Is “Diversity” Diverse Enough?

by Tung Yin†

Having survived the latest assault against affirmative action in Fisher v. University of Texas, the diversity rationale for affirmative action continues to rule the day in admissions offices across American universities, including law schools. Yet, there is a striking degree of uniformity about what actually constitutes “diversity;” law schools appear to strive for something around 60–70 percent white students, with the remainder divided fairly evenly among Asian American, African American, and Latino/Hispanic American students, with a handful of Native American students. With the exception of historically black colleges and universities, institutions that deviate too much from this conventional view of diversity are commonly assailed for their lack of diversity—even institutions like University of California, Berkeley, where whites are not even a majority of the student population.

This Article examines the costs of such a uniform conception of diversity. As an example, with so many law schools pursuing a small number of Native American applicants, the result is, with a few notable exceptions, student bodies that have a consistently tiny fraction of Native Americans (approximately less than 1 percent), which is unlikely to be any kind of critical mass. A different conception of diversity might accept that some law schools may end up with fewer Native Americans, while a few other schools would enroll significantly more, approaching a more reasonable critical mass; and the same would presumably be true for Asian Americans, African Americans, and Latino/Hispanic Americans. The question is whether having a relatively small number of schools with different notions of racial diversity (i.e., more concentrated in one of the three major minority groups) would provide alternatives for minority students who would like to be part of a group that is more than 10–15 percent of the overall student body. This Article explores the result of having some law schools being willing to admit student bodies that are just as diverse in white/minority terms but where the minority groups are not divided evenly.

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INTRODUCTION

As we know from the Supreme Court’s decisions on the constitutionality of affirmative action (Bakke, Grutter/Gratz, and Fisher), racial diversity in education is a compelling state interest sufficient for the purposes of Equal Protection strict scrutiny analysis. Having a racially diverse student body provides a number of benefits: “cross-racial understanding;” the breaking down of racial stereotypes; promoting learning; and preparing students for work in a diverse workforce.\(^1\)

Because diversity in higher education is an acceptable justification for affirmative action (while remedying general societal discrimination is not), institutions of higher education have embraced diversity. Diversity

\(^1\) Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003); Fisher v. University of Texas, 133 S. Ct. 2411 (2013). I use Bakke as the beginning point of the Court’s “affirmative action” jurisprudence because prior cases such as DeFunis v. Odegaard, 416 U.S. 312 (1974), and Sweatt v. Painter, 339 U.S. 629 (1950), were not decisions on the merits of race-based preferential treatment. DeFunis was decided on mootness grounds, and Sweatt was a pre-Brown case about equal access to state-provided education.


celebrates our differences. We are stronger because of our diversity; this is certainly true in genetics, where some endangered animal species are jeopardized by their lack of genetic diversity and more susceptible to widespread diseases. Yet the benefits of diversity hold true for broader ecosystems as well as for economic markets.

Yet our concept of what constitutes diversity in education is strikingly uniform. Colleges, universities, and graduate programs seek to assemble student bodies that include critical masses of African Americans, Asian Americans, Latinos, and Native Americans. It appears important to have enough members of each minority racial group; a shortage in one group is not compensated for by additional numbers in a different minority group. It is hard to generalize, but one might hazard a guess that when people think about racial “diversity,” they have in mind something like 60–70 percent white, and the rest split fairly evenly among African Americans, Asian Americans, and Latinos, with no particular group dipping below 5–10 percent. This distribution approximately mirrors the applicants to American Bar Association (ABA) accredited law schools.

Although racial diversity and affirmative action in universities has been the subject of extensive scholarship, the uniformity of diversity has not received much attention. In this article, I agree with the significant educational benefits that racial diversity provides in law school. I seek to demonstrate that the predominant conception among universities and law schools and a majority of the Supreme Court, among others, of what constitutes racial diversity is itself narrowly uniform. I also suggest that it would be beneficial if some (but far from all) law schools were to take a broader view of what constitutes racial diversity, with an eye toward

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4. See, e.g., Loss of Gene Diversity is Threat to Cheetahs, N.Y. TIMES, Sept. 17, 1985, at C2 (“[R]esearchers have concluded that if they do not find some diversified cheetah genes somewhere, the species could soon be vulnerable to extinction”); Jo Thomas, A Bird’s Race Toward Extinction is Halted, N.Y. TIMES, Dec. 29, 1998, at F3 (discussing scientific research on the decline of prairie chickens in Illinois likely due to “a genetic bottleneck – a sharp reduction in genetic diversity”).


