13 percent) of the 216 applicants in 2000 were offered admission. Seven chose to matriculate.²³

Had black applicants applied for admission to Berkeley in the fall of 2000 at approximately the same rate as they did, say, in 1993, and assuming they were admitted at the rate of thirteen percent (which was the overall rate for black admissions in the fall of 2000 as opposed to the higher sixteen percent rate for black admissions in 1993), there would have been approximately 65 black admittees for the class entering in the fall 2000.

The overall yield rate for the class entering in the fall of 2000 was 31 percent. Had that same yield rate applied to the 65 hypothetical black admittees, there would have been 20 black students entering the class. This would be one less black student than the group which entered in the fall of 1993 and would have equaled the number of black students who entered in the fall of 1996, the last year before Prop. 209 was passed.

The numbers at UC Berkeley for the fall of 2001 were even better. In that entering class, out of 258 black applicants, forty-eight were admitted and fourteen enrolled. In fact, nineteen percent of the black applicants were offered admission, a rate higher than that achieved by any other racial or ethnic group of applicants.²⁴ And black enrollment in the first year class equaled nearly five percent of

the total despite the fact that applications from blacks still remained over forty percent lower than the average numbers for the four years preceding the passage of Prop. 209.²⁵

In summary, the decrease in the number of black *applicants* following the passage of Prop. 209 inevitably led to a reduction in the number of blacks admitted and enrolled. As one UC Berkeley law student ruefully noted, “It is awfully hard to get admitted if you do not apply.”²⁶ (Similar patterns relating to black applicants played out at the University of Texas Law School and at the University of Georgia.)²⁷

Added to this is the difficulty which UC Berkeley historically has had in convincing the black admittees to attend. For example, the yield rate for Asian American applicants to Berkeley in the fall of 2000 was thirty-six percent. By comparison, the yield rate for all admittees was thirty-one percent. Yet for the twenty-eight black applicants who were admitted, the yield rate was just one-in-four, a rate which, with one exception (and not counting the politically driven “zero percent” yield in the fall of 1997), has not significantly varied during the decade between 1993 and 2003.²⁸

Thus, returning to the question:

Did the end of race preferences explain
why only one black student entered Boalt
Hall’s class in the fall of 1997?

Well, in one sense, of course, the answer is “yes.” But only because of the politics involved. Yet the end of race preferences cannot begin to explain why all eighteen black admittees in the fall of 1997 elected not to matriculate.

A second, and more important, question is whether depressed black law school enrollments at Berkeley and UCLA are due to black applicants being unable to successfully compete for admission under race-blind admissions policies, or are due in greater measure to the continuing campaign to paint the campuses as “hostile”?

The former, of course, is ridiculous—and racist—because of its wholesale lack of faith in the ability of black students to successfully compete with other students. The latter, of course, inevitably results in depressing the number of blacks who choose to

apply for admission in the first instance, and provides a far more logical explanation for the depressed enrollment figures. In the end, if the best and brightest minority students refuse to apply to a particular school, or refuse to attend even if admitted (which was precisely the scenario described by Texas State Senator Rodney Ellis after the *Hopwood* decision),²⁹ it becomes difficult if not impossible to attain the levels of racial diversity which the top schools would otherwise hope to achieve.

There remains, of course, the proponents-for-race-preferences’ argument that the current admissions systems used by many prestigious professional schools are simply “unfair” to certain minority applicants. This criticism is most often leveled, as it is in the undergraduate area, on the heavy emphasis given to the scores achieved by applicants on the traditional standardized tests (SAT, ACT, LSAT, etc.). Of course, if it were to be demonstrated that any particular factor is creating “unfairness” to any particular group of students, it should be removed or corrected. For example, if a law school were to determine that the use of the LSAT is, in fact, “biased” against certain students based on their skin color, then the school arguably should eliminate its use as a factor in admissions or, at a minimum, eliminate the degree to which the test’s results are emphasized in admissions decisions. Nothing prevents a law school from making such a decision voluntarily.³⁰ Indeed, were the test ever proven to be racially biased, the law would require its removal.³¹

Though persistent academic and standardized test score gaps continue to exist, and will continue to dampen black enrollment until these gaps are corrected, the drop in black law school enrollments at Berkeley and UCLA seems to be most clearly explained by the significant decline in black applicants to both of these schools.³²

Also overlooked in the conversations surrounding “diversity,” and the purported need to use racial preferences to achieve it, is the fact that the UC system has two other excellent law schools, UC Davis and Hastings (the latter of which is located in San Francisco and is affiliated with the UC system). The enrollment experience at these two law schools both before and after the passage of Prop. 209 is simply never mentioned by the proponents of race preferences.

