A Modest Proposal in Deference to Diversity

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"If all we do over the next twenty five years is affirmative action, then we will still need affirmative action."[1]

INTRODUCTION

In 2003, the United States Supreme Court pronounced in *Grutter v. Bollinger*[2] that diversity in higher education is a compelling interest sufficient to justify the race-conscious application of affirmative action admissions policies.[3] The Court recognized that in order to obtain meaningful racial diversity some consideration of race is necessary, finding that race-conscious policies will not violate the Fourteenth Amendment's Equal Protection Clause, so long as those policies are narrowly tailored to serve that compelling interest.[4] The Court held that seeking to obtain a "critical mass" of students from underrepresented groups does not amount to a quota, or to improper "racial balancing," and therefore will be permitted.[5] However, Justice O'Connor's 5-4 majority opinion was not a complete loss for the anti-affirmative action forces. It provided a clearer narrow tailoring requirement and the "sunset clause," which suggested that twenty-five years time may be sufficient to close the test score gap, and thereby propel students of color into higher education without the use of affirmative action policies.[6]

Notwithstanding the "conventional wisdom" that there is no effective proxy for race conscious policies to obtain short-term racial diversity, Professor Richard Sander published his conclusions that race-

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1 Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 188 & n.82 (2004) (quoting Nat Hentoff, *Sandra Day O'Connor's Elitist Decision*, VILLAGE VOICE, July 29, 2003, at 30 (quoting Lisa Naverette)).

2 539 U.S. 306 (2003).

3 *See id.* at 328.

4 *Id.*

5 *See id.* at 329-30.

6 *See id.* at 343. *See also* Gratz v. Bollinger, 539 U.S. 244 (2003).

conscious affirmative action admission policies at elite law schools actually harm African Americans in the long-term and thus such policies should be curtailed severely.[7] He therefore recommends that the diversity the United States Supreme Court approved include even fewer African Americans than have been admitted through affirmative action programs in the past. Although Sander states his intention to make similar claims about other ethnic groups (Latinos and Hispanics, as indicated in his article[8]), he claims that African Americans should receive an even smaller piece of the elite law school pie in relation to other ethnic groups, including Anglos.

One basis for Professor Sander's proposition may be a recognition that affirmative action was created to assist African Americans in dealing with the realities of rampant racism that limited their opportunities and access to education after equal rights were provided by the end of *de jure* segregation. Perhaps Sander thinks that if affirmative action's purpose was not actually being realized, and if affirmative action truly harmed African Americans, then it constitutes another form of invidious discrimination. As such, it should have been banned even under the less forgiving "benign versus invidious" distinction that existed before the United States Supreme Court determined that strict scrutiny should apply to all racial discriminations.[9] Accordingly, law schools should begin phasing out race-based affirmative action, despite the Supreme Court's approval of these programs in *Grutter*[10]

One important issue, however, is whether Sander's data set and interpretations are accurate. Scholars responded forcefully and promptly, in the May 2005 issue of the Stanford Law Review.[11] As such, this article will not reiterate a detailed analysis of Sander's methodology and conclusions,

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7 Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371-72 (2004).

8 *Id.* at 370.

9 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224, 227 (1995) (holding that all racial classifications imposed by federal, state, or local government actors are subject to strict scrutiny).

10 Sander, *supra* note, 7, at 482-83.

11 *See generally* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers*, 57 STAN. L. REV. 1807 (2005); David L Chambers, Timothy T. Clydesdale, William C. Kidder, Richard O. Lempert, *Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005) [hereinafter *Real Impact*]; Michele Landis Dauber, *Big Muddy*, 57 STAN. L. REV. 1899 (2005).
David B. Wilkins, *Systematic Response to Systemic Disadvantage: A Response to Sander,* 57 STAN. L. REV. 1915 (2005). *See also* Sander's response, 57 STAN. L. REV. 1963 (2005). This is the same edition of the journal in which Sander's article first appeared in the fall of 2004.

though some discussion of his claims and interpretations is necessary.[12] Rather, this article seeks to promote a temporary truce in the empirical battle of statistical significance by exploring another alternative.

Regardless of Professor Sander's conclusions, there is a vital question the data has not answered – What does it mean to have true diversity in law school? *Grutter* indicates that true diversity in law schools contemplates a critical mass of traditionally underrepresented groups, such that individuals within those groups feel comfortable expressing themselves and can learn and grow together, enhancing the education of all. Additionally, all students must prepare themselves for leadership and follower roles in the increasingly multi-racial and multi-cultural world around them.[13] Because African Americans are an integral and essential underrepresented group, obtaining and maintaining an appreciable number of African Americans within that critical mass will help us achieve true diversity in elite law schools. If we follow Professor's Sander's proposal, we will not achieve true diversity."

This article proposes a True Diversity Experiment, which will evaluate the costs and benefits of a true diversity regime. This experiment will enable scholars, students, and policy makers, to more accurately measure whether or not it is time for affirmative action to end. Among the questions to consider are: do affirmative action's burdens outweigh its value? Has the goal of equal educational opportunity been realized? The timing of this experiment is important, particularly due to the appointment of Justice Alito to replace Justice O'Connor, the subsequent appointments of Chief Justice Roberts and Justice Sotomayor, the recent retirement of Justice Souter, and the decision in the *Seattle Schools* cases.[14] As the fifth vote in favor of upholding Michigan Law School's affirmative action program, the absence of Justice O'Connor could mean that the next diversity case that is presented to the Court could result in a far different decision – such as the overruling or curtailing of the holding in *Grutter*, and extending the holding in *Gratz*. Even if the opportunity to address the constitutionality of diversity as a compelling interest does not present itself in the near future, it is unlikely that affirmative

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12 Some discussion of Sander's article, its conclusions and its critiques is necessary to provide a fuller understanding of the issues *infra* in Part IV.C and nn. 221-34 and accompanying text.

13 *See* Grutter v. Bollinger, 539 U.S. 306, 330-34 (2003) (stating, *inter alia*, that a large number of the nation's leaders earned law degrees and that because of an increasingly diverse workplace, employees must be able to work with other races).

14 Since the submission of this article for publication, the United States Supreme Court has considered affirmative actions policies in secondary schools in *Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1*, 551 S. Ct. 701 (2007) (deciding that the compelling interest in diversity did not justify the use of race in student assignment to high schools).

action policies like Michigan Law School's will be safe from high court intervention for what remains of the twenty-five year moratorium period that Justice O'Connor seemingly announced.

Part One of this article explains the *Grutter* case, the implications of its reasoning, the various readings of the plurality opinions, and demonstrates how the proposal can be implemented in a way that is consistent with the Court's holding. Part Two presents a modest proposal that invites law schools from all tiers of the US News and World Report ("US News") spectrum to engage in the True Diversity Experiment. This proposal suggests that critical mass and diversity be taken seriously, for a limited period of time, so that schools may observe and evaluate the benefits that flow from a diverse educational environment. The cornerstones of this proposal are Access, Environment, and Self-Interest. Part Three describes the main justification for the proposal, which is to prepare for sunset, whether that be in eighteen years or less, given the potential upcoming changes in the Court roster.[15] This part also explores Professor Derrick Bell's notion of interest convergence, and analyzes how the True Diversity Experiment may lead to the identification of a new convergence point that solidifies the rationale for continuing diversity goals. In addition to exploring the benefits and burdens of diversity and affirmative action policies on Anglos and African Americans, Part Four also analyzes and briefly responds to Professor Sander's critique of affirmative action for African Americans in law schools and concludes the article.

I. The True Diversity Experiment Satisfies the *Grutter* Test

A. What *Grutter* Says

In *Grutter*, the Court heard arguments on whether diversity could serve as a compelling interest, sufficient to justify an affirmative action program that considered race and ethnicity in allocating admission offers at the University of Michigan Law School. The Court's majority opinion gave deference to the university's own description of its institutional mission[16]

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15 Robert Barnes, *Justice John Paul Stevens Announces His Retirement from Supreme Court*, WASH. POST, Apr. 10, 2010 (explaining that Justice Stevens will retire in the summer of 2010).

16 *Grutter*, 539 U.S. at 329. The court further states:

> our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper

holding that "the Law School has a compelling interest in attaining a diverse student body."[17]

The Court also explained that part of this compelling interest in diversity requires enrolling a "critical mass" of minority students, recognizing that "[b]y virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."[18] The court's reference to "meaningful numbers" calls to mind the criticism of quotas and racial balancing. With the caveat that "outright racial balancing ... is patently unconstitutional,"[19] the Court distinguished the law school's concept of critical mass as being "defined by reference to the educational benefits that diversity is designed to produce."[20] The educational benefits do not result from the mere fact of obtaining a certain percentage of representatives, but these benefits can be provided when the environment becomes a "safe place." That is, sufficient "other" voices must be present so that the diverse students can feel comfortable. When the diverse students feel comfortable enough with the environment to really participate in the classroom conversation, all students learn more from the experiences of their peers. Therefore, the diffusion of diverse experiences and knowledge is one of the benefits flowing from a diverse student body – a benefit which cannot meaningfully be achieved without a critical mass of diverse students to serve as its source.

Thus the Court's concern over critical mass seems to relate directly to the environment. Once access is granted through diversity admissions, maintaining a critical mass of diverse students helps to create an environment in which the diverse students not only can learn and grow, but also teach their peers.[21] This environment relies upon interaction, in the true sense of word, requiring both contact and communication – not just in "being together," but

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institutional mission, and that "good faith" *on the part of a university is "presumed" absent "a showing to the contrary."*

Id. (internal citations omitted).

17 *Id.* at 328.

18 *Id.* at 338.

19 *Id.* at 330.

20 *Id.*

21 James P. Sterba, *Completing Thomas Sowell's Study of Affirmative Action and then Drawing Different Conclusions,* 57 STAN. L. REV. 657, 685 (2004) (book review) ("Unlike Sowell's definition of critical mass, the primary beneficiaries of achieving a critical mass of underrepresented minorities, as defenders of affirmative action use the term, are not the minorities themselves, but rather the student body as a whole, especially in classroom contexts.").

also in acting and reacting together.[22] This definition suggests that we consider whether the Court's rationale is more appropriately based on integration rather than diversity, and Part II.B.ii, *infra*, begins that discussion.[23]

The majority in *Grutter* determined that Michigan's law school program did not constitute a quota. The Court defined a quota as "a program

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22 WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 955 (2d ed. 1983) (defining "interaction" as "action on each other, reciprocal action, or effect").

23 As Bloom notes, the *Grutter* Court seems to be relying upon integration as the justifying principle when admitting that a critical mass is also necessary to achieve the university's institutional mission. *See* Lackland H. Bloom, Grutter *and* Gratz*: A Critical Analysis,* 41 HOUS. L. REV. 459, 472-73 (2004). Before *Grutter*, in *Wessmann v. Gittens,* 160 F.3d 790, 799 (1st Cir. 1998), the Court, citing *Miller v. Johnson*, 515 U.S. 900, 912 (1995), provided a compelling analysis of the difficulty in reconciling an interest in maintaining a critical mass with an interest in pursuing racial and ethnic diversity, stating that:

> It cannot be said the racial balancing is either a legitimate or necessary means of advancing the lofty principles recited in the Policy. The idea is that unless there is a certain representation of any given racial or ethnic group in a particular institution, members of that racial or ethnic group will find it difficult, if not impossible, to express themselves. Thus, the School Committee, says, some minimum number of black and Hispanic students—precisely how many we do not know—is required to prevent racial isolation. Fundamental problems beset this approach. In the first place, the "racial isolation" justification is extremely suspect because it assumes that students cannot function or express themselves unless they are surrounded by a sufficient number of persons of like race or ethnicity. Insofar as the Policy promotes groups over individuals, it is starkly at variance with Justice Powell's understanding of the proper manner in which a diverse student body may be gathered.[citations omitted]. Furthermore, if justified in terms of group identity, the Policy suggests that race or ethnic background determines how individuals think or behave—although the School Committee resists this conclusion by arguing that the greater the number of a particular group, the more others will realize that the groups is not monolithic. Either way, the School Committee, tells us that a minimum number of persons of a given race (or ethnic background) is essential to facilitate individual expression. This very position concedes that the Policy's racial/ethnic guidelines treat 'individuals as the product of their race,' a practice that the Court consistently has denounced as impermissible stereotyping.

in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'"[24] The quota was contrasted with a "permissible goal" which "require[s] only a good-faith effort... to come within a range demarcated by the goal itself' and permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate 'compete[s] with all other qualified applicants.'"[25] While the distinction between a quota and a goal is not always easy to discern, the Court has declared that the flexibility of the goal is the most significant factor in determining what is permissible as a goal and what is impermissible as a quota.

To further combat the quota criticism, Justice O'Connor explained that considering the numbers of students from different groups is a factor in evaluating the benefits that flow from diversity. The majority opinion states:

> The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by Justice Powell recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. Some attention to numbers," without more, does not transform a flexible admissions system into a rigid quota. Thus, the mere fact that numbers are considered and monitored does not turn a permissible goal into a quota, so long as the flexibility and individualized consideration remain.[26]

On the issue of narrowly tailoring, the majority opinion notes that *Bakke* requires that "[R]ace be used in a flexible, nonmechanical [sic] way."[27] Separate admissions tracks are not permissible, and "universities [cannot] insulate applicants who belong to certain racial or ethnic groups from the competition for admission."[28] The Court noted that race or ethnicity can be considered "more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."[29] The opinion explains further

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24 Grutter v. Bollinger, 539 U.S. 306, 335 (2003) (internal citations omitted).

25 *Id.* (internal citations omitted).

26 *Id.* at 336.

27 *Id.* at 334.

28 *Id.*

29 *Id.* at 334.

that simply avoiding a quota is not sufficient to satisfy the requirement of individualized consideration. For instance, when race is used as a "plus" factor, the program "must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[30] This, according to the Court, is because "individualized consideration ...is paramount."[31] By evaluating applicants individually, the majority hopes to avoid the criticism that African Americans, for instance, are fungible in an admissions program, and that any one will do in order to fill the spot and ensure that sufficient numbers of African Americans are admitted to the law school.

B. What *Grutter* Means

i. What Universities May Do, Post-*Grutter*

In Grutter *and* Gratz*: A Critical Analysis*,[32] Professor Lackland Bloom provides his summary of the law in *Grutter* and *Gratz*. He contends that while racial preferences remain subject to strict scrutiny, the meaning of "strict" is modified for institutions of higher education.[33] The compelling interests required to satisfy the modified strict scrutiny will include not only "diversity or the educational benefits that flow from interchange between students with different backgrounds and perspectives, but also the benefits that flow from increased minority representation in business, the military, government, and other positions of leadership."[34]

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30 *Id.* at 337.

31 *Id.* at 337.

32 *See* Bloom, *supra* note 23.

33 *Id.* at 494.

> First, the use of racial preferences in admissions processes of institutions of higher education can be constitutional. If an institution chooses to use race as a factor in the evaluation process, strict scrutiny will apply; however, the strict scrutiny employed will be far more deferential to the expertise and judgments of educational institutions than is normally the case."

34 Bloom explains that:

> As long as an institution of higher learning purports to be using race to achieve such diversity, the Court will not require the institution to prove further that educational benefits do indeed

Bloom surmises that the use of race must be made "pursuant to an individualized, competitive process in which all relevant diversifying factors are taken into account."[35] He explains that "[a]ll factors need not be given the same weight, and presumably race may be given significantly greater weight than other diversifying factors."[36] On the issue of critical mass, Bloom interprets broad latitude for educational institutions, stating that courts will permit them to pursue a critical mass for each of the various underrepresented minority groups because doing so does not necessarily constitute an impermissible quota.[37]

Professor Sander also interprets the essential elements of O'Connor's reasoning in the *Grutter* case as follows. "First, while race might be the single most important non-index [sic] factor, other non-index factors must be given significant weight—enough weight so that race is not the dominant non-academic qualification for admission."[38] Sander's statement suggests that

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> flow from diversity in general or racial diversity in particular; the existence of such benefits was definitively resolved by the Court in *Grutter*. A mission statement explaining what the university is attempting to achieve might prove useful in justifying the system that the university employs.

Id.

35 *Id.* at 495.

36 *Id.*

37 *Id.*

> An educational institution may attempt to achieve a critical mass of minority students for the purpose of ensuring that such students do not feel too isolated to participate in the academic interchange. Apparently, the institution may create significantly different critical masses for different underrepresented minority groups. An attempt to achieve such critical mass, including closely monitoring acceptance of offers of admission extended to minority students, will not give rise to an inference that the institution is maintaining a quota. An institution largely satisfies the requirement of narrow tailoring by taking account of all relevant diversifying factors in an individualized and competitive process. If challenged, it might be helpful if the institution can show that some nonminorities [sic] were admitted with lower academic indicators than those of underrepresented minorities who were rejected, though this is probably not essential.

Id.