6. See infra Part I.B.


8. Richard Epstein briefly criticized the insistence on requiring all institutions to diversify their student bodies in the same way in an endowed lecture in 1991, which is reprinted at Richard A. Epstein, Affirmative Action in Law Schools: The Uneasy Truce, 2 KAN. J.L. & PUB. POL’Y 33, 40–41 (1992) (“[T]he principle of diversity, far from supporting a system of mandatory affirmative action, calls for a withdrawal of the affirmative action question from the accreditation system”). More recently, Ilya Somin explored the point in a blog post. See Post of Ilya Somin to The Volokh Conspiracy, (Mar. 22, 2007, 5:56 pm), http://www.volokh.com/posts/1174600569.shtml (noting “diversity within institutions, but very little diversity across institutions”).

9. See, e.g., infra Part I.A.
increasing the proportional size of one minority group, even if doing so means having fewer members of other minority groups. That is, perhaps some law schools would be 60–70 percent white, and 25–30 percent of one minority group, with small percentages of the other minority groups (0–15 percent total).¹⁰

Part I of this Article focuses on critical mass theory. The concept of critical mass is that the number of minority students at any given institution should be substantial enough to avoid mere token representation; without a critical mass, minority students may feel isolated and alienated. Part I therefore begins by providing a summary and recapitulation of the benefits of increasing racial diversity in educational institutions, particularly law schools. This is a well-trodden area, and the purpose of this Part is primarily to outline the baseline expectations against which a broader conception of diversity would be measured. Part I next discusses public reactions to the perceived loss of multicultural diversity at certain universities, whether due to a statewide affirmative ban or conscious admissions policies, all aimed at showing there is a widespread and consistent notion of what constitutes a “diverse” student body. Finally, this Part turns its attention to the diversity at American law schools to show they resemble one another in terms of the general distribution of racial minority students.

Part II turns to the results of having more or less all law schools implementing the same vision of racial diversity. One example is the competition for scarce Native American law students to the extent that most schools have a tiny population of these students, such that they cannot realistically constitute a critical mass.¹¹ Other downsides include possibly monolithic views of minority groups and exacerbation of possible isolation (particularly if the local community is considerably less diverse).

Part III uses 2010 Census data to examine racial diversity in American states and cities, showing there are many different ways in which a given geographic area can be racially diverse. Cities that have a relatively large proportion of Asians, for example, reflect that particular diversity in a way

¹⁰ In fact, there is no reason that the total percentage of minority students needs to be limited to 30–40 percent of the total class; I offer this hypothetical distribution because it resembles the distribution at most law schools and so would involve less disruption to current admissions practices, compared to increasing overall minority presence. The effects of concentrating diversity more specifically within one minority group may be accentuated if that minority group approaches or even assumes plurality status. See also L. Darnell Weeden, Historically Black Colleges Advance Reverse Academic Diversity, 13 N.Y. CITY L. REV. 1, 5–8 (2009) (arguing that historically black colleges with predominantly black enrollment provide, among other things, an environment for white students to experience “nontraditional learning experiences that will broaden their cultural and intellectual exposure”); see generally infra Part II.2.

¹¹ Under the Supreme Court’s affirmative action jurisprudence, a critical mass of students of a particular minority group is not a minimum percentage, but a sufficient enough number of students of that group such that those students will not feel marginalized or isolated. See Grutter v. Bollinger, 539 U.S. 306, 317–20 (2003).
that is different from cities that have a relatively large proportion of, say, Latinos or African Americans. If we analogize law schools to cities, then we might see a law school whose racial diversity is concentrated in one particular group as not necessarily being “worse” from a pedagogical standpoint than other more conventionally diverse law schools, but merely different.