Even though Hastings and UC Davis are slightly less competitive than the two flagship law schools at Berkeley and UCLA,

both schools are ranked among the best law schools in the country. Surprisingly, however, UC Davis has never attracted a large black enrollment and, more tellingly, there never seems to have been an issue made of its supposed lack of “diversity.” For example, in the fall of 1995, there were three black students in the first-year class; in the fall of 1996, only four. After Prop. 209, there were five black students in the fall of 1997; three (again) in 1998; and six in 1999. Overall black enrollment at UC Davis averaged 3.6 percent of the entering law school class in the four years before Prop. 209 (largely attributable to an aberrational 6.5 percent in 1994, without which its average black enrollment during that time would have been below 3 percent) and 3 percent for many years following the passage of Prop. 209.³³

Hastings presents a similar picture. Prior to *Grutter*, it had in place a long-standing special admissions program based on “disadvantage” which was not race-based. Thus, Hastings reported that the impact of Prop. 209 on its underrepresented minority enrollment was negligible.³⁴

Moreover, Hastings was ranked eighth in the nation in 2002 on a “diversity index” compiled by *U.S. News*.³⁵ This rating was higher than that achieved by any other UC law school, and placed it among the most diverse law schools in the country. In fact, each of the UC law schools—despite the legal prohibition against using race in admissions—ranked relatively high on the “diversity index,” with UCLA tied for 12th, UC Berkeley tied for 16th and UC Davis tied for 17th.³⁶

Thus, in spite of the drop in minority law enrollments at Berkeley and UCLA, six years after the passage of Prop. 209, UC’s flagship law schools remained among the most racially and ethnically diverse in the entire country with nearly thirty percent of the students being identified as students of color.³⁷ The remaining seventy percent included “individuals of mixed race/ethnicity, unknowns, and those declining to state ethnicity/race.”³⁸

As for the undergraduate enrollment figures at both UC Berkeley and UCLA following Prop. 209, these campuses arguably remain the two most racially diverse of all flagship universities in the United States.³⁹ It is a “diversity” which is achieved *without* using race as a factor in admissions.

Indeed, the levels of diversity at UC Berkeley and UCLA seem to refute assertions by the University of Michigan’s president after Michigan’s voters (on November 7, 2006) passed their own constitutional amendment—similar to the amendment adopted in California—which bans the use of race preference policies at Michigan’s public educational institutions. In a post-election statement expressing her disagreement with the choice made by the people of Michigan, the University’s president confusingly characterized the levels of racial diversity at California’s flagship universities as the results of “a horribly failed experiment.”⁴⁰ Given that the levels of racial diversity at the University of Michigan have never come close to those found on UC’s flagship campuses, it is impossible to understand what the University’s president had in mind when she uttered those words.

Moving to states where racial preferences are still openly practiced, recent analyses also suggest that ending the use of race will not significantly affect their public universities’ enrollment of black students.

In a recent study of minority enrollments at Virginia’s three public law schools (the University of Virginia, the College of William and Mary, and George Mason University), the Center for Equal Opportunity (CEO) concluded that the most selective of the three (UVA) discriminated *against* white students to a degree greater than that found at any other American college or university which CEO had studied.⁴¹

Discrimination against white students at William and Mary, the second most selective of the three, was less than that found at UVA. According to the CEO study, the least selective of the three law schools, George Mason University, showed no evidence that it discriminated between black and white students based on race.

A comparison of the student bodies at these three law schools during the academic year 1999-2000 is revealing. Highly competitive UVA⁴² reported that blacks made up 7.9 percent of the total student body (86 students out of a total student body of 1090).⁴³ Slightly less selective William and Mary⁴⁴ reported black enrollment of 9.3 percent (50 students out of a total of 538). The surprise, however, was at George Mason, the least selective of the three schools.⁴⁵ At GMU, black enrollment was reported to be 1.7 percent (12 students out of a

total of 727), less than one-fifth the level found at William and Mary and less than a quarter of that found at UVA.⁴⁶

Since race preferences in law school admissions are viewed by their proponents as being necessary largely because of the significant gaps which currently exist between blacks and whites (and to an equal extent, Asian Americans) on LSAT scores and in their college GPAs, one would expect the less selective schools to enroll a proportionally *higher* percentage of black students.