38 Sander, *supra* note 7, at 397. He continues:

while race may account for a large percentage of the non--academic, or non-index factors, it cannot be worth more than all the other non-academic factors combined. This interpretation blends into his description of the second essential feature, which Sander recognizes as ensuring that race must not be the deciding factor (as it seemed to be in the *Gratz* case).[39]

Sander concludes, however, "that "the distinction drawn by O'Connor between the admissions systems of the University of Michigan's law school and its undergraduate college is a false one."[40] He asserts that "[it] is impossible to explain the admissions outcomes at the Law School, or at any other law school we have examined, unless the schools are either adding points to the academic indexes of blacks or separating admissions decisions into racially segregated pools."[41] He proposes that in reality the law school's admission policy was really a form of racial balancing or is an impermissible quota, accomplishing the goal of diversity with a "wink and a nod."[42]

> Otherwise, 'diversity' would simply be synonymous with 'race' and an applicant's race would indeed be the defining feature of her application. It follows that the greater the weight given to racial diversity, the more the weight given to the other diversity factors must also go up (to avoid having race dominate all other factors). The weight given to academic indices must accordingly go down, and the slope of the admissions curve will therefore become flatter.

39 *Id.* The second feature is that:

> the probability of admission for blacks cannot be close to 100% at any index level; if it were, this would mean that blacks at that level were not in any meaningful competition with academically comparable whites--for blacks in such ranges, their race alone would be making them indispensable. [Conversely,] the probability of admissions for whites cannot be close to 0% at any index level where the probability of admission for blacks is substantial---otherwise, again, blacks at that level would not be meaningfully competing with academically comparable whites.

Id.

40 *Id.* at 481.

41 *Id.* at 481. Sander's arguments are explored more fully *infra* in Section IV.C. and nn.221-234 and accompanying text.

42 Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 34 (2002).

ii. Does the *Grutter* Court use Diversity as a Proxy for Integration?

While *Brown* mandated that public educational institutions desegregate, *Brown* did not require that these institutions actually *integrate.*[43] One author describes the difference between desegregation and integration as follows: "To desegregate is to break down separation of the races and to promote greater equality of opportunity," whereas integration is more far-reaching, "bringing together people of different colors and ethnic backgrounds so that they associate not only on an equal basis but also make a real effort to respect the autonomy of other people and to appreciate the virtues of cultural diversity."[44] If integration requires an appreciation of diversity, then actual racial diversity is an important and necessary foundation for integration.

Many institutions took this first step and pursued desegregation policies after the laws eliminated formal barriers to equal education. As facially discriminatory policies were curtailed, African Americans were permitted to enter into white educational institutions. Subsequently, these institutions discovered that opening previously closed doors was not sufficient in the short run to provide a significant African American presence. In response, schools followed the lead of the Office of Federal Contracting Compliance, initiating affirmative action programs and taking steps to ensure that African Americans were given a chance to prove themselves in elite educational institutions.[45] While institutions tried to implement the first step of desegregation, it became clear that the elimination of formal barriers and even the realization of some racial diversity did not give rise to substantial progress towards integration.

Moreover, during the course of post-*Brown* desegregation efforts, the number of qualified applicants for higher education opportunities increased faster than the number of admissions slots. Consequently, some schools became more selective in their admissions processes.[46] Admissions standards

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[43] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (rejecting separate educational facilities as inherently unequal and thus requiring desegregation). This is not necessarily the same as requiring integration, as the long history to achieve integrated schools demonstrates.

[44] JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 205 (2001).

[45] This author has addressed this history in the article Christine C. Goodman, *Disregarding Intent: Using Statistical Evidence to Provide Greater Protection of the Laws*, 66 ALB. L. REV. 633, 637-639 & nn.15-28 (2003).

[46] Brief for Association of American Law Schools at 9-12, 66, as Amici Curiae

relied increasingly upon standardized testing. This emerging standard of an "LSAT-driven definition of merit" began to close the doors to people of color even though those doors had been unlocked by antidiscrimination laws.[47] The re-segregation of educational institutions through the race-neutral factor of "merit," led to a decrease in the racial diversity accomplished by the end of *de jure* segregation.[48] As LSAT scores rose, the gap between median scores of whites and African Americans increased, and the size of the affirmative action "boost" needed to provide racial diversity grew.[49] The larger the boost, the less "fair" affirmative action seemed. The individual benefits and harms of "displaced" white students were then recognized as "reverse discrimination," which could also violate the Fourteenth Amendment according to the *Bakke* plurality.[50]

As efforts to achieve *de facto* desegregation continued, various justifications for affirmative action emerged. One justification was remedying the effects of past discrimination,[51] and with *Bakke*, diversity (perhaps) emerged as another justification.[52] In the nominally desegregated nation, litigants and activists began to use the rhetoric of "promoting diversity" to recognize everyone's place at the table, instead of simply compensating for past discrimination against African Americans. These activists argued that any compensation seemed to be both too little and too much. *Bakke* was a compromise, declaring that explicit racial quotas were unconstitutional, yet permitting some consideration of race in the effort to promote the newly articulated interest in "diversity."[53] The *Bakke* articulation of diversity focused on desegregation by lowering the barriers for people of color to attend graduate schools, rather than focusing on conscious efforts to promote integration through interaction, or the notion of bringing together people of

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Supporting Petitioner, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187968 [hereinafter AALS *Bakke* brief] (evidencing the increase in competition for spots in law school class that results in heavy use of LSAT).

47 William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter*: a History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 27 (2003).

48 AALS *Bakke* brief, *supra* note 46, at 35. This seems to mean that race neutral criteria are doomed to failure, no matter how much we expand the conception of what constitutes merit for admissions purposes.

49 Vijay S. Sekhon, *Maintaining the Legitimacy of the High Court: Understanding the "25 Years" in* Grutter v. Bollinger, 3 CONN. PUB. INT. L.J. 301 (2004).

50 *Bakke*, 438 U.S. at 265 (1978).

51 Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

52 *See Bakke*, 438 U.S. at 271-72, 279, 289-90, 311-12, 319 (opinion of Powell, J.); *Id.* at 271-72, 305-10 (opinion of Powell, J.).

53 *Id.*

different colors. Powell's rationale was that this interaction was important "so that they associate not only on an equal basis but also make a real effort to respect the autonomy of other people and to appreciate the virtues of cultural diversity."[54] It was desegregation on multiple levels, rather than diversity as now defined by the *Grutter* court, which suggests a more integrationist view than *Bakke.*

Possibly, the *Grutter* Court used the term "diversity" to explicitly link the case to precedent in *Bakke.* Using the language of "diversity" permitted the majority to adopt the possible holding of the *Bakke* plurality,[55] to resolve the conflict in the circuit courts and specifically to overrule *Hopwood v. Texas.*[56] Moreover, "diversity" was the term used and briefed by the parties and *amici* in *Grutter.* Despite this explicit terminology, it is important to consider whether the University of Michigan's true goal was integration, and if the deference to diversity was the Court's method of avoiding further accusations of lawmaking from the bench.[57]

In addition to trying to decipher what *Grutter* "diversity" looks like, we should also identify the link between integration and diversity. Some scholars contend that *Brown* suggests that integration is a compelling interest in much the same way that diversity is compelling.[58] Professor Anderson

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54 PATTERSON, *supra* note 44, at 205.

55 *See, e.g.*, Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1199, 1201 (9th Cir. 2000) (holding that diversity was compelling interest). *Contra* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that diversity was not a compelling interest).

56 78 F.3d 932 (5th Cir. 1996).

57 Some suggest that the Court already made new law, because the plurality opinion in *Bakke* is not binding precedent on the issue of whether diversity constitutes a compelling interest. *See* Grutter v. Bollinger, 539 U.S. 306, 321-22 (2003) (stating that Justice Powell's opinion in *Bakke,* as it related to diversity, comprised the controlling rationale for the Court's judgment in *Marks v. United States*, 340 U.S. 188 (1977)). Regardless, finding integration to be a compelling interest would be making new law.

58 For instance, Professor Bell concludes that some of the recognition of the continued vitality of *Brown* is explicitly tied to the convergence of racial interests through integration.

> Whites in policymaking positions, including those who sit on federal courts, can take no comfort in the conditions of dozens of inner city school systems where the great majority of nonwhite children attend classes as segregated and ineffective as those so roundly condemned by Chief Justice Warren in the Brown opinion. Nor do poorer whites gain from their opposition to the improvement of educational opportunities for blacks: as noted earlier, the needs of the two groups differ little. Hence, over time, all will reap the benefit from a concerted effort towards achieving

notes that Brennan's plurality opinion in *Bakke* finds a compelling interest in racial integration in the educational context to be synonymous with a compelling interest in diversity.[59] Employment cases regarding police forces also suggest that integration is a compelling interest in the Title VII context.[60] As Anderson explains, "[i]ntegration, in this model, does not mean assimilation," but rather "effective participation and interaction on terms of equality by members of different races."[61] This interaction must occur "in shared spaces of civil society: at work and school, in the public spaces of neighborhoods, and in the sites of political action and discussion."[62] She notes that racial integration cannot simply be accomplished through non-racial "proxy" variables, "such as being educationally disadvantaged, or even being the victim of discrimination."[63] Anderson's conception of integration also incorporates diversity as a necessary component.[64]

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racial equality.

Derrick A. Bell, Comment, Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 528 (1980). *See also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

59 Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1226-27 (2002); *Bakke*, 438 U.S. at 261 n.1 (Brennan, J., concurring in judgment and dissenting in part) (describing the aim of Harvard's admissions plan as "achiev[ing] an integrated student body").

60 *See, e.g.*, Fountain v. City of Waycross, 701 F. Supp. 1570 (S.D. Ga. 1988) (deciding on other grounds where the city did not rely upon integration as a compelling interest, but suggesting that "a police chief might reasonably conclude that an integrated police force would lead to better relations with minorities and increased respect for authority in minority neighborhoods, particularly in a city with a history of racial unrest"). *Id.* at 1577 & n.7; *see also* Note, *Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. REV. 413 (2004) (proposing that "an amendment to Title VII to permit the use of race-conscious hiring of police officers when a city faces "law enforcement crises").

61 Anderson, *supra* note 59, at 1207.

62 *Id.*

63 *Id.*

64 Some might prefer to limit our definition of integration to focus on obtaining access, so that blacks and whites can be in the same school together. With this limitation, then, diversity would be a broader concept than integration, instead of being included within Anderson–style integration, because it requires integration among a larger number of groups, across many different dimensions, and avoids succumbing to the black white binary paradigm. *See, e.g.*, Juan F Perea, *The Black/White Binary Paradigm of Race: "The Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997). That binary paradigm is important, and not to be entirely dismissed, because of our nation's history of racial injustice specifically towards

Explaining this interpretation of the diversity/integration issue, Professor Issacharoff suggests that "one might argue that there really is no harm in the miscast reliance on diversity because, with a wink and a nod, everyone understands that diversity is really a proxy for integration."[65] Issacharoff continues, noting "that as the diversity nomenclature took on a life of its own, the capacity to address forthrightly the reasons for the distinct treatment of minorities who had been subject to formal barriers of exclusion diminished."[66] Diversity moves the focus away from racial recompense, and atonement for sins, and instead focuses on a positive good for all, without blame to people based on their affinity groups. Isaacharoff laments the movement away from traditional antidiscrimination principles of compensation and integration[67] though he admits that the reflexive quality of anti-discrimination laws ("on account of race" as opposed to "on account of being of African American") was destined to destroy even benign discriminations based on race.[68] Thus, he concludes, diversity is somewhat

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African Americans. As such, it works as a justification for the remedying of past discrimination, and perhaps even for racial reparations.

65 Issacharoff, *supra* note 42, at 35.

66 *Id.*

67 Issacharoff notes:

> There is also the problem that diversity—institutionalized through commitments to multiculturalism, -- has moved increasingly afield from its initial expression as a rationale, if a subordinate one, for the integration of blacks into mainstream institutions. The early rationale for affirmative action, ... was clearly integrationist. Society was taking responsibility for minorities' past subordination. Based on this moral authority, a forward-looking claim emerged about the necessity to improve the status of minorities, with blacks as the overwhelming case in chief, so as to promote the integration into mainstream American society. No one seriously claimed that the prime benefit would come from the improvement of the internal life of the affected institutions. In fact, there was specific repudiation of claims grounded in such internal institutional needs, which were often as with the case of customer preference, articulated as a defense of the discriminatory status quo.

Id. at 23.

68 *Id.* at 33 (stating that "the irony of third stage of equal protection law is that the tools of the first stage are increasingly being used to dismantle the legislative and administration discretion that was the hallmark of the second stage of equal protection law").

doomed as a defense for affirmative action, because it cannot sustain itself.[69]

The Court's renaming of the *Bakke* interest as "benefits flowing from a diverse student body" may provide a more cogent statement of the interest that the Court actually intended to foster. Mere "diversity" means having multi-desegregation, in the sense that the various races, ethnicities, differences of culture, tradition, and gender should be considered in determining who should be admitted in the school's entering class. In contrast, while the "benefits that flow from diversity" can occur when there is some representation, the likelihood of fruition is increased when there is a critical mass of underrepresented groups present. This is because with a critical mass, individuals are not tokens succumbing to racial isolation, and are given the space to meaningfully participate in the conversations, classes, and community experiences throughout the campus. It is through these types of "inter-actions" that the true benefits manifest, and one of these benefits is progress towards achieving actual integration.

This analysis suggests not only that one goal of affirmative action is integration, which flows from diversity, and but also that affirmative action has a forward-looking component. Thus, as Anderson articulates, affirmative action need not be justified solely as a remedy for past discrimination. Under Anderson's conception, integration also fosters equality, because if separate is inherently unequal, then integration is the best way to satisfy the guarantees of the Equal Protection Clause. As a method of ensuring equality, integration

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[69] Issacharoff continues:

> Once the formalist apparatus of the third stage of equal protection was invoked, the integrationist and remedial goals of the prior two stages of equal protection were placed at great risk. The formal doctrinal structure inherited from the first stage of post-War equal protection law proved remarkably adept at attacking all racial considerations, regardless of purpose or aim. Diversity emerged in *Bakke* as an alternative theory that might forestall some of the most extreme implications of equal protection formalism. Unfortunately, to the extent that *Bakke* pushed the defense of affirmative action to rest on the notion of diversity as an independent positive good, it compelled a departure from a central theme of pre-existing antidiscrimination law. Until *Bakke*, the leading defense of the antidiscrimination norm was precisely that it compelled an extra measure of judicial scrutiny to overcome the misappreciation of ability due to prejudice, crude assumption or cultural bias. Now, the defense of affirmative action had to rest on the alternative ground of diversity.

Id. at 34.

has both forward and backward looking components, thereby compensating for former inequalities, and promoting future equalities.

Some may wonder why the Court did not directly address the issue of integration, especially considering how directly the court addressed racial balancing and quotas. One possible explanation is that there would have been no majority for a holding that integration is a compelling interest. Objections could arise from freedom of voluntary association,[70] and the complacent attitude of the Court towards combating *de facto* segregation evidenced by the retraction of busing and many other efforts to promote the integration of public schools.[71] Nevertheless, if integration is the proper interest, as this article maintains, then let us examine how the Court's opinion can support such a conception.

iii. Promoting Integration: Access, Legitimacy and Self-Interest

The founding principles of the True Diversity Experiment—Access, Legitimacy and Self Interest—promote integration and are specifically addressed in Justice O'Connor's opinion. Recognizing the need for training a diverse force of leaders, she states:

> universities, 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.[72]

These percentages explain the critical importance of broad access to the most

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70 Anderson, *supra* note 59, at 1195.

71 The courts have stepped out of the busing battle and stopped trying to eradicate *de facto* segregation in public education, which results from *de facto* residential segregation and *de facto* economic factors that permit whites to opt out of the public school system and send their children to private schools or move to the suburbs. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); *Missouri v. Jenkins*, 515 U.S. 701 (1995).

72 Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (internal citations omitted). The court goes on to state: "The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 Unites States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges." *Id.*

elite law schools.[73]

Access is continued by maintaining affirmative action programs. This continued access will increase the legitimacy of those who are admitted through the door – as those admitted subsequently rise to the leadership positions of our governments, courts and businesses.

Bloom is concerned by this discussion of access as "shifting the focus away from the compelling interest in the educational benefits of diversity in the classroom, racial or otherwise, and toward a need for or a right of access to higher education by members of all racial and ethnic groups", which begins to sound more and more like the racial balancing declared unconstitutional *per se* by Justice Powell in *Bakke.*"[74] Nevertheless, providing access for all is more closely tied to an interest in Anderson's "transformative process" of integration because it stems from the recognition that different groups should learn and work together, rather than merely exist in the same place. Using a flexible goal while cognizant of the importance of a critical mass may avoid the criticism of racial balancing, and thus open up access without resorting to quotas. Thus, the majority opinion does provide some support for the proposition that integration is an interest that the Court sought to promote and protect.