Finally, Part IV identifies limitations and offers precautionary principles about the implementation of this broader view of diversity. It is one thing to move from one city to another, but it can be more challenging to transfer from one law school to a different one, so the cities analogy has its limits. Additionally, in the absence of coordination among law schools, the distribution of law schools focusing on each particular minority group may be uneven, and one or more groups might find themselves more underrepresented nationally. While coordination among law schools could avoid that outcome, it is likely illegal under current antitrust law. Finally, the most serious obstacle to this Article’s proposal may be the apparent stranglehold placed on law schools to diversify in a different way, due to the criteria used in national rankings such as the U.S. News & World Report’s rankings.

I. CRITICAL MASS THEORY

Although the Supreme Court has placed restrictions on state institutions’ use of affirmative action, it has thus far interpreted the Constitution to permit appropriately tailored racial preferences aimed at ensuring diversity.12 While the degree of preferences that can be given could not be quantified (as that would turn the preference into an unlawful quota), the Court did acknowledge that the preferences should be enough to permit the school to achieve a “critical mass” of minority students.13

A. The Benefits of Diversity

The diversity rationale in support for affirmative action is different from the concept of compensation for past discrimination. Under the compensation rationale, affirmative action “aims to make victims whole, to place them in the position they would have occupied absent the injustice.”14 The assumption behind this rationale is that discrimination and the vestiges of slavery have suppressed the academic performance of African American students to levels below what they would have been in a truly neutral environment; affirmative action merely compensates for that societally-

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imposed disadvantage.\textsuperscript{15} The compensation rationale has its supporters,\textsuperscript{16} but current constitutional doctrine rejects it in the absence of specific, identified past discrimination by the state entity.\textsuperscript{17}

In their groundbreaking work, \textit{The Shape of the River}, William G. Bowen and Derek Bok conducted empirical research and identified a number of benefits flowing from increased diversity in American colleges and universities. First, recipients of racial preferences generally achieved strong career outcomes that the authors believed resulted in part from their attendance at prestigious colleges and universities.\textsuperscript{18} For example, their surveys found that “\textit{[t]wenty years after entering college, black men who graduated from these selective colleges earned… twice the average earnings of all black men with BAs nationwide . . .}”\textsuperscript{19}

Second, Bowen and Bok argue that the strong career outcomes for these minority graduates also result in positive outcomes for society. Minority graduates from prestigious colleges were “much more likely than whites to hold leadership positions in civic and community organizations,

\textsuperscript{15} Kent Greenawalt, Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions, 75 COLUM. L. REV. 559, 582–83 (1975); Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 CALIF. L. REV. 953, 1002 (1996). See also STEPHEN B. OATES, \textit{LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING, JR.} 426 (1982) (quoting Martin Luther King, Jr. as saying, “[A] society that has done something special against the Negro for hundreds of years must now do something special for him, in order to equip him to compete on a just and equal basis.”); MARTIN LUTHER KING JR., \textit{WHY WE CAN’T WAIT} 147 (1963) (“[I]t is obvious that if a man is entered at the starting line in a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner.”).


\textsuperscript{17} See, e.g., Bakke, 438 U.S. at 306–07, 310 (Powell, J., plurality opinion); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); United States v. Paradise, 480 U.S. 149 (1987) (permitting judicially ordered racial quotas as a remedy for a defendant’s specifically identified past discrimination). Private universities and colleges are not subject to the Fourteenth Amendment’s Equal Protection Clause and hence have more leeway with which to engage in affirmative action without the need to conform to constitutional requirements.

\textsuperscript{18} \textit{BOWEN & BOK, supra} note 7, at 281–82 (“These findings suggest that reducing the number of black matriculants at the [college and beyond] schools would almost certainly have had a decidedly negative effect on the subsequent careers of many of these students . . .”). The authors conceded being unable to quantify how the subjects of the study would have done had they attended less prestigious institutions, although the authors expected that many “would have done well no matter where they went to school.” Id. at 281. Thus, all that Bok and Bowen were asserting was that, all other factors being constant, attendance at a highly prestigious college or university benefitted the recipients of racial preferences. Id.