However, in Virginia, as in California before that state ended preferential admissions, that is not the case. Highly selective schools like UVA and William and Mary, through the heavy use of racial preferences, end up robbing sister schools like George Mason of a significant group of black students who comfortably qualify for admission to George Mason without any consideration being given to race. The same pattern was seen in the respective enrollments at UC Berkeley, UCLA, and UC Davis before the passage of Prop. 209. The inevitable result is that the comparative levels of racial diversity found in many law schools is skewed heavily in favor of the more selective schools due, at least in significant part, to their greater reliance on racial preferences.

The question in Virginia is: What would happen to *overall* black enrollment at its three public law schools were race to be eliminated from the process?

The answer seems to be nothing much.

According to CEO’s data, the *average* black admittee to UVA had a realistic prospect of being admitted to George Mason (and to a lesser extent William and Mary) without race being a factor. As the numbers demonstrate, the black UVA admittees’ average test scores and academic credentials were equal to, if not better than, the average credentials of *all* admittees to George Mason. Surely, therefore, many of the preferentially admitted UVA students would have found a home at George Mason; and, in the process, contributed to a more racially diverse class at George Mason. In summary, eliminating racial preferences at both UVA and William and Mary would *not* end racial diversity at either institution, and would likely improve the racial diversity at GMU.

Of course, undeterred by facts, a proponent of race preference policies speaking at UVA’s law school just weeks before the Supreme

Court arguments in *Grutter*, suggested that eliminating the race preference policies at UVA and other elite law schools would result in a return to “essentially all-white classes.”⁴⁷ Such statements are not only unproven, they are, like race preference policies themselves, demeaning to black students generally. Though no doubt unintended, they suggest a troubling lack of confidence in the ability of black applicants to successfully compete for admission to elite law schools unless their race is given positive consideration.

The fact is, instead of a return to “all-white classes” at UVA, the most likely effect of ending the use of race in Virginia’s admissions would be to more evenly apportion the racial diversity at each of Virginia’s three public law schools. One would think that the deans at all three of Virginia’s public law schools, UVA’s included, would concede that to be a good thing.

But even were disparities to remain (as they surely might, at least for a short period), and it were GMU instead of UVA or William and Mary which had 9 percent black enrollment, why should that matter? Only hard-core elitists like Bowen and Bok—and the rare Supreme Court justice—would suggest that a black (or white) GMU law graduate is somehow inherently less capable of making a positive contribution to society and to the legal profession than is a black (or white) UVA graduate. So long as black law school applicants (or applicants of any race for that matter) find a seat which they’ve earned when measured against the same standards applied to every other applicant, and even if that seat is at a less selective school (which simply means they will be studying alongside the many white and other students who equally earned seats at the same institution), isn’t society better off with race entirely eliminated from the equation?

Thus, even assuming no structural changes were to be made in K-12 and undergraduate educational systems, and no progress were to be made in reversing the “anti-intellectual” attitude widely seen by many black educators as the reason for black students’ current academic underperformance,⁴⁸ and without giving any consideration to amending admissions criteria to assign positive weight to “disadvantage” which can cross all racial lines (including assigning extra weight for demonstrably overcoming socioeconomic or educational disadvantages,⁴⁹ factors which, as Professor Dershowitz

points out will, in the near term, continue to disproportionately benefit underrepresented minority applicants),⁵⁰ and without giving any consideration to increasing “outreach” and “recruiting efforts,” or to making other structural changes in current law school admissions systems (where elite schools continue to place an inordinate and arguably ill-advised emphasis on LSAT scores⁵¹ and actively maintain “legacy”⁵² preferences), it seems all but certain that ending racial preferences will not have the adverse effect on minority enrollment predicted by their proponents.

Moreover, if truly effective changes were to be made in each of the areas outlined above, changes which undoubtedly *must* be made if we are to narrow the current gaps in academic and standardized test performance between blacks and other racial groups, there is no reason for law school administrators or black students themselves to doubt that black law school enrollments will eventually escape the demeaning phrase “underrepresented.”⁵³

Finally, as to the overwhelmingly negative effects on black students in particular of systems which continue to use race as a factor in admissions, we must not ignore the words of Shelby Steele (which I have often quoted or otherwise referred to throughout this book):