Additional support for the notion of integration as the interest hinges

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[73] As Justice O'Connor continues:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

The opinion continues:

> As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

Id. (quoting *Sweatt v. Painter,* 339 U.S. 629, 634 (1950)).

[74] Bloom, *supra* note 23, at 475. The differences between the Court's program and racial balancing are discussed *supra* in Part I.A.

on the majority's slightly differing phrasing of what actually constitutes the compelling interest at stake. Initially, the opinion indicates that diversity is the compelling interest,[75] and later states that the compelling interest is in the educational benefits that diversity is designed to produce.[76] These two different formulations suggest that diversity, "in and of itself, is a means, not an end, thus raising questions concerning what these compelling educational benefits are, whether they in fact flow from diversity, and whether they could be achieved in a less discriminatory manner."[77] If the true interest is in the benefits that flow from diversity, and not just the achievement of diversity itself, then Justice Thomas may be correct.[78] Therefore the Court would need to examine whether those benefits are sufficiently compelling to satisfy the first prong of the strict scrutiny test.

The benefits have been described in various ways. Referring to the arguments of the University of Michigan, as well as to those made by *amici* submitted in the case, the majority opinion articulates these benefits as including the promotion of "cross-racial understanding" and learning outcomes that "better prepare the students for a diverse workforce and society," as well as "deconstructing racial stereotypes."[79] Given the Court's deference to Michigan's conception of its institutional mission, the Court would likely find each of these benefits to be compelling in and of itself. The next step is seeing whether the affirmative action program was narrowly tailored to serve these new compelling interests.[80]

The Court's emphasis on the benefits of *racial* diversity would provide more support for the argument that integration is the true interest being protected. Bloom states that the court "focused exclusively on the benefits to be derived from race-based diversity, especially as promoted by the use of critical mass," instead of providing some discussion of other forms of diversity as Justice Powell discussed in the *Bakke* case.[81] Bloom surmises

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75 Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

76 *Id.* at 343; *id.* at 354-58 (Thomas, J., concurring in part and dissenting in part) (stating that "it is the *educational benefits* that are the end, or allegedly compelling state interest, not 'diversity'") (internal citations omitted) (emphasis added); Bloom, *supra* note 23, at 467-69 (critiquing the differences between the two formulations).

77 Bloom, *supra* note 23, at 467.

78 *See* text accompanying *supra* note 76.

79 *Grutter*, 539 U.S. at 330-31.

80 The narrowly tailoring analysis is addressed briefly *infra* in Part III.A. For more on the narrow tailoring of means to support a compelling interest in diversity, *see, e.g.*, Bingham McCutchen LLP *et al.*, *Preserving Diversity in Higher Education: A Manual on Admissions Policies and Procedures After the University of Michigan Decisions*, Part I.C.1 (2004) (explaining the steps schools can take post-*Grutter*).

81 Bloom, *supra* note 23, at 472.

that this perceived omission "leaves the impression that it [the Court] viewed [broader based diversity] as nothing more than a fig leaf to cover an aggressive use of racial preferences."[82] According to Bloom, diversity comprised solely of race and ethnicity reverts back to the notion of desegregation, rather than the notion of integration.

Bloom's interpretation is flawed because it overlooks several portions of the *Grutter* opinion where the Court articulated its interest in non-racial forms of diversity. The compelling interest articulated by the Court is "mere diversity," separate from the benefits that may flow from achieving that diversity. For instance, the Court found that "like the Harvard plan Justice Powell referenced in *Bakke*, the Law School's race-conscious admissions program adequately ensures that *all factors that may contribute to student body diversity* are meaningfully considered alongside race in admissions decisions."[83] Later, the Court also explained that there was no limitation on diversity factors, stating: "[t]he Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity."[84] Recognizing that applicants have the chance to explain how they may contribute to diversity on any level, the Court provided a roadmap of additional non-racial diversity factors to insure that race is not the only criterion of diversity in admissions decisions.[85]

This argument is supported by the Court's past jurisprudence on compelling interests. For instance, the Court has repeatedly held that an entity has a compelling interest in seeking to remedy its own past

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82 *Id.* Bloom concludes that the Court took "the position that the Law School has a compelling state interest in seeking the educational benefits of a diverse student body that contains a critical mass of minority students," with the term "minority" being limited to racial and ethnic minorities. *Id.* at 473. Bloom further discusses the court's concern with "the larger societal benefits of racial diversity, such as keeping American businesses competitive, producing a stream of minority students capable of military leadership and assuring society that persons from all races have access to the paths to civilian leadership." *Id.* at 477.

83 *Grutter*, 539 U.S. at 337 (emphasis added).

84 *Id.* at 338.

85 *Id.* at 338-39. The court stated: "[t]he Law School frequently accepts nonminority [sic] applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority [sic] applicants) who are rejected. This shows that the Law School seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority [sic] applicants as well. By this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.

discrimination.[86] While remedying past discrimination is the compelling interest,[87] some of the benefits that flow from this remediation include eradicating stereotypes and promoting cross-racial understanding–which are benefits similar to those the *Grutter* Court identified as flowing from diversity. Thus, the fact that achieving the compelling interest in remedying past discrimination promotes other benefits as well does not render remedying past discrimination any less compelling.[88] Similarly, the fact that achieving the compelling interest in diversity has other positive ramifications does not render diversity any less compelling as an identified interest.

In responding to criticisms over the two different interests, it seems that while both diversity and the benefits flowing from diversity could be compelling interests, the most explicit statement of the Court's holding was that *diversity* is the compelling interest. The opinion states, "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."[89] The rest of the diversity rationale is part of the court's reasoning, and not its explicit holding. However, if what constitutes the true compelling interest is "the benefits that flow from a diverse environment," then considering all forms of diversity broadens the benefits. In fulfilling that mandate, the True Diversity Experiment would consider as wide a variety of non-racial diversity characteristics as the participating school supports. As long as those non-racial characteristics are dispositive, the policies are flexible enough to avoid constituting a racial quota, and the True Diversity Experiment should pass constitutional scrutiny.

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86 *See, e.g.*, City of Richmond v. Croson, 488 U.S. 469, 483 (1989).

87 *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 369 (1978), *see also Croson,* 488 U.S. at 484 (citing Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring)); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (O'Connor, J.)) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination... is an unfortunate reality, and government is not disqualified from acting in response to it."); Missouri v. Jenkins, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) (acknowledging "compelling governmental interest in redressing the effects of past discrimination") However, *Cf. Grutter*, 539 U.S. at 328 ("[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.").

88 It may be that these other ramifications make it more difficult to ensure that the means are sufficiently narrowly tailored to serve the compelling interest, particularly when the means serve other interests as well.

89 *Grutter,* 539 U.S. at 307.

II. The Modest Proposal and its Implementation

As discussed above, the United States Supreme Court's decisions in *Grutter* and *Gratz*[90] were considered a victory and a defeat for both sides of the affirmative action debate. *Grutter* permitted the continuation of affirmative action, but limited its duration and reaffirmed the illegality of racial quotas and racial balancing.[91] *Gratz* struck down a policy that more explicitly showed race to be the deciding factor, but permitted the continuing use of less rigid affirmative action boosts for race and ethnicity.[92] While Professor Sander suggests minimizing or even eliminating affirmative action for people of color in law schools, this article proposes that American law schools should maximize diversity through affirmative action programs while they are still permitted to do so.

The consensus among academics who support the goal of increasing diversity in classrooms seems to be that race-conscious affirmative action is needed to achieve diversity. Thus, the schools participating in this experiment should continue to diversify as long as they can while evaluating the learning outcomes to see whether achieving the goal of a diversified student body truly has been a success. This proposal involves a new type of percentage plan to address the critical mass component of *Grutter's* reasoning. Each participating school would aim at having a critical mass of "diverse students" throughout the student body, such that when one class graduates, or certain students are dismissed for academic or other reasons, more need to be transferred in. The non-participating schools would be the "control group," free to practice diversity or not, according to their own educational mission and goals.[93] At the end of the experiment, data will be available to evaluate the extent of the benefits and burdens that flow from a more diverse student body. With this information, scholars can more effectively analyze the salience of the diversity rationale, and better prepare our law schools for the impending sunset, if it is indeed still expected to occur. The proposal has seven basic steps, which are briefly outlined below.

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90 Gratz v. Bollinger, 539 U.S. 244 (2003).

91 *Grutter*, 539 U.S. at 325, 330, 334, 342.

92 *Id.* at 270-72.

93 While both the "control group" and the "participating schools" will be able to use whatever diversity factors they choose, the difference between them is that the former group will have a commitment to diversity that they will try to realize, whereas the control group will consider diversity as a factor with the primary goal of satisfying other institutional objectives and thus will not be primarily motivated by diversity in its decisions.

A. The Proposal

Step One involves recruiting participating law schools. First, we must recruit schools from all tiers of the US News rankings[94] to participate in the True Diversity Experiment. In this experiment, all tiers are represented so that applicants at every achievement level have choices between attending participating and non-participating schools. If this distribution can be accomplished, comparing numbers across schools can be done in a meaningful way.

Step Two would be to create a list of Diversity Factors. Each participating law school will produce a list of "diversity factors" that it considers important to its educational mission. This list will be the factors that the law school currently uses, or would like to use in making admissions decisions during the experimental period. Race and ethnicity, as well as socio-economic status ("SES"), first generation college or law students and second-career students are some of the factors that can be included.

Step Three is to develop a Diversity Quotient (DQ). Each participating law school will use its list of diversity factors and past history of admissions, matriculations and its applicant pools to develop a Diversity Quotient ("DQ"). For instance, New York University's DQ may be quite high, given its existing critical mass of students from diverse racial and ethnic backgrounds, as well as those with low SES, second careers, and other qualities that it argued would contribute to the *Grutter*-approved "benefits that flow from a diverse student body." The DQ will be created based upon factors including (a) the composition of the geographic area from which the law school draws (nationally for the more prestigious schools, and locally for the schools with a smaller range), (b) an evaluation of the current and historical student population percentages, (c) the applicant pool, (d) the entering class size, (e) percentage of applicants from each group meeting (minimum or average) admissions criteria, (f) the group's percentage within the local or national population (depending on the school and its prestige level), and other criteria such as the level of selectivity of the school (its

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94 This experiment assumes that practicing affirmative action in public education is legal in the State in which the experiment is happening. The only states that have passed propositions banning affirmative action are California, Washington, Michigan and Nebraska. Texas and Florida have legislative or executive enactments that accomplish the same purpose. Thus, as long as schools from other states were included in the tiers, the sample would be probative.

prestige, or US News ranking), (g) the quality and credentials of its faculty, (h) special academic programs, and (i) clinical offerings; and any other qualities that might make the specific school more or less attractive to students from particular racial and ethnic groups, or other diversity affinity groups.[95]

Step Four is to determine a DQ range. Using each participating schools' DQ, the LSAC or AALS[96] would determine an appropriate DQ Range for each participating school. This range would be based on geographic distribution of the applicants, the racial and ethnic make-up of the applicant pool, as well as the school's past history and other factors that affect the context of diversity calculations. The goal of this range is to provide a mechanism for monitoring the school's compliance with the DQ, while permitting some flexibility from year to year to account for changes in the school's applicant pool, resources and yield rates.

Step Five is to implement the DQ through the next admissions cycle. Once the DQ is calculated and the permissible range is approved by LSAC or AALS, each participating law school must admit the next law school class

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95 Professor Bloom provides some guidance on how to determine which groups are underrepresented, stating that:

> unless we know what is proper representation, there is no way to determine whether a group is underrepresented. There are a variety of benchmarks to choose from, however. Representation might be judged by comparison to the group's percentage in the national population or its population in the state or city in which the institution is located, to a percentage in the school's applicant pool or percentage in the national applicant pool, members who choose to attend if admitted without racial preferences. Each of these might yield a different figure. Arguably, the most appropriate comparison would be between the percentage of a particular minority group's members in the applicant pool and the percentage of that group admissible in the absence of racial preferences. As *Croson* indicates, comparisons to a nonqualified pool would be of little relevance. On the other hand, the emphasis in the *Grutter* opinion on ensuring the production of a leadership corps from all segments of society suggests that a focus on the national population may be the appropriate benchmark.

Bloom, *supra* note 23, at 500.

96 If this is not the kind of task that fits within their educational or monitoring functions, then we may need to set up a separate monitoring group to perform this function.

(including transfer students for the second year class) in percentages within that DQ range. For instance, if NYU has a DQ of 40%, then no more than 60% of the student body can have been admitted on LSAT and GPA alone. The remaining 40% must be students that contribute to the diversity factors NYU listed.[97] The DQ range would allow some flexibility on this percentage.

Step Six is to maintain the DQ range from year to year. During the first year, the participating law schools must strive to maintain a critical mass of students who possess identified diversity factors, based on that school's DQ. Each law school must maintain this DQ or critical mass in the aggregate for the test time period, and will be evaluated every two or three years to check for compliance, as well as periodically through the AALS accreditation process.[98]

Step Seven involves evaluating the data. During the course of the True Diversity Experiment, each school will monitor the benefits and costs of maintaining diversity. The AALS or LSAC can also provide data that it collects as part of its DQ compliance monitoring process. In order to justify their position it is likely that non-participating schools will do their own monitoring of the benefits and burdens of declining to participate in the diversity experiment. At the end of the experiment, the data of participating and non-participating schools can be gathered, evaluated and published for comparison purposes.

The True Diversity Experiment satisfies both Bloom's and Sander's interpretations of the *Grutter* and *Gratz* case holdings. Furthermore, the True

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[97] Some critics may ask: Is this then having two separate admissions tracks? Yes, but one is for numbers only (which every school must do some of), and the other is for the vast middle category of admissible and qualified students from which a selection must be made. The two tracks are not divided racially, but rather on the basis of diversity factors, including but not limited to racial and ethnic diversity, and thus will not violate *Grutter* or *Bakke*. Since *Washington v. Davis*, 426 U.S. 229 (1976), *de facto* discrimination or a discriminatory result is only actionable in disparate impact cases under Title VII. Therefore, any disparate impact (against whites) that may result from the use of diversity factors would not be actionable. *See also* Grutter v. Bollinger, 539 U.S. 306, 335-37-22 (2003) (stating that the admissions program must afford individualized consideration to each student) and discussion *infra* in Part II.A.i.

[98] The AALS accreditation cycle is 5 years. Additionally, per AALS bylaws, member schools "shall seek to have a... student body," which is "diverse with respect to race, color, and sex." BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS art. VI, § 6-1(c) (1971) (amended 2004), *available at* http://www.aals.org/bylaws.html. AALS member schools may also pursue "additional affirmative action objectives." *Id.* (last visited 8/20/05)

Diversity Experiment also avoids what *Grutter* and *Gratz* prohibit: the use of quotas, set asides, two track admissions systems based solely on race, racial balancing and predetermined numerical bonuses for race.[99]

B. Implementing the Proposal Consistent with *Grutter*

i. Achieving Diversity through Increased Access

The first question is how to obtain or increase diversity at the participating schools. Initially, the participating schools should strive to increase their diversity through a properly administered and evaluated race-based affirmative action program (that is narrowly tailored to serve the compelling interest). *Grutter*, and commentators since that decision,[100] tell us how to increase diversity while complying with the *Grutter* and *Gratz* mandates. Explicit measures of ability to contribute to a diverse student body can be identified and evaluated throughout the admissions process. Contributions to diversity and critical mass can be two line items with point allocations on the application evaluation form, so that the notion of merit includes contribution to diversity evaluated individually and contribution to critical mass. Critical mass is evaluated based on group identity and the emerging make-up of the entering and existing classes.

It is important to note that the DQ in the True Diversity Experiment does not explicitly mandate that participating schools include a critical mass for specific groups. Crafting a critical mass goal is difficult because the *Grutter* decision did not give any guidance on what is sufficient to constitute a critical mass for any particular group. The VMI Court noted that VMI could, with recruitment, "achieve at least 10% female enrollment' — 'a sufficient 'critical mass' to provide the female cadets with a positive educational experience.'"[101] Thus, there is some precedent to support the proposition that 10% constitutes a critical mass of an underrepresented group. The difficulty is in converting this appropriate standard from women in the military to racial and ethnic minorities in law schools.[102]

Incorporating a specific critical mass percentage would be troublesome, as a concrete target number opens the program up to "quota

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99 Bloom, *supra* note 23, at 501; *Grutter*, 539 U.S. at 330, 334, 337; Gratz v. Bollinger, 539 U.S. 244, 293 (2003).

100 *See, e.g.*, McCutchen *et al.*, *supra* note 80.

101 United States v. Virginia, 518 U.S. 515, 523-25 (1996).

102 Intersection issues and overlapping group membership are beyond the scope of this article. For more information on this topic, see Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

criticism."[103] Despite Bloom's interpretation that *Grutter* permits different critical masses for each of the various underrepresented minority groups,[104] a deeper analysis of the critical mass concept suggests that maintaining a critical mass without thereby instituting a quota is virtually impossible. Bloom explains that the critical mass concept is very similar to proportional representation, given that for different racial groups, the critical mass point is set differently.[105] Thus, having these critical mass target numbers is too similar to the fixed percentage system deemed unconstitutional by Justice Powell in *Bakke*. But is Bloom's criticism a fair one?