\textsuperscript{19} Id. at 257; see also Jason S. Marks, Legally Blind? Reevaluating Law School Admissions at the Dawn of a New Century, 29 J.C. & U.L. 111, 138 (2002). This is not to say that affirmative action has magically eliminated all racial barriers for minority progress. See, e.g., Floyd Weatherspoon, The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers, 80 MISS. L.J. 259 (2010).
especially those involving social service, youth, and school-related activities.”

In a similar vein, other scholars have argued that the visible success of minority role models will encourage younger members of that minority group to pursue similar career paths. Other proponents of diversity believe minority communities will benefit because those minority graduates will be more likely to serve those communities as doctors, lawyers, and other professionals.

Finally, Bowen and Bok provided evidence that increasing the racial diversity of collegiate student bodies resulted in a perception of improved development of professional skills, such as the “ability to work effectively and get along well with people of different races/cultures,” and the “ability to have a good rapport with people holding different beliefs.” A key aspect of this particular justification of diversity is that non-minority students are better off with more minority students around, “because race itself is socially significant[,] students need knowledge of the attitudes, views, and backgrounds of racial minorities.”

Dean Erwin Chemerinsky concisely captures a widely-asserted view:

The reality is that race matters enormously in the classroom. A person’s race powerfully affects how he or she experiences the world. A discussion of race in a political science class is vastly different in an all-white classroom than it is in a racially diverse classroom. In law school classes, discussions about racial profiling in a criminal procedure class or about affirmative action in a constitutional law course are very different depending on the racial composition of the students.

However, despite the benefits discussed earlier, not all affirmative action defenders fully support the diversity theory, and some others openly admit that they promote diversity primarily because it is the justification

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20. Bowen & Bok, supra note 7, at 258 (“These findings appear to bear out the assumption of selective institutions that minority students have unusual opportunities to make valuable contributions to their communities and the society”); see also id. at 283 (“American society needs the high-achieving black graduates who will provide leadership in every walk of life”).

21. See, e.g., Brest & Oshige, supra note 14, at 869.


23. Bowen & Bok, supra note 7, at 225–27.


25. Erwin Chemerinsky, Guidelines for Affirmative Action After Proposition 209, L.A. LAWYER, Feb. 2002, at 16, 17. My own anecdotal experience over the past eleven years of teaching courses ranging from Constitutional Law I (structure and federalism), National Security Law, and Criminal Procedure, has been that having more minority students sometimes, but not always, result in classes with livelier discussions about race and the law. As one might expect, it is highly dependent on the individual students, the mix of students, and other such factors. For an interesting study in which corporate directors almost universally think that diversity matters in the corporate board context but have a hard time saying why or even giving any concrete examples, see Kimberly D. Krawiec et al., The Danger of Difference: Tensions in Directors’ Views of Corporate Board Diversity, 2013 U. ILL. L REV. 919 (2013).
that the Supreme Court has permitted for affirmative action programs. Whatever the reason, diversity is the foundation upon which racial preferences now stand.

B. The Diversity of American Law Schools

American law schools generally seek diverse student bodies. This section proceeds by looking at the overall pool of law school applicants and matriculants in terms of racial demographics, and then analyzes the variation in diversity at the top fifty law schools, using data obtained from the ABA.

Table 1. US Demographic Data 2008

<table>
<thead>
<tr>
<th>Race</th>
<th>U.S. Population</th>
<th>Bachelor’s Degrees</th>
<th>ABA Applicants</th>
<th>ABA Matriculants</th>
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<tbody>
<tr>
<td>White</td>
<td>66.6%</td>
<td>72.2%</td>
<td>63.5%</td>
<td>69.9%</td>
</tr>
<tr>
<td>Black</td>
<td>12.4%</td>
<td>9.6%</td>
<td>11.3%</td>
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</tr>
<tr>
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<td>7.5%</td>
<td>9.3%</td>
<td>8.2%</td>
</tr>
<tr>
<td>Asian</td>
<td>4.6%</td>
<td>6.9%</td>
<td>8.6%</td>
<td>8.3%</td>
</tr>
<tr>
<td>American Indian</td>
<td>0.8%</td>
<td>0.8%</td>
<td>0.9%</td>
<td>0.8%</td>
</tr>
</tbody>
</table>

The distribution of diversity varies somewhat depending on whether one is looking at the overall U.S. population, the population of college graduates, the population of law school applicants, or the population of law school attendees. In law schools, whites are slightly overrepresented compared to the overall population, and Asians are significantly overrepresented (by 80 percent), while blacks and Latinos are substantially underrepresented (by 41 percent and 48 percent respectively).