All social reform that hopes to initiate minorities fully into society should be based first and foremost on high expectations. The subliminal message of a high expectation is “*You can and you must.*” *The high expectation is the only credible assertion of equality that a society can make.* It not only shows faith in the human equality of minorities but it also holds them accountable for demonstrating that equality through performance. . . . The most dehumanizing and defeating thing that can be done to black Americans, for example, is to lower a standard in the name of their race. There the black is asked to identify with it as proof of his victimization, to hold it, and

to use it. But in the high expectation there is a faith in his equal humanity, intelligence, and skill. And when he meets that expectation, his equality becomes unassailable.⁵⁴

In the end, it is this “lowering of standards” which occurs each time racial preferences are employed. It is what happens at every school where race is used as a factor in admissions. And it is dehumanizing and defeating to black students. If there were no other reason to eliminate “racial preferences,” Dr. Steele’s observation would be reason enough.

¹ Bloomberg News Service, “University Racial Preference Fight Moves to the U.S. Supreme Court” (Aug. 8, 2002), quoting former University of Michigan President Lee Bollinger: “There’s always the wish that there would be some other way to accomplish [racial diversity] other than explicitly considering race and ethnicity.”

² Proposition 209 amended the California State Constitution. It provides, in pertinent part: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in . . . public education, . . .”

³ I use the term “static” to mean that no changes are made in the admissions system, structural or otherwise, apart from eliminating race. So, for example, static means there would be no consideration given to adding or increasing the emphasis on such race-neutral factors as “socioeconomic or educational disadvantage”; no consideration given to eliminating family “legacy” or “faculty-relationship” preferences; no consideration given to revising, de-emphasizing, or eliminating altogether the use of high-stakes standardized tests; no effort to improve the student pool through critical educational reforms in the K-12 area; to effort to expand “outreach” and “recruiting” efforts to applicants from communities who historically have been underrepresented at a particular school or in a given profession. The fallacy, of course, is that the system is *not* “static.” As for the reforms mentioned, above, many have already been undertaken or are being actively considered at various institutions. See, e.g., Texas A&M University’s post-*Grutter* reforms (refusing to reinstitute race-conscious admissions while expanding recruiting and outreach programs and eliminating legacy preferences).

⁴ The enrollment of applicants from various minority groups remains a function of not only the numbers “admitted,” but of “yield,” or the ability of the school to convince those applicants who are admitted to accept the offer and actually enroll. For example, in the fall of 1997, 18 black applicants were offered admission to Boalt Hall, the law school at UC-Berkeley but none accepted. See Trial Exhibit 132 in *Grutter*.

⁵ According to statistics provided by the American Bar Association through 2001, black enrollment in law schools reached a high mark of 9,681 in the fall of 1994 which represented 7.5% of the total enrollment of 128,989 (which also happened to be the high mark in total law school enrollment). Overall, minority enrollment constituted 19% of the total. It is important to note that 1994-95 was the time period before the court decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which banned the use of race in law school admissions in the states of Texas, Louisiana, and Mississippi; and before the 1996 passage of Prop. 209 in California and the 1998 passage of I-200 in Washington (which, like Prop. 209 in California, banned the use of race in public university admissions in the State of Washington). Five years later, in 1999-2000, overall law school enrollment had dropped by almost 4,000 students; yet minority enrollment actually grew both numerically and as a percentage of the total enrollment (to over 20% of the total). Black enrollment during this period, like overall enrollment, did drop slightly, but remained essentially unchanged in terms of its overall percentage of the total (7.4%). See OFFICIAL ABA GUIDE TO APPROVED LAW SCHOOLS (2001 ed.) at 454-57.

⁶ J. BLACKS IN HIGHER ED (Winter 2001-2002) at 85.

⁷ *Id.* at 84. Ironically, this data appears under the bold heading, “The Collapse of Black Enrollments in Washington State.” The Journal goes on to assert in the very first paragraph following this heading that, “the ban on affirmative action has had a profound impact on black enrollments at the University of Washington, the state’s flagship university in Seattle.” *Id.* at 83. Obviously the actual data reported when compared with the Journal’s inflammatory description (see preceding note and accompanying text) cannot be reconciled.

⁸ *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

⁹ See *Grutter* Trial Exhibit 131.

¹⁰ Peter Schmidt, “A New Route to Racial Diversity: Texas A&M raises minority enrollments without race-conscious admissions,” THE CHRON. OF HIGHER ED. (Jan. 28, 2005) at A22.

¹¹ *Id.* Texas A&M reported that 1,078 of the total fall 2004 entering class of 7,068 were black or Hispanic.