Initially, it may seem that having a list of critical mass numbers for each underrepresented racial and ethnic group is establishing a quota for that group, but the majority opinion in *Grutter* provides reasoning to the contrary. As the Court suggests, as long as the number is a flexible goal, it is not considered a quota. A rigid number is construed as a quota.[106] In the True Diversity Experiment, the only fixed number or "quota" will be a non-racial one: the DQ, which reflects the percentage of students admitted on the basis of something more than their test scores and undergraduate grade point average. The DQ would be diversity-based, not race-based because the notion of diversity, as espoused by *Grutter*, encompasses more than race and ethnicity. This type of quota would not be prohibited.[107]

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[103] *See* discussion of quotas *infra* at pp. 6-10. For another example, look at the UCLA "Seeds" elementary school case of *Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999) (upholding, under strict scrutiny, an admissions program that gave a preference to minority students in an elementary school run by the UCLA Graduate School of Education and Information Studies), *cert. denied*, 531 U.S. 877 (2000). *See also* San Francisco NAACP v. San Francisco Unified Sch. Dist., 576 F. Supp. 34 (N.D. Cal. 1983) (issuing a Consent Decree ordering the SFUSD to desegregate its schools using a system that would prevent schools from being "racially identifiable or isolated").

[104] Bloom, *supra* note 23, at 495 (suggesting that this appears to be the proper interpretation of the Court's opinion).

[105] *Id.* at 475; *see also id.* at 495. *See also*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 729 (2007), stating, "[t]his working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent." The Court went on to explain that "racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling [sic] it 'racial diversity.'" *Id.* at 732.

[106] See infra, n. 26 and accompanying text.

[107] It would not violate *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 217 (1978), *Adarand v. Pena Constructors, Inc.*, 515 U.S. 200, 214-15 (1995), or *Croson v. City of Richmond*, 488 U.S. 469, 494 (1989). *See also* Professor Randall's Question and Answers Email (6-13-05) (supporting *A Proposal to Modify ABA standards pursuant to*

Nevertheless, a subsequent court may not follow Justice O'Connor's rationale, and may determine that this group of critical masses actually does constitute an impermissible quota. Because the United States Supreme Court deferred to the University of Michigan's own consideration of what it needed to satisfy its institutional mission, lower courts should permit participating schools to flexibly consider the critical mass ranges for the various groups, instead of providing guidance as to what constitutes a critical mass. Schools should note that failing to obtain a critical mass can result in racial isolation, which leads to dissatisfaction and contributes to higher attrition rates, further exacerbating the lack of diversity.[108] To avoid racial isolation, schools must strive to admit a critical mass without crossing the line into impermissible quotas. Schools can do this by remaining flexible in considering who contributes to the critical mass, and by ensuring that race is not the determinative factor for any individual applicant.[109]

Thus, a DQ becomes more palatable and easier to defend because it includes different students who contribute to one of the institution's stated diversity factors. Although keeping the DQ high may sacrifice some measure of educational elitism, this loss can be obviated through the individualized review process. Still, the question remains: are we accomplishing our goals with a "wink and a nod" as Justice Ginsburg indicated?[110] As long as all

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Grutter, available at http://academic.udayton.edu/thewhitestlawschools/2005twls/chapter2/LSATArticle01.htm (last visited Mar. 24, 2010).

[108] In *Grutter v. Bollinger*, O'Connor says that a critical mass is important because of the benefits that flow from a diverse student body, such as promoting cross-racial understanding, and breaking down stereotypes. 539 U.S.306, 330-31 (2003). It seems that the majority is implicitly recognizing how racial isolation can mitigate the benefits of diversity. For instance, one benefit that flows from a diverse student body is the airing of different points of view and perspectives based on different backgrounds and experiences. When only a token few people represent a race in a school class, those token few may not be willing to speak up or out, and therefore their different perspectives and experiences will not be a part of the classroom dialogue. In those classes, this benefit of diversity is obviated by tokenism. This is not to say that diversity is therefore not beneficial, even in token cases, because often the presence of anyone different has an impact on the conversation, or those subsequent conversations outside of class that emanate from the in class dialogue, even if that person does not speak. *Id.* at 333.

[109] *Grutter*, 539 U.S. at 337. The United States Supreme Court reiterated this point in *Parents Involved in Cmty. Schs v. Seattle Sch. Dist No. 1,* 551 U.S. 701 (2007), finding that in contrast to *Grutter*, "race is not considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas and viewpoints;' race for some students is determinative standing alone.").

[110] Gratz v. Bollinger, 539 U.S. 244, 305 (2003) (Ginsburg, J., dissenting) ("winks, nods, and disguises"); Sander, *supra* note 7, at 391-92.

forms of diversity are considered in the initial admission decisions, as well as in decisions about transfers after attrition and other losses, schools will be able to avoid this pitfall.

The diversity line item can also be measured in terms of a diversity index, with adjustments to account for the current student body make-up. For example, many grade indices are adjusted under existing admission procedures to discount "A's" from colleges that give too many "A's." Under the True Diversity Experiment, diversity will not be limited to racial and ethnic diversity, but includes the full range of factors on the list created and revised by each participating school. Thus the Court's pronouncement on the importance of all forms of diversity is satisfied.

By creating an index, the diversity component of the applicant's index score increases the index scores for applicants of color, but not by a specific amount based on race. Rather, applicants of color increase their scores in amounts that range based on individual characteristics and experiences, as well as their membership in various affinity groups. Thus, race will be a "plus factor," rather than a deciding factor in each individual admissions decision. Diversity, more broadly defined, is factored in each individual decision. Admissions will be race-conscious but not race-determinative.[111] Notwithstanding the scant attention to the concept of non-racial diversity and its contribution to the educational mission of the institution and the benefits that flow from it in the *Grutter* majority opinion, this proposal will provide the opportunity for each participating institution to factor in the forms of non-racial diversity that matter most to that institution.

After a sufficient number of students are admitted to the school based on the DQ, the next step will be to ensure that a sufficient number of diverse students accept the admissions offers. Although many schools have attempted to increase diversity at their institutions, a common problem is that schools cannot get enough of the qualified diversity applicants to accept the offers.[112] Some schools will continue to struggle to find additional diversity candidates. The answer to this problem lies in the voluntary participation of law schools. By publicly announcing that the school is interested in increasing diversity, the school may attract more diversity candidates who also have an

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[111] Still we must be prepared for the potential outcome of less racial diversity. When the data is collected and analyzed, we can then determine whether a re-evaluation of the means and ends is appropriate.

[112] Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1076 (2002) ("[W]hen admissions processes use racial preferences, the yield 'tends to be lower for highly qualified black candidates than for comparable white candidates because the black candidates are likely to be admitted by more schools.'") (citations omitted).

interest in attending a diverse school, and who also share the belief that diversity in higher education is valuable. Thus, participating schools will receive more applicants who can meet the diversity quotient and have a larger selection of applicants from which to choose. As a result, participating schools will enjoy the benefit of increased selectivity among their diversity candidates.

However, this solution may result in fewer diverse applicants attending non-participating schools. Alternatively, diverse applicants may still apply to non-participating schools but be more likely to choose to attend the participating school instead of the non-participating school when they receive admissions offers from both.[113] This potential problem may have an unintended negative effect on the control group statistics as non-participating schools become less diverse. This discrepancy should be factored into any subsequent evaluation of the differences between the participating and non-participating groups at the conclusion of the True Diversity Experiment.

ii. Maintaining Diversity Using Environment, Access and Self-Interest

If these practices help participating schools achieve their DQs with higher diversity levels, the next consideration is how to maintain these higher diversity levels. Access, Environment, and Self-Interest are the key factors. Increased access is provided through the law schools' pledges to achieve and then to maintain the DQ levels for a specified time period. Increased access leads to a more conducive environment for maintaining diversity. Pledges include enrolling a critical mass, maintaining that critical mass to avoid issues of racial isolation, and having a community of like-minded persons[114] who

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[113] Also, using law school as an example, transfer students would have to come from somewhere. For instance in the Los Angeles area, the higher ranked schools are likely to get transfers from Whittier, Southwestern, or perhaps Chapman, thus potentially decreasing the diversity in those lower tiered schools, some of which probably already have more diversity than a lot of the higher tiered school. Consider the diversity statistics of Chapman and Southwestern University. In 2004, Chapman had an entering class of 181 students, 33% of whom were minority students. That same year, Southwestern's student body of 980 students had 36% minority enrollment. *See* Chapman University School of Law, 2004 Entering Class Profile-Minority Representation, *available at* http://www.chapman.edu/admission/law/profile/default.asp (last visited Aug. 28, 2005); Southwestern University School of Law, Diversity, *available at* http://www.swlaw.edu/overview/diversity.html. These levels of minority enrollment are not often experienced in higher-tiered law schools.

[114] This is similar to the former "House" system of undergraduate living at Harvard. Each House had some sort of personality: the jock house, the old money/preppie

recognize and value the benefits that flow from a diverse student body. The self-interest motivation comes from the pledge, the accreditation review process, each participating school's understanding of the importance of diversity to its institutional mission, and perhaps most effectively from the US News and World Report rankings. The US News rankings are particularly important if the current diversity index line item – which is a category upon which law schools are rated, but not a category that is included in numerical scores generated for ranking purposes, is included in the ranking formula on an experimental basis.[115]

Despite the increased Access, conducive Environment and Self-Interest motivations for increasing and maintaining diversity levels, inevitably each year participating schools may lose one or more of their diverse students. Some students may withdraw for non-academic reasons, like family or financial issues. Some students may earn low grades, and either voluntarily withdraw or be asked to leave.[116] Some students will transfer to a lower-

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house; the "still in high school" house; and of course the super-intellectual house. Not everyone in each house fits the personality reputation of that house, but the house personality is a useful guide for students who are ranking their housing preferences. So it would be with law schools.

[115] The U.S. News and World Report Diversity Index for Law schools is listed on a separate web page, and is explained as follows:

> To identify law schools where students are most likely to encounter classmates from different racial or ethnic groups, *U.S. News* has created a diversity index based on the total proportion of minority students—not including international students—and the mix of racial and ethnic groups on campus. The index is calculated using demographic data reflecting each law school's student body during the 2008-2009 academic year, including both full- and part-time students. The groups that form the basis for our calculations are African-Americans, Asian-Americans, Hispanics, American Indians, and non-Hispanic whites. Our formula produces a diversity index that ranges from 0.0 to 1.0. The closer a school's number is to 1.0, the more diverse is the student population. Law schools that enroll a large proportion of students from one ethnic group, even if it is a minority group, don't score high in this index.

Robert Morse & Sam Flanigan, *Law School Diversity Rankings Methodology*, US NEWS & WORLD REPORT, Apr. 22, 2009, http://www.usnews.com/articles/education/best-law-schools/2009/04/22/law-school-diversity-rankings-methodology.html (last visited Mar. 23, 2010).

[116] Sander, *supra* note 7, at 436-37, Table 5.5 & n.185 (discussing proportion of matriculating students not graduating, broken down by race and law school tier).

ranked school if they feel that such a school is better suited to their abilities, and some with very high grades will transfer to a higher ranked school as well.

Under this proposal there are at least three ways to address attrition. First, participating schools can maintain diversity in the rising second year class by recruiting and admitting transfer students from diverse backgrounds into the second year class. The transfer students likely earned high grades at lower-ranked schools. Some may be students who received lower grades at better schools and, convinced that they were "mismatched," place themselves in a law school that they feel is more appropriate for their entering credentials and demonstrated first year school performance. Some schools may even consider permitting mid-year transfers after the first semester grades are in.[117] Incoming transfer students provide an immediate solution to the attrition problem that occurs at the end of the first year. At the end of the year, schools know which students are not returning for academic reasons and can re-evaluate their diversity numbers in order to fill the gap in time for the next academic year. If there is no longer a critical mass of students from a racial minority group, then the transfers can be race-conscious admissions, intended to serve the compelling interest of maintaining a sufficiently diverse student body. If the critical mass is lacking in some other category, such as lower socio-economic status, then transfers will be consciously sought to fulfill that aspect of diversity instead.

During the experiment, it is likely that the most selective schools[118]

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[117] At many law schools, in order to be admitted as a transfer, the applicant must have completed his or her first year of law school, and thus be a second or third-year student, or have completed a substantial portion of legal study. *See, e.g.*, Pepperdine University School of Law, Admissions Information for Transfer Applicants, http://law.pepperdine.edu/admissions/apply/transfer-applicants/ (last visited Mar. 23, 2010) (requiring applicants desiring to be admitted with advanced standing to have completed the first year of study).

[118] The top ten or twenty schools, as defined by US News rankings. The basis on which U.S. News ranks 179 of the ABA-accredited laws schools consists of a weighted average of 12 measures under Four categories—Quality Assessment (peer assessment; assessment by lawyers/judges); Selectivity (median LSAT scores; median UPGA; acceptance rate); Placement Success (employment rates for graduates; bar passage rate); and Faculty Resources (expenditures per student; student/faculty ratio; library resources). To get the tiers and overall rankings, data "were standardized about their means, and standardized scores were weighted, totaled, and rescaled so that the top school received 100; others received their percentage of the top score." *See* USNews.com, Best Graduate Schools – Law Methodology, http://www.usnews.com/articles/education/best-graduate-schools/2008/03/26/law-methodology.html (last visited Mar. 24, 2010). By comparison, Wightman uses the LSAC-BPS database, and Sander uses that database along with his own. *See* Linda F. Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current*

can achieve and maintain their diversity levels because these schools have the lowest attrition rates[119] and can accept transfers from diverse students with good grades who were enrolled in lower-ranked schools. This second group of schools, and the remainder of the US News rankings of Tier One schools,[120] will lose some diverse students to attrition and transfers to top schools. They still might not maintain their DQ except through non-racial diversity, or by relying upon a revolving door for racially or ethnically diverse students. Inevitably, some schools simply will be in non-compliance.[121] Many schools ranked in the Third Tier and Fourth Tier according to the US News Report will be closer to being in full compliance if the diversity numbers are included within the formula for determining overall rankings, because they are already more diverse than the top-tier schools, and thus their status may be raised in the US News rankings. If their rankings increase, then they will become more attractive to additional qualified diversity applicants, and also to additional qualified non-diversity applicants.

Second, participating schools will use Access tools, such as outreach and recruitment to potential diversity applicants, as well as admissions decisions themselves, to increase the diversity of the next entering first year class. If attrition happens after first year grades are tabulated, the vast majority of students for that next entering class will already have been admitted. Accordingly, admissions officers have to carefully monitor yield rates to determine whether they can admit any additional diversity students from the waiting list later in the summer, and thus begin the class with the proper numbers to fulfill the DQ range. Careful monitoring of the DQ is permissible according to both *Grutter* and Bloom's interpretation.[122] If the school does not admit a sufficient number of students from the waiting list, then it will need to admit a class with an even higher diversity quotient for the

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Law School Data, 53 J. LEGAL EDUC. 229, 233-34 (2003); Linda F. Wightman, LSAC National Longitudinal Bar Passage Study (1998); Sander, *supra* note 7.

119 *See* Sander, *supra* note 7, at 436-37.

120 *See* USNews.com, Rankings - Best Law Schools, http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/rankings (last visited Mar. 24, 2010).

121 *See* US News website and explanation, *supra* note 118. To add some "teeth" to the proposal, perhaps some sort of probation would be imposed in this situation.

122 Grutter v. Bollinger, 539 U.S. 306, 336 (2003) ("'[S]ome attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota."). *See also* Caulfield v. Bd. of Educ., 583 F.2d 605, 611-12 (2d Cir. 1978) ("The Constitution itself does not condemn the collection of [racial] data."); Anderson *supra* note 59, at 1224 (arguing that "attention to numbers" is necessary to avoid tokenism, a phenomena that may result in isolation of underrepresented minorities and reduced likelihood of white students interacting with such minority students.).

following year to return to its DQ range in time for the next periodic review or AALS/LSAC assessment.

Third, schools can foster an environment conducive to increasing and maintaining higher levels of diversity. Over time, participating schools will choose students who can succeed in that school's diverse environment. With this, schools can avoid constantly compensating for retention problems to maintain the mandated DQ. Making the environment more conducive to retaining diverse students would have a substantial impact on retention. The Diversity Experiment is self-regulating because if administrators do not aggressively address retention issues, then they will not keep the students of color and will have to recruit and admit even more every year.[123] Moreover, if a participating school falls behind in its DQ one year, the admissions office needs to compensate within a year or two, as the accreditation cycle is the main measuring point, along with periodic, intermediate, "check-ups." Disconnecting the measuring point from each entering or graduating class also helps curtail some of the quota criticism.