Appendix 1 lists the percentage of student bodies, by race, for the top fifty law schools. The mean percentage of minority students for those fifty law schools is 24.2 with a standard deviation of 6.6. This means that more than two-thirds of the schools have a minority student percentage within a standard deviation of the mean – that is, two-thirds of the law schools have

26. See, e.g., LEVINSON, infra note 50.
28. Standard deviation is sensitive to extreme outliers. In the 2008 data, the University of Alabama law school had an extremely low percentage of minority students (11.7) while the USC law school was at the other extreme (39.3). Taking those two schools out of the data leaves the mean essentially unchanged (24.2) but decreases the standard deviation by almost 10 to 6.1 percent.
a minority student percentage between 17.6 and 30.8. One might also observe that the law school with the highest percentage of black students is the University of Georgia, the one with the highest percentage of Latino/Hispanic students is American University, the one with the highest percentage of Asian students is University of California, Hastings College of the Law, and the one with the highest percentage of Native American students is the University of Arizona.\textsuperscript{29}

Compared to the top fifty U.S. metropolitan areas, no top fifty law school skews toward one particular minority group as some cities do. The closest example is UC Hastings’ 2008 matriculating class, which was 24.1 percent Asian and 9.4 percent all other minority groups, followed by University of California, Davis, which was 22.9 percent Asian and 10.1 percent all other minority groups.

However, there is a readily apparent explanation for those schools’ racial demographics. In 1996, California voters passed Proposition 209, which barred state entities, including the University of California, from “grant[ing] preferential treatment to . . . any group or individual on the basis of race, sex, color, ethnicity, or national origin . . . .”\textsuperscript{30} A federal court challenge to the proposition failed.\textsuperscript{31} Thus, both of those law schools (as well as UC Berkeley and UCLA) were barred since 1996 by Proposition 209 from giving preferential treatment based on race.\textsuperscript{32}

Accordingly, the distribution of minority groups at the University of California law schools does not tell us anything about the diversity that those schools would have preferred had they had the freedom to act on racial preferences. To be sure, this does not mean that law schools without affirmative action bans in fact achieved their desired racial goals; given the differences, it is quite likely that factors such as the racial composition of their applicant pools and their relative \textit{U.S. News} rankings impacted their ultimate student body composition.

Eleven law schools in the surveyed group had minority student percentages more than one standard deviation below the mean: Alabama, George Mason, Indiana, Iowa, Minnesota, Tulane, Virginia, Wake Forest, Washington & Lee, Washington University, and William & Mary. What is

\textsuperscript{29} With the exception of American University, the other law schools are located in geographic regions with relatively high concentrations of those particular minority groups.

\textsuperscript{30} See Proposition 209: Text of Proposed Law, http://vote96.sos.ca.gov/Vote96/html/BP/209text.htm; Girardeau A. Spann, \textit{Proposition 209}, 47 DUKE L.J. 188, 201 (1997) (“The point of the ballot initiative was to eliminate affirmative action in response to political disenchantment with the direction in which it had developed”).

\textsuperscript{31} See Coalition for Economic Equity v. Wilson, 122 F.3d 692, 710–11 (9th Cir. 1997) (“Assuming all facts alleged in the complaint and found by the district court to be true, and drawing all reasonable inferences in plaintiffs’ favor, we must conclude that, as a matter of law, Proposition 209 does not violate the United States Constitution”).

striking is that within this group, the smaller proportion of minority students usually reflected an across-the-board decrease in each particular minority group. That is, law schools with a smaller percentage of minority students overall still had relatively proportional representation of each particular minority group.