¹² Source: University of Texas Law School Enrollment data. See R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEX. REV. L. & POLITICS 313, 334, n. 108 (Spring 2003).

¹³ *Id.*

¹⁴ *The University of Texas at Austin News* (Mar. 13, 2002), “Hispanic magazines rank Law, Business schools No. 1; university ranks No. 4.” (www.utexas.edu/new/nr_ranking020313).

¹⁵ *Id.* Stanford University, a private university in California, was the only institution unaffected at the time of these rankings by either Prop. 209 or the court ruling in *Hopwood*.

¹⁶ TSR at 38, note 23.

¹⁷ How, for example, could a campus which at one time openly discriminated in favor of certain students and against others based solely on skin color be characterized as *more hostile* after it ended this practice? Moreover, racial hostility reportedly had been a fixture at UC Berkeley for decades with racial preference policies firmly in place, and long before the passage of Prop. 209. See, Daryl G. Smith, Lisa E. Wolf, and Thomas Levitan (eds.), *STUDYING DIVERSITY IN HIGHER EDUCATION* (Spring 1994) at 55-56.

¹⁸ See, Purdy, *supra* note 12 at 334, n. 104 (*Grutter* Trial Exhibit 132).

¹⁹ *Id.*

²⁰ *Id.* As the UC enrollment data disclosed, pre- and post-Prop. 209 differences in black enrollments at the other two UC law schools, UC Davis and Hastings, have been negligible.

²¹ See Trial Exhibit 132 in *Grutter* (cited and discussed in Purdy, *supra* note 12 at 334, n. 104). Other minority groups showed drops in overall applicants but nothing to compare with the drop in black applicants. For example, “Mexican-American/Other Hispanic” applicants averaged 498 between 1993 and 1996. After 1996, applicants from these same groups dropped to an average of 345 per year. For the class entering in the fall of 2000, there were 373 “Mex.-Am/Oth Hisp” applicants of which 63 were admitted. The rate at which they were admitted equaled the rate for the entire class (17%) yet only 18 elected to attend. *Id.*

²² *Id.* A similar pattern is seen in UCLA’s black applicant pool. In 1993, there were 487 black applicants to UCLA; in 2000, there were 223.

²³ *Id.*

²⁴ See data cited in Purdy, *supra* note 12 at 333, n. 102.

²⁵ *Id.*

²⁶ David Wienir & Marc Berley (eds.), *THE DIVERSITY HOAX* (1999) at 83.

²⁷ After *Hopwood*, black applications to UT’s law school reportedly dropped by more than 50%. As Texas State Senator Rodney Ellis declared, “Clearly the best and the brightest minority students are leaving Texas.” See “Statement from the office of State Senator Rodney Ellis” (Apr. 17, 1998) (www.senate.state.tx.us/75r/senat/members/dist13/pr98/p041798a/html).

Similarly, the year after the University of Georgia had its undergraduate program of numerical race preferences struck down by a federal court in *Johnson v. Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001), black applications dropped by 40 percent, resulting in a decline in first-year black enrollment of nearly 20 percent (from 249 to 201). See *J. BLACKS IN HIGHER ED* (Winter 2001/2002) at 83.

²⁸ Purdy, *supra* note 12 at 334, n. 104.

²⁹ See *supra* note 27.

³⁰ One of the University of Michigan Law School’s witnesses, a former professor and the current Vanderbilt University Law School dean, agreed with the district court judge in *Grutter* that racial diversity—if deemed important to a law school’s pedagogical mission—could more easily be accomplished if the school “abandon[ed] the LSAT and GPA as significant factors in admissions.” See Trial Testimony of Kent Syverud in *Grutter* (Jan. 22, 2001), cited in Purdy, *supra* note 12 at 331-32, n. 91.

³¹ As noted earlier, the elimination of the SAT and ACT as a factor in undergraduate admissions is already well underway at many of our nation’s most prestigious colleges and universities. This is an approach reportedly being used by UC Berkeley’s highly regarded Graduate School of Education. Its dean, Dr. Eugene Garcia, testified that in spite of Prop. 209’s ban on the use of race, Berkeley’s Graduate School of Education has been able to enroll a “highly qualified” and a “racially diverse” class each year (approximately thirty percent being underrepresented minorities) *without considering the race of an applicant*. The school accomplishes this by using a “holistic” review process which essentially eliminates the weight previously given to the Graduate Record Examination (GRE). See Trial Testimony of Eugene Garcia in *Grutter* (Vol. 11, generally, at 83-92). Also see *Grutter I*, 137 F.Supp.2d 821, 862, 869 (E.D.Mich. 2001).