Because diversity is a compelling interest, maintaining diversity levels is equally compelling and meets the narrow tailoring requirement. Mechanisms to maintain diversity include campus life resources, theme houses and clubs, financial aid programs, remedial education programs, merit scholarship programs,[124] course diversity, professorial diversity, administrative diversity, alumnae diversity, and staff diversity. Moreover, a focus on retention is a narrowly tailored way to serve the goal of maintaining diversity because the admissions office is only pulling in a few more diverse students to maintain the right balance between diverse and non-diverse students. Because the means closely fit the compelling interest, they are sufficiently narrowly tailored to avoid constitutional impermissibility.

This proposal is one way to prepare for the sunset clause. In some ways, it is analogous to the gender discrimination cases involving male and female firefighters.[125] Similarly, qualities that satisfy diversity mandates may

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[123] There will also be some limitations and monitoring to avoid promoting a revolving door of diverse students who never graduate from the law school. For more detail on maintaining an environment conducive to retaining diverse students, see, e.g., Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 PEPP. L. REV. 663 (2008).

[124] There may be federal funding issues implicated here however, based on the Office of Civil Rights' challenges to race based scholarship aid. *See, e.g.,* Nahal Toosi, *DPI must remove race from requirements of scholarship program*, MILWAUKEE J. SENTINEL, Dec. 2, 2004, at 1, *available at* LEXIS.

[125] *See, e.g.,* Shauna I. Marshall, *Class Actions as Instruments of Change: Reflections on* Davis v. City and County of San Francisco, 29 U.S.F. L. REV. 911 (1995); Davis v. City and County of S.F., 656 F. Supp. 276 (N.D. Cal. 1987).

become more valuable to elite educational institutions as the True Diversity Experiment runs its course.

III. The Main Justification for the Proposal: To Prepare for Sunset

A. The Sunset Provision

Implementing the True Diversity Experiment consistent with the mandates of *Grutter* and *Gratz* is crucial if the legal academy is ever to realize the sunset dream of *Grutter* – that at some point (whether by 2028, or some other time) affirmative action no longer will be needed. For now, the question is this: if we achieve diversity and only sustain it for a limited time, how will that lead to a world where affirmative action no longer is needed? Is that especially true considering that we currently use affirmative action to obtain and maintain that diversity?

The sunset provision from the *Grutter* decision states:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[126]

This statement suggests a causal relationship between time passing and an increase in the grades and test scores of minority applicants. However, some scholars dispute this apparent connection, arguing that the test score gap is still so wide because as minority test scores rise, test scores of Anglos also rise. The authors of *The Real Impact*, a study that responds to Professor Sander's argument, note that the average increase for Anglo test scores is more than the minority average, thus continuing the widening of the gap.[127]

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126 Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (citations omitted).

127 *See, e.g.*, *Real Impact*, *supra* note 11, at 1875-77. *See also* William G. Bowen, Grutter: *Where Do We Go From Here?: The Impact of the Supreme Court Decisions in the University of Michigan Affirmative Action Cases*, 44 J. BLACKS HIGHER EDUC. 76 (2004). Bowen states:

> Scholars have noted that the overall reduction in the test-score gap since the 1960s has not been continuous. The narrowing occurs until the last 1980s or 1990, after which the gap holds steady or, in the case of science and mathematics, actually widens slightly. If we

This empirical evidence about the achievement gap suggests that the passage of time alone is not sufficient to erase the gap within the next eighteen years.

Former University President, William Bowen explains, "[t]here is no reason to believe that the need for race-sensitive admissions will end within the next 25 years simply as a result of trends and policies already in place. If 25 years is a firm limit, it might benefit from some more analysis."[128] Another author, Vijay Sekhon, discussing the significance of O'Connor's closing note argues that the reasoning of the opinion "leans strongly against a 25-year statute of limitations on the use of race in college admissions," because diversity will be no less compelling of an interest in the year 2028, and, more importantly, the achievement gap is so significant that there is little evidence to suggest that it will be eradicated by the year 2028.[129] Sekhon explains that as the test scores of Anglos increase, those of minority groups are in some instances decreasing. Further, he notes that the increases in rates for minority groups are less than those of white students in other cases.[130] Therefore, Sekhon concludes, there is little support for O'Connor's apparent claim that "race will not be necessary in 2028 to enroll a 'critical mass' of underrepresented minority students at the Law School."[131] Quoting one activist's insightful remark that "if all we do over the 25 years... is affirmative action, then we will still need affirmative action," Johnson also argues that the need for affirmative action will not simply evaporate after the twenty-five year deadline, unless we take "aggressive steps" to dramatically change student enrollment numbers.[132]

Because no evidence suggests that race-blind policies produce a sufficiently diverse class by the year 2028, Sekhon reaches his own conclusion about the reason for inserting the sunset clause. The primary rationale for inserting the 25-years sentence into the opinion was motivated by political

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> focus on what has been happening over the last 15 years, rather than over the past 40, there is much less reason for optimism about convergence of scores. It is also sobering to note that black underrepresentation in the top tenth of the test score distribution has not changed in recent decades. It is, of course, candidates from the "top tenth" who would have the best chance of gaining places in the most selective programs in the absence of race-sensitive admissions programs – and then to go to do graduate work.

Id. at 79.

128 Bowen, *supra* note 127, at 79.

129 Sekhon, *supra* note 49, at 305.

130 *Id.* at 307 n. 27.

131 *Id.* at 308.

132 Johnson, *supra* note 1, at 188.

reasons, in order "to maintain the legitimacy of the Supreme Court in the eyes of the American public."[133] His article explains that this language was motivated by a desire to soften the blow to anti-affirmative action forces, while also lessening the political and social unrest that would have followed from a decision completely upholding affirmative action, or one completely disposing of it.[134] This argument echoes the concerns Kathleen Sullivan expressed in 1985.[135]

Bloom has a slightly different analysis of the sunset provision, following more closely along with Justice Ginsburg's interpretation that "the Court's statement is more of a hope than a forecast."[136] He recognizes that as long as the test score gap remains, the Court will permit affirmative action,[137] concluding that "[i]t seems likely that Chief Justice Rehnquist is probably correct in his conclusion that the Court 'in truth... permits the Law School's use of racial preferences on a seemingly permanent basis."[138]

Bloom and other commentators recognize the "fundamental flaw" in

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133 Sekhon, *supra* note 49, at 302.

134 Sekhon concludes, "Therefore, it seems likely that Justice O'Connor inserted the nebulous '25 years' clause in order to satisfy her dual desire to both interpret the Constitution to the best of her ability—or promote her political agenda, as cynics would contend—and mitigate the deleterious consequences of her jurisprudence." *Id.* at 309.

135 *See, e.g.*, Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1985) (explaining the Rehnquist Court's move to limit the constitutionality of affirmative action programs to those which remedied past discrimination as an attempt to mediate tensions between "[affirmative action's] opponents [who] wage an all-out war on preferential treatment for blacks, invoking a norm of "color-blindness" [and] its advocates [who] insist that the norm of equality requires increased black representation in our social institutions now."); *see also* Sullivan, *infra* note 188 and accompanying text (discussing how remedial justifications for race-based preferences arguably do entail singling out displaced whites for racial harm in a way that racial diversity justifications do not).

136 Bloom, *supra* note 23, at 488.

137 He explains:

> there is no reason to believe that the test score gap will have vanished or will even have significantly narrowed in twenty-five years. If it has not, then presumably schools will be able to say, contrary to the Court's hope, that the need for racial preferences still exists and that they must continue. If the Court at that time exhibits the same degree of deference to educational institutions as the *Grutter* court did, then continue they will.

Id.

138 *Id.*

the sunset provision--that remedial-based affirmative action must end once the past discrimination is remedied, based on the court's reasoning that the affirmative action plan was permissible to serve the compelling interest in diversity, rather than in remedying past discrimination.[139] Johnson argues that remedial-based affirmative action plans require an ending point in order to meet the narrowly tailoring requirement because "[r]emedial-based affirmative action... would not be necessary after the impacts of an institution's discrimination had been remedied."[140] Diversity as the justification, however, "would not seem to demand any expiration date, although periodic review might make policy sense in order to ensure scrutiny of the results of affirmative action programs and to evaluate whether the consideration of race remains necessary to ensure a diverse student body."[141] If the benefits that flow from diversity are compelling in their own right, then those benefits always will be compelling. They do not evaporate simply because they have been around for a long period of time. In contrast, a remedial justification expires once the harm has been remedied.

Justice O'Connor's purpose for including the sunset provision is still a subject of scholarly debate. Perhaps O'Connor tried to set up a benchmark, a measuring stick to prod schools into making efforts towards ending affirmative action. Perhaps she also was providing an accommodation to the dissenters, so they would have some hope that affirmative action would end. Johnson and Bloom suggest that there was no need to show this type of narrow tailoring, because the decision was not based on remedying past discrimination.[142] Still, the means must be narrowly tailored to satisfy the second prong of the strict scrutiny test, and while an endpoint is not required, Johnson suggests that monitoring of progress should be required. Perhaps Justice O'Connor believed it best to postpone another legal battle until 2028, leaving the doors open for political battles in the meantime.

A third alternative – a logical extension of the arguments made by Bloom and Sekhon above,[143] is that sunset for affirmative action will not occur because the "sunset" is incompatible with diversity as a compelling interest. This alternative could prevail if the dominant culture and underrepresented groups have an "interest convergence" that recognizes the continuing salience of diversity as a compelling interest. The True Diversity Experiment may enable us to find that convergence of interests. For instance, forced desegregation led to some integration. Firehouses were

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139 Johnson, *supra* note 1, at 173.

140 *Id.*

141 *Id.*

142 Johnson, *supra* note 1; Bloom, *supra* note 23.

143 *See* Sekhon, *supra* note 49; *see also* Bloom, *supra* note 23 and accompanying text.

forced to hire women, and then learned that it is a good thing to have smaller people with better balance to get into tight spots to save lives.[144] Similarly, the diversity programs in higher education since *Bakke* have taught many students and faculty about the importance of listening and learning with a diverse group of voices. The True Diversity Experiment illustrates a version of diversity that really works, so we can more fully understand the depth of the benefits that True Diversity has to offer. By forcing the issue, perhaps more people will realize the benefits and understand the actual costs. Perhaps with this, a more informed determination can be made about whether it is in society's interest to continue the efforts to maintain diversity or to hasten its sunset.

B. Bell's Theory of Interest Convergence

Professor Bell's "Interest Convergence Theory" proposes that institutional advancements for minority groups only occur when that advancement coincides with the self-interest of the majority group.[145] He states that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[146] He postulates that as the strongest anti-segregation discussion, *Brown* must be contextualized with regard to its value to whites, evaluating not simply the concerns of the "immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation."[147] First, the decision helped provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples – often people of color. Both the NAACP and the federal government advanced this argument. The media also promoted this argument as well. Time Magazine, for example, predicted that the international impact of *Brown* could be scarcely less important than its effect on the education of black children, noting that "in many countries where U.S. prestige and leadership has been damaged by the facts of U.S. segregation, it will be the timely reassertion of the basic American principle that all men are

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144 *See* Marshall, *supra* note 125.

145 Bell, *supra* note 58, at 523. He continues, "[h]owever, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites."

146 *Id.*

147 *Id.* at 524.

created equal."[148] Many African-American soldiers fought in the wars abroad to protect freedom and democracy, but the world knew that they were treated as second-class citizens upon their return to the United States.

Bell also argues that the *Brown* decision offered reassurance to African Americans because the concept of equality could be given its true meaning at home as well.[149] He further states

> Finally there were whites who realized that the south could make the transition from a rural, plantation society to the Sunbelt with all its potential and profit only when it ended the struggle to remain divided by state-sponsored segregation. Thus segregation was viewed as a barrier to further industrialization in the south.[150]

For this reason, desegregation was in the economic interests of the Anglos in the nation as well. Bell concludes that some of the recognition of the continued vitality of *Brown* is explicitly tied to the convergence of racial interests.[151] Understanding that the interests of poor whites and blacks are similar in many areas, Bell notes that both groups must be forced to recognize this convergence for real change to occur. At the time of the *Brown* decision, when our national reputation and economic institutions were at stake, desegregation was in the interest of both groups and the United States Supreme Court was able, or felt the urgency, to reach a unanimous decision. Still, subsequent history indicates that the convergence of interests that permitted the change in the laws on school segregation was not able to quickly or effectively change the applications of those laws.[152] The reason perhaps, is that the national security and economic interests depended on the laws changing, rather than the actual change of social practices.

Bell concludes the interest convergence discussion by arguing that

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148 *Id.*

149 *Id.*

150 *Id.* at 525.

151 *Id.* at 528. Bell explains, "[w]hites in policymaking positions, including those who sit on federal courts, can take no comfort in the conditions of dozens of inner-city school systems where the great majority of nonwhite children attend classes as segregated and ineffective as those so roundly condemned by Chief Justice Warren in the *Brown* opinion. Nor do poorer whites gain from their opposition to the improvement of educational opportunities for blacks: as noted earlier, the needs of the two groups differ little. Hence, over time, all will reap the benefit from a concerted effort towards achieving racial equality."

152 Brown v. Bd. of Educ., 349 U.S. 294, 294 (1955) (Brown II); Missouri v. Jenkins, 515 U.S. 70, 71 (701) (1995).

the focus on integration was a larger disservice than benefit to African Americans in the long run. He notes that effective schools, such as the success of magnet schools, may be more important than integrated schools.[153] According to Bell, the challenge is to learn how black and white interests can re-converge and what that re-convergence will look like. Bell suggests that effective education for all, across classes as well as races, may be where the interests can re-converge.[154] Others suggest that maintaining diversity should be an important value to both sides and is another point of common interest.[155] Still others promote integration more specifically.[156] The re-convergence in this post-*Grutter* world is not merely integration, but rather the self-interest of obtaining the benefits that flow from a diverse student body, where all have access, and the environment is conducive to maintaining diversity.

i. Is Diversity the Convergence, or Merely a Distraction?

Professor Bell argues that the concept of diversity serves as a point of convergence in the *Grutter* decision. Interest convergence exists because the homage paid to diversity is in the interest of applicants of color who would not otherwise be admitted, and in the interest of elite institutions that want to continue to rely upon tests scores and grades to ensure that elite education is accessible mostly to the economically privileged class.[157] That is, interests converged at "Diversity" because diversity permits the elite institutions to continue to use the LSAT and GPA predictors that often are based as much on economic status as on intellectual capabilities, while fostering some racial integration through the use of heavy preferences to compensate for the dearth of people of color who meet the test score and grade cut off points.[158]

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153 Bell further explains that "[m]any white parents recognize the value in integrated schooling for their children but they quite properly view integration as merely one component of effective education. To the extent that civil rights advocates also accept this reasonable sense of priority, some greater racial interest conformity should be possible." Bell, *supra* note 58, at 532-33.

154 Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

155 *See, e.g.*, Bell, *supra* note 58.

156 *See, e.g.*, Anderson, *supra* note 59, at 1196, 1212, 1270-71; CHRISTOPHER EDLEY, JR., NOT BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES 137 (1998).

157 Bell, *supra* note 154, at 1632; *see also id.* at 1625, 1626, 1631.

158 Bell continues:

> The University of Michigan must know that the need for special

Bell therefore asserts that "[r]ead together, *Grutter* and *Gratz* provide a definitive example of my Interest-Convergence theory."[159]

Bell's article also suggests a wider focus to the goal of achieving diversity in higher education by ensuring that socio-economic factors are a substantial consideration. The experiment at UCLA Law School[160] as well as others demonstrates that striving to achieve socio-economic diversity does not lead to substantial racial diversity, and focusing on achieving both types of diversity does not require a significant reformation of application and selection processes. Is higher education at elite institutions only a way for the privileged class to ensure that their progeny remain in that privileged class? This is part of the rationale for legacy admissions, but Bell argues that it carries over to non-legacy admissions as well.

If Professor Bell's theory is correct--that admissions decisions are largely based on preserving the status quo in education, then too much energy is being spent on trying to find a way to admit more students of color who are not going to have equal scores on standardized tests. If the tests are no longer considered a substantial part of the consideration for admission, then large numbers of applicants of color would not be automatically rejected, and the rest would not need the boost of "heavy preferences" in order to "qualify" for admission. The True Diversity Experiment could help by showing that the students with lower scores who have been excluded in the past may contribute more to the classroom experience and learning environment than was previously thought, thereby increasing the benefits for all of a diverse student body and educational environment.

If the battle to increase recognition of the benefits of diversity is successful, then perhaps the battle strategy can be expanded to permit a reconsideration of the traditional measures of "academic merit" that competently exclude these diverse students. Traditional measures do not give institutions the full range of diverse students and should be modified. If

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> racial consideration for minority applicants to college and graduate schools would be alleviated if admissions officials dropped or substantially reduced their reliance on standardized tests, like the SAT and the LSAT. Studies show that such tests are notoriously poor predictors of performance either in school or after, but they measure quite accurately the incomes of the applicants' parents.

Id. at 1630.

159 *Id.* at 1624.

160 *See, e.g.*, Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997). In addition, as a clinical faculty member at UCLA during this time period, and a member of the public interest law and policy program founding group, this author experienced some of this decline first-hand.

participating law schools end up providing a higher quality of education using other measures, then perhaps we can move to answer Professor Bell's critique and revise our goal to include broader diversity of socio-economic status as well.

ii. Exploring Other Potential Interest Convergence Points: Access and Environment

The environment created from a diverse student body is potentially a place for interest convergence. Re-convergence occurs when Anglo students are able to engage with African American students, to help all students learn to communicate with one another, thus breaking down racial barriers of prejudice and stereotypes that so often curtail cross-cultural communication. The AALS recognized this problem during the *Bakke* litigation.[161] While African Americans have an interest in these interchanges, the burden can be a heavy one.[162] Additionally, improvements in the society depend partly on

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[161] AALS *Bakke* brief, *supra* note 46, at 52, stating, "we cannot imagine that any law teacher whose subject matter requires discussion of racially sensitive issues can have failed to observe the inability of some White students to examine critically arguments by a Black, or the difficulty experienced by others in expressing their disagreements with Blacks on such issues. Yet, these skills are not only a professional necessity they are indispensable to the long-term well-being of our society."

[162] It should be noted, however, that while African Americans have a significant interest in interchanges with Anglo students, the burden of such interactions for African Americans can be severe. *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53 (1993); Johnson, *supra* note 1; Angela Onwauachi-Willig, *Cry Me a River: The Limits of "A Systematic Analysis of Affirmative Action in American Law Schools"* 7 AFR.-AM. L. & POL'Y REP. 1, 15 (2005). Onwauachi-Willig remarks on the importance of race in the classroom, stating that:

> Race had an impact on minority students' level of comfort in the classroom. Specifically, although only 28% of white students agreed that discussions in class made them feel uncomfortable, almost 43% of African American students agreed with this statement. In addition, although a majority of white students did not think race mattered in the classroom, the majority of African Americans disagreed. They believed that there were not enough professors of their own race to serve as role models and that they were more likely to speak in a class taught by a same-race professor and that they ordinarily were more comfortable with the teaching approach of a same-race professor.

debating legal interpretations from diverse backgrounds. This multi-racial debate will help more people of color to understand and believe in the legitimacy of the legal institutions that govern (and punish) them, which may lead to a more stable society.[163] Professor Anderson refers to this as a "transformative forced association," which is one that "can cultivate 'bridging bonds.'"

The notion of a "transformative forced association" suggests that even when integration is not voluntary, integration can result in a positive good and has a distinct parallel to graduate school education because it all begins with access. The NAACP, in *Sweatt v. Painter*, articulated associational interests as one rationale for integration of graduate schools in the first place.[164] Integration is essential in a profession that relies upon networks and

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Onwauachi-Willig goes on to discuss how:

> Professor Sander neglects to address the possibility that minorities find themselves in a hostile environment during law school and fails to recognize how debilitating an unconscious act of racism can be to a minority student. For example when a professor calls on an African-American student to answer a 'black' question, that one incident may immobilize a student for hours, or perhaps even days....

See also id. at 17.

[163] Anderson apparently agrees with this form of legitimacy, recognizing that:

> [H]ere lies the educational significance of racial diversity on college campuses. Both blacks and whites tend to continue the patterns of cross-racial interaction they learned in college.... Given the high degrees of racial segregation in neighborhoods, churches, and K-12 schools, college provides a nearly unique opportunity for many middle-class Americans to break this pattern and build an integrated society. What college diversity teaches American elites is, fundamentally, how to live with members of all races. This is a lesson they demonstrably carry with them in later life, and one rarely learned by white elites who attend schools with low minority enrollments.

Elizabeth Anderson, *From Normative to Empirical Sociology in the Affirmative Action Debate: Bowen and Bok's the Shape of the River*, Review Essay, 50 J. LEGAL EDUC. 284, 303-04 (2000).

[164] Sweatt v. Painter, 339 U.S. 629, 634 (1950) (stating that law schools cannot be effective in isolation from individuals and institutions with which the law interacts).

networking. Integration ensures that African American lawyers interact with white lawyers who become judges, co-counsels, opposing counsels, District Attorneys and other important players in the local legal institutions thus giving blacks the opportunity to make full use of the social aspects of their education.[165] Additionally, integration also addresses the quality control issue because people can no longer argue that the education of an African American lawyer was inferior if both attended the same law school. The social benefits of the educational association are equally important, which maintain the mechanism of association is crucial for legitimizing our legal institutions, which legitimizes the legal system for many people of color in the United States.

iii. Occupational Need as another Potential Point of Convergence

Access facilitates association, a foundation for contributing to an environment of equality, but does not necessarily lead to increased influence and leadership. As the military amicus brief in *Grutter* notes, despite having integrated enlisted forces, sufficient integration of the officer ranks did not automatically follow. The military came to realize that an integrated officer corps was crucial to maintaining discipline as well as *esprit de corps.*[166] In response to this observation, the military took steps to achieve diversity within its leadership ranks, such as instituting aggressive affirmative action policies.[167] Similarly, the representation of African Americans in leadership roles is important for maintaining the legitimacy of the legal system, but educational access alone has not led to adequate representation in the higher ranks of the elite legal academy, such as law school professorships, judgeships and prestigious partnerships at national law firms.[168] More integration within

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165 *Id.*

166 Brief of Amici Curiae Lt. Gen. Julius W. Becton, Jr. et al. at 6, Grutter v. Bollinger, 539 U.S. 306, 330-34 (2003) (No. 2-241) [hereinafter *Military brief*].

167 *Id.* at 7 (stating that the absence of minority officers threatened the military's ability to function effectively in defending the nation); *see also Grutter*, 539 U.S. at 331 (referencing the Military brief and the brief's arguments).

168 One author notes:

> Although there are quite a few black professionals, including lawyers, African Americans continue to be vastly underrepresented in positions of authority. Affirmative action in admission to professional schools is a significant route to such positions. Furthermore, the size, history, culture and contemporary salience of this racial group, and the role law has played in its history, make

these esteemed professions would further strengthen the legal world and provide greater legitimacy to the justice system.

The integration of institutions is good because it fosters a beneficial environment, but also because a diverse workforce requires diverse leaders who have been trained in diverse environments. As noted in *Bakke,* "[t]he nation's future depends upon leaders trained through wide exposure to the ideas and *mores* of students as diverse as this Nation of many peoples."[169] Cultivating that diverse leadership is a self-interest that American business people and politicians alike can then support. Professor Leach explains the project of diversifying higher education:

> as a means of populating the professional ranks with a new generation of racially diverse, or at least racially attuned, leaders. In effect, it is the Court's appeal to these occupational needs for diversity, as opposed to the intrinsic importance of cross-racial understanding that forms much of the basis for its conclusion that the educational benefits of diversity constitute a compelling state interest.[170]

In military and prison guard situations, courts have upheld the need for a diverse workforce in the upper levels of the chain of command in the interest of maintaining discipline and order. As indicated in the military's amicus briefs filed in the *Grutter*, and cited in the Court's opinion,[171] diversity is considered important for maintaining the military's ability to provide adequate national security. In a similar context requiring order and discipline, the Seventh Circuit determined in *Wittmer v. Peters*, that black inmates were

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> the presence of African Americans in law schools virtually essential for the responsible education of tomorrow's lawyers and policymakers.

Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 880 (1995).

169 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (This language from *Bakke* was a jumping off point for recognizing the similarities and the legitimacy justification.) (emphasis added).

170 Brian W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L. J. 1093, 1094-1095 (2004). The author continues "The notion that racially diverse leadership contributes to the functionality of certain professions is not a recent innovation. Rather, such claims have been advanced by numerous industry leaders, sociologists, and historians."

171 *See, e.g., id.* at 1094 (discussing the Court's and the Military's arguments regarding the need for diversity in certain fields); *see also supra* note 166.

not likely to succumb to their roles if all of the prison guards were Anglo.[172] In evaluating the situations in which the courts have upheld race conscious hiring based on occupational need, Leach notes, "judges have distinguished between employers merely catering to client preferences and those whose race-conscious decisionmaking [sic] reflects a genuine concern about the functionality of their profession."[173]

Extending the definition of occupational need also promotes the goal of Self-Interest. The military justifies affirmative action as the only means of obtaining the diversity that it needs, much as did the AALS Amicus brief in the *Bakke* litigation. The Military Brief states, "[t]he fact remains: Today, there is no race-neutral alternative that will fulfill the military's and thus the nation's compelling national security need for a cohesive military led by a diverse office corps of the highest quality to serve and protect the country."[174] In the interests of occupational need and national security, the military was granted the latitude to engage in race-based affirmative action.[175] The same rationale may apply to a legal education, though as one student Brian Leach noted, it would be a stretch to permit such preferences in business and law.[176] If there is a bona fide occupational need for a diverse professional workforce, then permitting race-conscious consideration at the graduate school level to help expand the pool of diverse candidates who are training to fulfill the mandates of the profession should extend to the law schools.[177]

Leach critiques the discussion of occupational need in the *Grutter* case

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172 87 F.3d 916, 920-21 (7th Cir. 1996) (holding that a prison warden could take race into account when hiring guards in order to maintain order among prisoners and the administration). As to the situation in *Wittmer*, Professor Leach comments that:

> White correctional officers were not seen as having the interpersonal skills necessary to motivate minority inmates, many of whose life experiences had engendered deep skepticism of white authority figures. Although African American guards were not regarded as role models in the traditional sense, their presence was nonetheless thought to have quelled inmates' fears that the prison administration was racist and had no real interest in rehabilitating them.

Leach, *supra* note 170, at 1126.

173 *Id.* at 1095.

174 *Military brief*, *supra* note 166, at 9-10.

175 *Wittmer*, 87 F.3d at 916; *see also* Leach, *supra* note 170, at 1124-28 (discussing occupational need in relation to prison guards and police officers).

176 Leach, *supra* note 170, at 1096.

177 *Id.* at 1123.

as "unsatisfactory," because of the "polarized, all-or-nothing approach" adopted by both sides of the debate, and suggests "a theoretical framework for determining when occupational need arguments should be accepted as compelling state interests and when they should be rejected as pre-textual grounds for racial discrimination."[178] Leach's suggestion for a clear framework may help to address other criticisms of diversity as a compelling interest, such as that it is inconsistent with larger interests as noted by Bell.[179] While greater consistency makes the court decisions easier to apply, it may be that such consistency can only be achieved by a return to some sort of "benign versus invidious" distinction in the use of the occupational need defense. It is unlikely, however, that the current Court would support any additional deference for certain types of so-called "benign" discriminations.

iv. Legitimacy as Convergence

Another potential area of interest convergence is on legitimacy. As Boalt Hall Dean Edley recognizes, "in some institutions, especially public and elite ones, visible inclusion also has powerful symbolic value, both political and social."[180] This symbolic value cannot be under estimated. He explains that "[i]t communicates an openness about the power structure, it commands legitimacy, and leads traditionally excluded groups to believe, correctly, that the exclusion has softened or perhaps dissolved. It means progress."[181]

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178 *Id.* at 1097.

179 *Id.* at 1098. Leach then addresses the larger jurisprudential issue, stating that:

> As a simple matter of intellectual coherence, Congress and the courts should agree on the extent to which American law recognizes that a person's race may affect her ability to perform certain tasks within an organization or profession. From a judicial perspective, the current inconsistency between the statutory and constitutional precedents in this area creates unnecessary confusion, undermining the clarity and force of opinions that must address occupational need claims.

Id.

180 Edley, *supra* note 156, at 137.

181 *Id.* at 137. *Id.* Edley then discusses the coal miner's daughter, and states:

> The point of the coal miner's daughter hypothetical, in my view, is that it sharpens our awareness that several important preferences can and should have different weights in our moral calculus. And the justifications of inclusion and remediation are not nearly separable. As we debate the particulars, context matters.

The progress that Dean Edley speaks about has been achieved to a large extent in our nation's military forces. The *Military Brief* states "[i]In the interest of national security, the military must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting."[182] The majority opinion in *Grutter* specifically agreed with the military rationale, and stated that the step from the military context to the selective civilian educational institution is a small one.[183]

While arguing that law school diversity is essential to national security or even preventing prisoner disobedience is difficult, the normative perception of many is that people of color not only have little power in the legal structure, but also hold no strong stake in the legal institutions that govern and punish them. Thus, the fact that people of color do not, for the most part, see themselves as stakeholders in the legal system – due to the perception that they have been disenfranchised by the system, undermines the legitimacy of the legal system in the minds of people of color. Providing broad racial access to legal education is an important means of legitimizing legal institutions for members of traditionally excluded races and would foster the stabilization of our legal system because fewer will feel that the system is unfair or unjust. A stable legal system that members of the society understand and participate in helps to maintain the legitimate rule of law. The justification for diversity in higher education is analogous to the prison guard and military justification for race-based affirmative action. As Professor Lawrence notes, "[w]e must integrate our universities because we cannot fulfill our democratic ideal until we have conquered the scourge of American apartheid."[184]

Id. at 139. In addition, the importance of socio-economic diversity is worthy of consideration, but beyond the scope of this article.

182 *Military brief*, *supra* note 166, at 29-30. The brief continues:

> [i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective. Like our military security, our economic security and international competitiveness depend upon it. An alternative that does not preserve both diversity and selectivity is no alternative at all.

Id.

183 Grutter v. Bollinger, 539 U.S. 306, 330-32 (2003).

184 Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 964 (2001). He cautions, "we cannot teach and learn about racism in classrooms where only white folks are present." *Id.*

A primary goal of the True Diversity Experiment is identifying and fostering self-interest in the legitimacy of the legal system, a crucial next step to re-convergence. The diversity subjects in the True Diversity Experiment can go out into the world – the workplaces, other graduate schools, politics and elsewhere in the larger society, as representatives of our elite educational institutions. These representatives have the opportunity to preach tolerance or extol the benefits of achieving and maintaining diversity. Moreover, their very presence is a testament to the legitimacy of the institutions within which they now participate. Establishing and maintaining the legitimacy of institutions of power in this nation will be a part of our collective self-interest. Then, when sunset arrives, the interests will once again converge – not in the name of abolishing *de jure* segregation in the schools, as they did with *Brown*, but rather in the name of maintaining the legitimacy of our legal institutions. At that point, legitimacy will be prefaced on maintaining diversity. Therefore diversity can remain a compelling interest sufficient to justify race-based affirmative action policies if such policies are needed to maintain diversity levels required to support the legitimacy of the legal system.

IV. Other Justifications and Critiques

A. The Extent of the Burdens on (and Benefits) for Anglos

Aside from the Self-Interest justification discussed above, another justification requires a focused inquiry into the benefits afforded individual African Americans vis-à-vis the lack of burden placed on a large number of Anglos, due to the diffuse nature of the actual harm to individual Anglos. Professor Liu summarizes this argument based on "[o]ne simple statistical truth: In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants."[185] He continues, "the admission of minority applicants, and the rejection of white applicants are largely independent events, improperly linked through the causation fallacy."[186]

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185 Liu, *supra* note 112, at 1049.

186 *Id.* Additionally, Liu notes:

> When the mechanics of selective admissions are analyzed at the level of individual applicants, it becomes clear that a substantial number of unsuccessful white applicants (somewhere close to half in Bowen and Bok's study) are too weak to be admitted even when

Even when considering those applicants who were sufficiently qualified for admission, the actual displacement is minimal because there are more who are qualified than slots available. Thus, some qualified applicants are denied because the school has a limited number of admission seats for the first year class. Only the smaller group of qualified applicants who are displaced by students of color can legitimately claim to have been harmed by affirmative action policies. Liu suggests that even when considering those applicants who were sufficiently qualified for admission, the actual displacement is minimal because there are more who are qualified than slots available. Thus, some of those qualified applicants will be denied, even absent racial preferences, because the school has a limited number of admission seats for the first year class. Only members of this much smaller group have endured an actual burden as a result of their race, have been harmed because of an affirmative action policy.

Further analysis of the "burden based on race" is required to see how displaced Anglo students actually are harmed. As Liu notes, displacement based on race is different than being stereotyped based on race because the harm of displacement is more concrete and specific whereas stereotyping harm is more diffuse and amorphous.[187] Opponents of affirmative action exacerbate the tension involved in the fairness debate by focusing on the fact

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> placed on an equal footing with minority applicants. He further states: "Because the failure of those [displaced white] applicants to gain admission has nothing to do with race, they lack standing to challenge affirmative action.

Id. at 1050.