³² “For reasons that are unclear, black enrollments at the five medical schools of the University of California *were already on a steep path of decline*” prior to the passage of Prop. 209. Notwithstanding that decline (which cannot be attributed to the ban on using race in admissions—the decline occurred while racial preferences were in use), since the fall of 1996 before Prop. 209 took effect, black medical school enrollments in the UC system have “remained

relatively constant.” See J.BLACKS IN HIGHER ED (Winter 2001/2002) at 93 (emphasis added).

³³ See Trial Exhibit 132 in *Grutter*.

³⁴ See Online NewsHour, “Redefining Diversity” (Jan. 18, 1999).

³⁵ See www.usnews.com/usnews/edu/beyond/gradrank/gblawdiv.htm.

³⁶ *Id.*

³⁷ See data cited in Purdy, *supra* note 12 at 333, n. 102.

³⁸ *Id.*

³⁹ An example of UC Berkeley’s and UCLA’s racial diversity is found in *The Princeton Review’s* college guide, THE BEST 331 COLLEGES (2000 ed.) at 518, 524. UC Berkeley reported that almost 70 percent of the students were members of racial or ethnic minorities. Only 31 percent of the student body was described as “Caucasian.” The figures were essentially the same at UCLA where 34 percent were described as “Caucasian.”

⁴⁰ Laurel Thomas Gnagey, “Coleman on Prop. 2: ‘We will not be deterred,’” The University Record Online (Nov. 13, 2006).

⁴¹ Robert Lerner and Althea K. Kagai, “Racial and Ethnic Preferences at the Three Virginia Public Law Schools,” prepared for The Center for Equal Opportunity (April 2002) (“CEO Study”).

⁴² *Id.* at 8. For entering law school classes in the falls of 1998 and 1999, the median LSAT for whites who were admitted at UVA averaged in the 97th percentile with a median GPA of 3.75. For these same time periods, black admittees had a median LSAT in roughly the 81st percentile with a median GPA of 3.43.

⁴³ All references to racial composition are from the OFFICIAL ABA GUIDE TO APPROVED LAW SCHOOLS (2001 ed.), *supra* note 5.

⁴⁴ For falls of 1998 and 1999, median LSAT and GPA for whites at Wm & Mary was 91st percentile and 3.48; for blacks 59th percentile and 3.22. CEO Study, *supra* note 41.

⁴⁵ For falls of 1998 and 1999, median LSAT and GPA at GMU for whites was approximately the 81st percentile and 3.23; for blacks approximately the 75th percentile and 3.12. The overall difference, while statistically significant, does not appear to be substantially so, particularly in 1999 where no statistically significant differences in admissions criteria existed between black and white applicants. CEO Study, *supra* note 41 at 31.

⁴⁶ See, *supra* note 5.

⁴⁷ Michael Marshall, “‘Scrimmage’ previews affirmative action case,” InsideUVAOnline (Mar. 28-Apr. 10, 2003).

⁴⁸ John H. McWhorter, LOSING THE RACE (2000) at 100.

⁴⁹ Two examples of long-standing programs which reportedly target disadvantaged students of all races are The Special Admissions and Curriculum Experiments (Sp.A.C.E.) program at Temple University’s School of Law, and the Legal Education Opportunity Program (LEOP) at the University of California—Hastings School of Law.

⁵⁰ Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?* 1 CARDOZO L. REV. 379, 417-18 (1979).

⁵¹ Consider the trial testimony of Vanderbilt Law School dean Kent Syverud, *supra* note 30. Consider, also, the lack of any purported relationship between a Michigan law student’s entering LSAT/GPA index and his or her eventual success as a lawyer. See, generally, Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395 (2000)(Trial Exhibit 230 in *Grutter I*). It is not at all clear that Bowen and Bok would agree with this alleged finding.

⁵² Texas A&M has recently eliminated “legacy” preferences. See, *Office of the President, Texas A&M University*, “Statement on Legacy” (Jan. 9, 2004). And see *Grutter I*, *supra*, 137 F.Supp.2d at 853 (discussing, among other steps, eliminating legacy preferences, and using a “lottery system for all qualified applicants”).

⁵³ For black students to emerge from the “underrepresented” label also requires that black students apply to law and other professional school at the same rates as do students of other races and ethnicities.

⁵⁴ Shelby Steele, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA (1998) at 112-13 (emphasis in original).