[187] Liu explains:

> Because strict scrutiny takes into account the nature and severity of the burden that affirmative action imposes on white applicants, it is essential to characterize that burden accurately, without the distorting influence of the causation fallacy. Moreover, exposing the causation fallacy has the salutary effect of centering the merits inquiry on whether white applicants are improperly stereotyped, not displaced, by affirmative action. Claims of displacement tend to inflate the degree of racial conflict inherent in race-conscious admissions, thereby heightening the pressure to be "for" or "against" affirmative action. In contrast, the stereotyping concern defuses the tendency toward polarization by relating the fairness of affirmative action to the concrete workings of particular policies.

Id.

of displacement, rather than the fact that the displacement is not based on a pernicious stereotype.

Former Stanford Law School Dean Kathleen Sullivan recognizes the difference between the harm to whites caused by compensatory policies and those caused by diversity-based policies.[188] Sullivan argues that there is no intentional harm to whites who may feel displaced by a "redefinition of criteria" for graduate school admissions – that is, by a diversity-based policy.[189] Because intent is required in order to prove wrongful discrimination under the strict scrutiny standard, such a policy would be constitutionally permissible. Thus, the increased use of diversity factors is not intended to disadvantage whites, but is instead being adopted despite that fact. Describing the burden more accurately, as Sullivan and Liu suggest, should lead to shifting the debate away from intentional discrimination that implicates the strict scrutiny test. Without a constitutional violation, there would no need to provide compensation to the displaced Anglos.

We can consider the operation of these "despite-race" perspectives in the context of Boston's public examination schools in the case of *Wessmann v. Gittens*.[190] In *Wessmann*, an applicant sued school officials for operating a racially- and ethnically-conscious admissions policy. Prior to the *Wessmann* litigation, a court found the school to be "complicit in promoting and maintaining [a] dual system" – which means that the school districts are

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188 She states:

> [c]ompensatory justifications for race-based preferences arguably do entail singling out displaced whites for racial harm in a way that racial diversity justifications do not. Compensatory justifications proceed from a baseline of unjust enrichment, seeking to disgorge white privilege that would not have existed but for past discrimination. A compensatory transfer of a benefit differs from a redefinition of the criteria by which the benefit will be allocated in the first place. Where no compensatory rationale is advanced, it is difficult to argue that a race-conscious program is intended primarily, or even partially, to disadvantage whites.

Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1051-52 (1998).

189 *Id.* at 1052 (arguing that "it is difficult to argue that a race-conscious program is intended primarily, or even partially, to disadvantage whites."); *Id.* (explaining that "[a] compensatory transfer of a benefit differs from a redefinition of the criteria by which the benefit will be allocated in the first place.").

190 160 F.3d 790, 793 (1st Cir. 1998) (rejecting the Boston Latin School's system of allocating half of its places by proportional racial and ethnic representation among those students who scored in the top half of its admissions test and not already admitted on the basis of test scores alone).

largely segregated based on race and ethnicity, and the proposed remedy was a court mandate requiring that at least thirty-five percent of the entering classes be composed of African American and Hispanic students.[191] After several years, when the mandate was no longer in force, the school continued the policy voluntarily, until challenged by a white applicant who was denied admission. In response to the challenge, the policy was adjusted so that one half of the spots were allocated based purely on test scores, and the other half were allocated based on "flexible racial/ethnic guidelines."[192]

The court was not interested in addressing the diversity issue,[193] and stated that it:

> must look beyond the School Committee's recital of the theoretical benefits of diversity and inquire whether the concrete workings of the Policy merit constitutional sanction. Only by such particularized attention can we ascertain whether the Policy bears any necessary relation to the noble ends it espouses. In short, the devil is in the details.[194]

After evaluating the details, the *Wessmann* court criticized the Schools Committee for engaging in racial balancing, rather than providing racial diversity, given that an estimated 18% of the students selected solely on merit would be from non-Anglo racial and ethnic groups reflected– groups intended to be represented in the thirty-five percent allocation.[195] The *Wessmann* court reasoned that a policy cannot pass constitutional muster if it forecloses an applicant for consideration for a spot based on race or ethnicity.

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191 *Id.* at 792.

192 *Id.* at 793.

193 In some language that turned out to be refuted by *Grutter* five years later, the court states:

> [t]he word "diversity," like any other abstract concept, does not admit of permanent, concrete definition. Its meaning depends not only on time and place, but also upon the person uttering it. It would be cause for consternation were a court, without more, free to accept a term as malleable as 'diversity' in satisfaction of the compelling interest needed to justify governmentally-sponsored racial distinctions.

Id. at 796 (citations omitted).

194 *Id.* at 797-98.

195 *Id.* at 798.

This court declined to address the question of whether diversity can be a sufficiently compelling interest, and concluded that the Boston school's policy did not meet the standard of *Bakke* and did not justify a race-based classification because "it effectively forecloses some candidates from all consideration for a seat at an examination school simply because of the racial or ethnic category in which they fall."[196] This foreclosure of spots is similar to that of the *Bakke* case, and echoes Professor Sander's concern that when Anglo students have only a small chance of being admitted through a particular diversity program, then that program should be struck down under *Gratz*.[197] Likely, however, the challenger in *Wessmann* likely missed out on an admissions spot because her score did not automatically qualify her for a spot reserved for those admitted on test score alone. When she was put into competition with the other candidates in the diversity mix, her score was not high enough to earn herself a spot. Therefore, she did not really suffer harm based upon her race. She is a member of the causation fallacy group, who would not be admitted, even if no students of color were admitted ahead of her.

The achievement gap among Anglos as well may be attributable to other factors, such as parental income, education, or geographic location – hence the rationale for considering such factors in the second stage of the admissions process. If she had a higher test score, her admission would be based on the race or score categories. Similarly, the African American student is precluded from the "score only" spots because her score is not high enough for one of those spots.[198] Under this evaluation, neither the African

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196 *Id.* at 800.

197 Sander goes farther, however, in stating that he sees no real difference between the undergraduate program struck down in *Gratz* and the law school program upheld in *Grutter*, because the law school must have been either adding points based on race, or dividing the candidates into separate racial pools for separate consideration. *See* Sander, *supra* note 7, at 481.

198 The *Wessmann* court then went on to address the achievement gap, stating:

> [w]e do not propose that the achievement gap bears no relation to some form of prior discrimination. We posit only that it is fallacious to maintain that an endless gaze at any set of raw numbers permits a court to arrive at a valid etiology of complex social phenomena. Even strong statistical correlation between variables does not automatically establish causation. On their own, the achievement gap statistics here do not even identify a variable with which we can begin to hypothesize the existence of a correlation.

American, nor the Anglo is precluded from any spots based on race, but merely from some based on test scores (which is accepted as a bona fide mechanism for admitting and rejecting applicants, at least at the highest and lowest ranges).

Moreover, the affirmative action policy in *Wessmann* differs from *Bakke* in one crucial respect: spots were not set aside based on a particular race (or several races and ethnicities as they were in *Bakke*), but on the basis of an applicant's perceived ability to contribute to diversity. Because Anglos can contribute to many components of diversity and no one is foreclosed from a spot based on race, under this article's proposal, the program struck down in *Wessmann* would not place an impermissible burden on Anglo students, and could withstand a constitutional challenge applying *Grutter*.

Turning from the burden on Anglos to their benefits, Sander argues that Anglos benefit from affirmative action – because they avoid being in the bottom of their classes.[199] However, most Anglo students do not receive this "benefit" because there are so few African American students in law school classes. That is, even if all African American students were to be at the bottom of a law school class, but there were only two of them, this would only mean that some Anglos still will be very near the bottom of the class.

The actual benefit to whites other than the benefits that flow from a diverse student body is that many white students actually are admitted through affirmative action because of holistic policies designed to increase a broader conception of diversity.[200] Sander also uses Anglos as his affirmative

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160 F.3d at 804 (citations omitted).

[199] "Whites, in contrast, arguably benefit from preferences in a number of ways," such as having higher grades because the lower ranks are filled with blacks and others." Sander, *supra* note 7, at 481.

[200] Examining the data for white students, Wightman states:

> These data demonstrate that although one result of affirmative action admission practices might be to offer admission to some applicants of color who have LSAT scores and UGPAs that are lower than those of white applicants who are denied, lower-scoring applicants of color are not the only ones who are given special admission consideration. Specifically, the data in Table 2 show that the number of white applicants who were not admitted, but would have been if decisions were based entirely on numerical indicators, is not so large as the number of white students who were admitted, but would not have been based on LSAT and UGPA alone. For example, the LSAT/UGPA –combined model identified 4392 white applicants who were not accepted to any school although they were predicted to be admitted based on their

action control group, arguing that they generally do not receive racial preferences.[201] However, as Wightman notes many Anglos who would not otherwise have been admitted are in fact admitted because of the non-racial affirmative action and diversity factors. [202] Some of these factors could include ethnic factors that do not explicitly constitute a racial preference. Kidder recognizes that "even when diversity is a factor in admission decisions, Anglo applicants consistently have a better chance of gaining admission to at least one ABA law school than African Americans, Native Americans, Chicanos/Latinos or Asian Americans."[203] Anglos benefit more, in actual numbers, than people of color do under affirmative action programs in law schools.[204] This means that the holistic and individualistic approach advocated by the United States Supreme Court and the Michigan Law School admits a far larger number of Anglos who would not otherwise have been admitted as well as a larger percentage, but modest actual number, of African American and other students of color. Thus, the costs for access are not as substantially high as the opponents of affirmative action policies suggest.

B. The Extent of the Benefit Affirmative Action Policies Provide for African Americans

Even though (1) fewer white applicants are displaced by race-based affirmative action than generally thought, and (2) many Anglos are actually

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LSAT scores and UGPAs alone. But the model also identified 6321 white students who were admitted who were predicted not to be admitted to any school.

Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 16-17 (1997).

[201] Richard H. Sander, *Mismeasuring the Mismatch: A Response to Ho*, 114 YALE L. J. 2005, 2006 (2005) ("First, Ho suggests that my article is flawed because there is no 'control' group – a group that has not received racial preferences to whom blacks can be compared. Not so: The entire paper is organized around a comparison of 'treatment' of blacks (who generally receive preferences) and 'control' whites (who generally do not).").

[202] This is because there is a larger pool of white applicants to law school who also exhibit non-racial, diverse qualities.

[203] William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 BERKELEY LA RAZA L.J. 173, 207 (2001).

[204] Of course, in terms of percentages, because there are just so many more Anglos in law schools, the percentages of people of color who benefit may be higher than the percentage of whites who benefit from current affirmative action policies.

admitted through affirmative action, affirmative action policies have a substantial impact on the number of African Americans and other underrepresented groups enrolled in law schools. In a cost-benefit analysis, the cost, in terms of the burden to actually displaced Anglos, is much lower than the benefit when measured as admission for African Americans. There seems to be a growing consensus that race or ethnicity has an impact on the admission of those applicants who are "qualified," but only slightly exceed the qualification threshold for admission.[205] Wightman explains, "[w]ithin individual groups of underrepresented minority applicants, the impact of not taking race into consideration can be substantial. Within the much larger group of white applicants, the impact of prohibiting that consideration is relatively small."[206] This consideration of race on balance, benefits a larger

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[205] In addressing admissions policies at the undergraduate level, Liu discusses this point in his interpretations of the Bowen and Bok data, stating:

> In sum, differences in admission rates based on SAT scores provide a reasonably valid measure of the admissions advantage black applicants receive through affirmative action. As suggested by the Harvard College admissions policy featured in Bakke, racial preferences operate not at the top or bottom of the applicant pool, but in "the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses." Contrary to what *Bakke* suggests, however, the race of a minority applicant in this middle group does not merely 'tip the balance in his favor.' It confers a considerable advantage that is much more substantial than proponents of affirmative action typically acknowledge.

Liu, *supra* note 112, at 1070.

[206] Linda F. Wightman, *The Consequences of Race Blindness: Revisiting Prediction Models with Current Law School Data*, 53 J. LEGAL EDUC. 229, 253 (2003). As further support, she provides the following background information:

> Taking race into consideration is a different process from admitting simply "because of" race." The data and models cannot definitely determine that it is the former and not the latter that is happening in law school admission, but it can provide evidence to support such a hypothesis. The strong relationship between admission "numbers" (test scores and grades) within each group is part of that evidence. So is the discovery that there are applicants within each racial/ethnic group who were denied even though they had higher test scores and grades than others in the same group who were admitted. The number of minority applicants who would have been denied under the numbers-only model is a

percentage of African Americans than the percentage of Anglos actually harmed by this use of race in admissions, and consequently, African Americans are admitted in much greater numbers with affirmative action than they would be without affirmative action. Conversely, when such affirmative action policies are discontinued, a larger percentage of African Americans will be harmed by displacement and only a small percentage of Anglos will benefit. Under the cost-benefit analysis, therefore, the Access cost of race-conscious affirmative action to Anglos is less than the Access costs of race-blind policies to African Americans.

Anderson also recognizes that racial preference determines who is offered an admission spot, but explains that the magnitude of the preference is significantly less than the amount given to academic factors, and is similar in degree to those given to other non-academic factors like geography and athletics for undergraduates.[207] Still, the advantage is a substantial one, which, according to Professor Sander, is the reason blacks end up at the bottom of

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> maximum estimate of the number of applicants who may have benefited from taking race into consideration. Just as a number of white applicants with lower grades and test scores were admitted due to some combination of other factors, some minority applicants were admitted for the same kinds of reasons.... Even so, both the models and the summary statistics on LSAT score and UGPA suggest that race was a factor in many admission decisions.

Id.

[207] About elite university admissions and preferences she states:

> [t]his information confirms two key points. First, the size of the racial preference in selective college admissions, relative to the weight given to academic credentials, is substantial. Critics of affirmative action are right to claim that race operates as far more than a tiebreaker in college admissions. Second, the size of the racial preference is not close to being an overriding or decisive factor in admissions, relative to combined academic credentials, and is comparable to the advantage conferred by other non-academic factors, such as athletics, socioeconomic status, and geographic origin. Contrary to the claims of its critics, affirmative action admissions programs in undergraduate schools do seem to treat race as "only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body" – the constitutional standard defended by Justice Powell in Bakke.

Anderson, *supra* note 160, at 288.

their law school classes.[208] Sander's view can be contrasted with the premise behind the justification for preferences in the Bowen and Bok study which was that those admitted through affirmative action programs who had lower test scores were equally capable of succeeding in their chosen professions.[209] This seems to be another crucial point of disagreement in the affirmative action debate: are affirmative action programs admitting unqualified, less qualified, or equally qualified applicants of color?

Some critics of affirmative action believe that more unqualified students of color are admitted, but the threshold or entry qualifications keep getting higher as time passes. For instance, Kidder notes that the entry academic credentials of students of color are higher than the entry credentials of the white men admitted before affirmative action was instituted. He explains that "admission standards were relatively more relaxed during the 1950s and the early 1960s, when White men maintained virtually total control over access to legal education."[210] As the world becomes more competitive, standards of quality and expectations rise, resulting in the average qualifications rising from one decade to the next. However, a rise in the average qualification level does not mean that those below the new average are no longer qualified. For example, if a 40 LSAT score (on the former scale of up to 48) was sufficient to admit Anglo males to Stanford during the 1970s, then an African American admitted in the 1990s with a 40 LSAT score is still qualified, even though 40 is no longer the average LSAT score of

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208 *See* Sander, *supra* note 7, at 478-79. In fact, Sander asserts that this is because generally those blacks admitted under racial preferences are not equally capable of doing good work in their courses.

209 *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 96-100, 110-11, 392 (1998) (noting that at Ivy League schools, blacks' chances of earning degrees in law, medicine and business are greatly enhanced).

210 Kidder, supra note 47 at 19. He continues:

> For instance, at the University of Michigan Law School, the students of color in the entering class of 1971 had equivalent index scores to Michigan's White male-dominated class of 1957. Yet nationally these White males of the 1950s and early 1960s, the majority of whom would have been denied access to an ABA education under the more extreme competition that was the norm by the early 1970s, apparently performed well enough as the judges, professors, government officials, and law firm partners of their generation.

Id.

Stanford's entering class.[211] As qualifications rise, the notion of "qualified" evolves as well. If we curtailed the focus on actual numbers, we may recognize that the increase in abilities does not mean that fewer people are qualified, but rather that more people are qualified. Law schools have a much larger pool of qualified candidates from which to choose, and thus admissions decisions should not be based on numbers alone.

For Professor Sander, however, the difference in average numbers is critical,[212] and meeting a qualification threshold that might have been average decades previously, will not permit the affirmative action admits to compete effectively with their peers who have a new higher average. Sander seems to believe that those with lower LSAT and Undergraduate GPAs are significantly less qualified, [213] and for this reason, their grade point averages end up at or near the bottom of the class.[214] The *Real Impact* authors who critique Sander's proposal only partially disagree, admitting that on average the grades of African American students are lower than the grades of white students at the schools they studied, while also disputing that entry credentials alone account for blacks' lower grades.[215] There is "something else," which is not fully accounted for.[216]

In examining the lower grade point average of African American law students, the prevalence of mandatory curves, enforced medians and widening grade distributions would be important to consider. Such policies may operate to force higher grades on some students, and lower grades on others, which would exacerbate the gap between averages scores for the top and bottom of the curve. Thus, the bottom of the class may be artificially low, or incorrectly low in some instances, due to the requirements of an enforced curve.[217] We may find that this difference also has some relation to the size of the performance gap described above. Sander believes that those with lower scores (LSAT and Undergraduate GPAs) are significantly less

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211 The score ranges have been raised and expanded in subsequent years.

212 Sander, *supra* note 7, at 425 ("[A]dmitting law students whose academic credentials vary dramatically is likely to have dramatic effects in law school.").

213 *Id.* at 429 (stating that '[t]he poor performance seems to be simply a function of disparate entering credentials").

214 *Id.* at 427.

215 *Real Impact*, *supra* note 127, at 1880.

216 *Id.* at 1885-86 (postulating that the cause could be related to such factors as stereotype threat, financial difficulties, and the scarcity of African-American faculty).

217 A similar effect can occur at the top of the class, where the curve requires a set percentage of A grades and the professor does not find as many A grades when grading the exams. Some of the high B grades are artificially increased to A grades, thus increasing the GPA of those students, and again widening the gap between those students in the top of the curve and those in the bottom.

qualified,[218] and for this reason, their grade point averages end up at or near the bottom of the class.[219] But the question remains: does the benefit of African American admissions to law schools outweigh the burdens thereby imposed upon those same African American law students? The next section explores this question in the context of Professor Sander's most recent affirmative action study.

C. The Burden of Affirmative Action on African Americans According to Professor Sander

This section of the article provides a brief analysis of Professor Sander's latest thesis that African Americans actually are harmed more than they are helped by affirmative action polices.[220] Professor Sander rejects the

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[218] *Id.* at 429 (stating that "[t]he poor performance seems to be simply a function of disparate entering credentials").

[219] *Id.* at 427 (stating that "[t]he data shows that blacks are heavily concentrated at the bottom of the grade distribution.").

[220] For a more full evaluation and critique of Sander's entire article, see *Real Impact*, *supra* note 127 at 1863. The main conclusion of *The Real Impact* is that "if affirmative action in admissions were eliminated, there would probably be a 25 to 30 percent decline in the numbers of African Americans entering the bar, not the rosy 8.8 percent rise that he [Sander] forecasts." To Sander's argument that law school applications from blacks would not decline significantly, the *Real Impact* authors respond by stating that their:

> estimate is that many of the African Americans who now secure admission to the fortieth-ranked school could, in the absence of affirmative action, at best expect admission only to a school in the sixtieth- to eightieth-rank range, and we expect that whether it is the fortieth- or the eightieth-ranked school that would admit them, many African Americans who now opt to attend elite law schools will turn to other careers.

Real Impact, *supra* note 127, at 1863. Furthermore, the *Real Impact* authors state that "[b]y Sander's own estimates, without affirmative action African Americans would constitute only about one to two percent of the student bodies at the most elite law schools." *Id.* at 1864. Without affirmative action, postulate the *Real Impact* authors, blacks might not find law school attractive, and a reason for this may be that some blacks, even those eligible for elite schools, shun the prospect of being part of a "tiny minority." *Id.* In addition, the authors note that financial considerations may operate to decrease the number of African American applicants. *Id.* at 1866. While US News notes, and Sander agrees, that the median income of graduates rises with the ranking of the law school:

idea that affirmative action is actually benign discrimination that benefits African Americans. He says:

> The premise accepted by O'Connor is that racial preferences are indispensable to keep a reasonable number of blacks entering the law and reaching its highest ranks—a goal which is in turn indispensable to a legitimate and moral social system. The analysis in this paper demonstrates that this premise is wrong. Racial preferences in law schools, at least as applied to blacks, work against all of the goals that O'Connor held to be important. The conventional wisdom about these preferences is invalid.[221]

It is not a situation of the benefits outweighing the burdens, because there are burdens all around – on displaced Anglo students, and dismissed, disqualified, or disenchanted African American students.[222] He concludes that because

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> most people do not realize that many schools in the lower tiers are as expensive to attend as schools at the top [and recall that many of the inexpensive public schools are in states with low African American populations]. Thus between graduates of the first and fourth tier schools there was a difference of more than 2 to 1 in median second-year earnings ($135,000 versus $60,000) but very little difference in median educational debt ($80,000 versus $75,000).

Id. at 1898 n.37, 1865-66; *see also* Johnson, *supra* note 1. Considering this, many African Americans may perceive that legal education has a diminished return on investment.

221 Sander, *supra* note 7, at 481.

222 Sander continues:

> But a third legal implication of this work is the most important of all. All of the Supreme Court's decisions about affirmative action in higher education presume that the discrimination involved is fundamentally benign. It is tolerable only because it operates on behalf of a politically vulnerable minority – that is African Americans. A preferences program that operated on behalf of whites would be unconstitutional beyond question. Yet if the findings of this Article are correct, blacks are the victims of law school programs of affirmative action, not the beneficiaries. The programs set blacks up for failure in school, aggravate attrition rates, turn the bar exam into a major hurdle, disadvantage most

these preferences actually harm African Americans, they should be discontinued.[223]

After exploring the use of racial preferences in both elite and non-elite law schools, Sander determines that "the current structure of preferences creates a powerful 'cascade effect' that gives low- and middle-tier schools little choice but to duplicate the preferences offered at the top."[224] Sander explains that the preferences cannot be justified on the grounds that the LSAT and UGPA predictors for law school admissions are biased against students of color, because he finds "compelling evidence that the numerical predictors are both strong and unbiased."[225]

The more controversial aspects of Sander's article are in his analysis on the law school performance of African Americans and Anglos. He notes that "in the vast majority of American law schools, median black grade point averages (GPAs) at the end of the first year of law school are between the fifth and tenth percentile of white GPAs."[226] This statistic is startling – that 50% of the black law students have a GPA that is less than the bottom 10% of white students. Only 50% of African American students have a GPA that exceeds the GPA of the bottom 10% of Anglo students. Sander analyzes the gaps in law school grade performance, stating that:

> the collectively poor performance of black students at elite schools is not to any appreciable extent due to their being 'black' (or any other individual characteristic, like weaker educational background, that might be correlated with race). Poor performance is simply a function of disparate entering credentials, which is primarily a function of the law schools' use of heavy racial preferences. It is only a slight oversimplification to say that the performance gap in Table

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> blacks in the job market, and depress the overall production of black lawyers.

Id.

223 *See id.* at 482. For a more full evaluation and critique of Sander's entire article, see generally Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759 (2007); Beverly I. Moran, *The Case for Black Inferiority? What Must Be True if Professor Sander is Right: A Response to A Systematic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L.J. 41 (2005); *Real Impact*, *supra* note 127.

224 *Id.* at 372.

225 *Id.* He recognizes that their GPAs "rise somewhat thereafter only because those black students having the most trouble tend to drop out. The black-white gap is the same in legal writing classes as it is in classes with timed examinations." *Id.* at 373.

226 *Id.*

5.1 is a byproduct of affirmative action.[227]

From these numbers, Sander concludes that "[b]ecause of low grades, Blacks complete law school less often than they would if law schools ignored race in their admissions process."[228] Sander's premise suggests that students with very low grades are less likely to graduate. Students with lower predictors get lower grades. Most African Americans admitted through affirmative action have lower predictors. Therefore, most African Americans will get the lower grades, and are less likely to graduate. Because Sander believes that these African American students are less likely to graduate,[229] Sander hypothesizes that those students would be better off attending a law school where their predictors would not put half of them in the bottom five or ten percent of the grade distribution for their classmates. By earning the same grades relative to their peers, these "properly matched" African American law students will be more likely to graduate from that lower-ranked law school, to pass the bar exam and to continue as a professional.

Sander's proposal for the future consists of being honest about what is happening with affirmative action admissions at most law schools.[230] He suggests an intermediate step, limiting racial preferences at the most elite law schools to perhaps half of what they are now which would allow for a lower preference, and thus lessen the credentials gap between black and white students at these elite schools.[231] He explains that the true benefit of this limitation would be a dampening of the cascade effect."[232] He explains that if "the top ten schools enroll 150 blacks instead of 300, then the next tier of schools (say those ranked eleven through twenty) would need to exercise even smaller preferences to reach the 4% target."[233] He notes that "[a]t some point fairly high in the law school spectrum, no preference would be needed to achieve a 4% goal, and from that point on the proportion of blacks (all admitted on essentially race –blind systems) would be greater than 4%."[234]

Is Professor Sander's suggested number a token, or a critical mass?

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227 *Id.* at 429.

228 Sander, *supra* note 7, at 373.

229 In the event that they do graduate, they will be less likely to pass the bar, or if they do pass the bar they will be less likely to get good law firm jobs, according to Sander's article. *See id.* at 479.

230 He suggests that "[w]e can admit that black applicants are treated differently as a group, and that our schools' practices look more like the system described by Justice O'Connor in *Gratz*, rather than the 'individualized assessment' of *Grutter*." *Id.* at 482.

231 *Id.* at 483.

232 *Id.*

233 *Id.*

234 *Id.*

The United States Supreme Court's decision in the *VMI* case suggested that 4% would not be sufficient to constitute a critical mass, though that case considered gender, not race.[235] Without the critical mass, educational institutions arguably would lose many of the benefits that flow from a diverse student body. But, according to Sander's theory, the benefits to blacks of higher grades, bar passage rates and good legal jobs are worth the trouble.

Liu's analysis suggests that if fewer offers are made to students of color, then they will have fewer options, and will accept those admissions offers at higher rates.[236] It is possible then, that the yield rate would be much higher, and that the same number of diversity students will accept their offers of admission. With the higher yield rate, fewer offers need be extended to get the same number of students to enroll in the entering class. If Sander's suggestion of limited affirmative action is implemented to cut the preferences to one half of what they currently are for African American applicants at elite law schools, then, surely fewer offers will be extended, and the yield rates for African Americans at those schools should rise as well.

However, the main drawback of a proposal to reduce the number of offers to students of color applying to elite schools is that the number of "black candidates still accepted by a given school" likely would be reduced so dramatically by race blind admissions, that their percentages in the elite schools would be much lower than even Sander's suggestion. Under such a system, many of those African American students who currently get more than one offer would receive none. Those who received only one offer might be more likely to take that offer, unless the cost of acceptance was prohibitive given its place in the rankings, or because the school had only a token few other African Americans and thus rendering the environment undesirable for the student. The only African American students who will likely get multiple admissions offers from top schools will be those African American applicants

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235 For a discussion of critical mass vis-à-vis race in *Grutter*, *see infra* Part I.A..

236 Liu states:

> if all institutions of higher education were required to adopt race-neutral admissions policies... the typical black candidate who was still accepted by any given school would presumably have fewer options." One would expect to see black applicants accept offers at the same rate as white applicants if both are admitted at the same rate and face the same array of options. The elimination of affirmative action thus means that selective institutions would not need to make as many offers of admission as they otherwise would in order to fill the same number of seats.

Liu, *supra* note 112, at 1076-77.

at the very outer right region of the curve. The fact that they get multiple offers when fewer offers are extended overall thereby would reduce the overall number of potential African American students even further.

The *Real Impact* authors analyze the likelihood that many African American students would chose not to attend law school, if their options and choices were curtailed as severely as Sander's proposal suggests.[237] The racial isolation would be more pronounced, and the "benefits that flow from a diverse student body" would be less significant, given the small numbers. The numbers below represent the *Real Impact* authors' findings on African American student representation under Sander's proposal.[238]

Law School Ranking	% of African American Students
1-10	.75
11-25	1.01
26-50	1.68
51-100	2.38
Tier 3	3.72
Tier 4	4.69

Thus, even if we double the figures to account for other factors and to make them a bit more realistic, the picture is far from a rosy one.

Another author addresses the question of which schools people of color would attend if their UGPA's and LSAT scores do not alone suffice to get them into the schools that they currently attend.[239] 74% of whites with LSAT scores less than 35 (under the old system) and UGPA's less that 3.25 attended Cluster 4 or 5 schools,[240] where the clusters are sorted by median LSAT and UGPA.[241] Thus, with race blind admissions, one would presume that most of the African American applicants with similar scores would be admitted to these schools.[242] This, however, would be an improper

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237 *Real Impact*, *supra* note 127, at 1891-97.

238 *Id.* at 1894, and Table 5.

239 Wightman, *supra* note 200.

240 Using the same LSAC-BPS data that Sander uses in his *Systematic Analysis*, *supra* note 7.

241 Wightman, *supra* note 200, at 23.

242 She continues:

> The question of interest is whether the same high proportion of applicants of color might be willing and able to attend schools in these clusters if they were the only schools to which the applicants were accepted. There are two characteristics in particular about the

assumption according to Wightman.[243] Additionally, the dual effects of higher costs and lower levels of diversity would reduce Sander's anticipated enrollment rates even further. Thus Sander's solution results in a much more significant decline in the representation of African Americans in law schools, particularly at the elite and even semi-elite levels. For a variety of reasons, even students admitted pursuant to race-blind policies or less substantial preferential boosts would forego attending law school. The further decrease in numbers likely widens the racial achievement gap between blacks and whites in law schools, further undermining the legitimacy of the legal system, and the efficacy of its educational institutions.

V. Conclusions and Recommendations

This article has proposed implementing the True Diversity Experiment, involving a limited number of participating law schools at different tiers of the US News rankings. Each participating school will develop a list of various diversity factors and, with the help of LSAC or AALS, develop an appropriate Diversity Quotient Range as a goal for increasing and maintaining the type of racial and non-racial diversity important to that school's institutional mission. Compliance with the DQ range will be monitored, and schools will commit to achieve and maintain those DQ levels from year to year for the duration of the experiment. The True Diversity Experiment satisfies the *Grutter* test because it defers to the educational institution decisions of which factors (race, ethnicity, religion, socio-economic status, parental education level, commitment to serve underrepresented groups) form integral parts of its own conception of diversity. Then, the schools commit to pursue and maintain these facets of diversity using *Grutter*-approved means like monitoring access and attrition using individualized review of applicants.

Because participating schools are choosing to comply with the experiment, they should recruit and retain more qualified diversity students.

> schools that make up Clusters 4 and 5 that place doubt on the assumption that students of color would have either made application to those schools or attended them. First, the schools in these two clusters enroll the lowest proportion of minority students of any of the clusters. Second, the schools in Cluster 4 are primarily private (98%) and are among the most costly of the schools – being exceeded only by the eighteen schools included in Cluster 1.

Id. at 24.

[243] *Id.*

Some methods they might use include reducing reliance on the LSAT, changing the structure of law school exams, or experimenting with new law teaching methods. These methodological reforms also benefit non-diverse students, particularly those who are non-traditional learners.

The True Diversity Experience attempts to reach goals in three interests: Access, Environment, and Self-Interest. While implementing the True Diversity Experiment, schools at each level will provide greater Access, and more consistently attract diverse students and students who appreciate and value diversity. Participating schools will also learn how to retain more of their diverse students, as they create and foster an Environment conducive to maintaining diversity. The participating schools will be motivated to succeed in this experiment through their own Self-Interest, which will include providing access and opportunities for underrepresented groups, cultivating a diverse learning environment, and increasing their attractiveness to the kinds of diverse students that they want to enroll. Consequently, their placement in the US News rankings may increase, particularly if the diversity index at some point is assigned some point value that is actually factored in to calculate the schools' rankings. Participating law schools likely would have a higher yield rate than non-participating law schools, and could become even more diverse, or maintain their diversity levels, with increasingly smaller preferences. Thus, over the course of the True Diversity Experiment, all the participating schools could eventually achieve greater diversity, with increasingly higher average predictors, which benefits their US News rankings as well.

The critical justification for this experiment is that our collective self-interest requires establishing and maintaining the legitimacy of institutions of power in this nation. Broad access to legal education is crucial for maintaining the legitimacy of legal institutions and would promote a more stable legal system. This self-interest in the legitimacy of the legal system is a critical component of the next point of interest-convergence, and must be a primary goal of the True Diversity Experiment. The True Diversity Experiment can help us anticipate that point of Professor Bell's interest convergence, so that we prepare for the potential sunset of affirmative action and avoid the pitfalls that Professor Sander's mismatch theory predicts.

That preparation for sunset requires an explicit consideration of the true costs and benefits of wholeheartedly pursuing diversity for a sustained period of time. As the True Diversity Experiment progresses, the participating schools will be able to gather data about the "benefits that flow from a diverse student body" and also will measure the costs of making diversity an absolute priority for a fixed length of time. Meanwhile, schools that do not participate likely will gather their own data on the costs and benefits of declining to pursue True Diversity. At the end of the experiment, law schools, policy makers, and judges will be able to more effectively

evaluate whether there is a time for the sun to set on affirmative action or whether our mutual interests justify continuing affirmative action programs in law schools and beyond.