The two exceptions were Alabama and Minnesota. Alabama’s 8.4 percent African American student population is seven times its 1.2 percent Asian American student population. Conversely, Minnesota’s 9 percent Asian American student population was more than four times its 2.2 percent African American student population.

Still, what we see is that the vast majority of the top fifty law schools have aimed for broadly consistent diversity in their student bodies, with a majority of white students, and smaller and roughly comparable numbers of African American, Latino, and Asian students, with no minority group making up more than half the total non-white population. Although various factors such as regional diversity, applicant pool, yield rate, and the like can affect the ultimate distribution of racial diversity at each school, the general consistency of diversity should not be surprising. The umbrella organization of law schools—Association of American Law Schools (“AALS”)—requires as a condition of membership that its member schools “seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex.”

C. Public Reactions to Loss of Multicultural Diversity

Of course, it is within the realm of possibility that the racial distributions at the top law schools could be as relatively uniform as they appear through random chance. However, there is evidence from which one can conclude that universities and law schools prefer that their student bodies include more than just token numbers of the major racial/ethnic groups—that is, African Americans, Latinos, Asian Americans, and Native Americans.

As noted earlier, California’s Proposition 209 barred the UC campuses (among others) from practicing affirmative action. The impact of Proposition 209 was most stark at the undergraduate level; shortly after its passage, UC Berkeley and UCLA experienced sharp decreases in the number of admitted and matriculating African American and Latino students, including at the law schools. As then-Berkeley law professor Rachel Moran reported:

In 1996, the last year in which affirmative action was permissible, the

33. See American Association of Law Schools, Bylaws and Executive Committee Regulations Pertaining to the Requirements of Membership, Bylaw Art. 6-3, available at http://www.aals.org/about_handbook_requirements.php.

34. See, e.g., Gorov, supra note 32, at A3.
admissions process produced a class of 263 students, which included 20 Blacks, 28 Latinos, 4 Native Americans, and 38 Asian Americans. Together, these groups accounted for thirty-four percent of the students in [Berkeley Law]’s entering class. In 1997, the first year in which affirmative action was abolished, the change was dramatic. The new admissions process yielded a group of 243 students, of whom none were Black, 7 were Latino, none were Native American, and 32 were Asian American.35

A wide variety of persons, ranging from then UC Berkeley Chancellor Robert M. Berdahl to individual students, lamented the lack of African American and Latino diversity. Berdahl said, “I am disappointed that our entering class will not better represent the impressive diversity that distinguishes this state.”36 A UC Irvine student complained that “I come here and it’s predominantly Asian. There are so few of us who speak for black students. We’re only about 2% black.”37 In 1998, a Frontline report described UC Berkeley as having admitted “its least diverse freshman class in 17 years,”38 notwithstanding the fact that the white population at the campus had been surpassed by Asians. The same pattern of emphasizing the decline in African American and Latino student acceptances and matriculations, without acknowledging the concurrent overall diversity in white/non-white terms, can be seen in numerous commentaries about Proposition 209.39

35. Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2246–47 (2000); see also Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1157 & n.61 (2008) (“Although the black student enrollment numbers at Berkeley Law have improved since then, they are not nearly as high as they were in the pre-209 days”); Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 Mich. St. L. Rev. 293, 293–94 (2007) (reporting that in the five years after the passage of Proposition 209, “[t]he percentage of minority students at state law schools, like UCLA and Boalt, is a fraction of what it was at comparable private schools like Stanford and U.S.C.”); Ryan Fortson, Comment, *Affirmative Action, the Bell Curve, and Law School Admissions*, 24 SEATTLE U.L. REV. 1087, 1114–15 (2001) (“[T]here were 19 African Americans and 26 Hispanics in an entering class of about 290 at the UCLA School of Law in 1996, the year before Proposition 209 went into effect. In the entering class of 1999, there were 17 Hispanics and only two African Americans”).


Yet, those same two campuses remained extremely diverse in white/non-white terms. At UC Berkeley, for example, the fall 2008 entering freshman class was still well more than half non-white.\(^{40}\) 42.8 percent of the class was Asian, and only 29.9 percent was white (although 14.8 percent declined to identify their ethnicity).\(^{41}\) Some of the other University of California campuses, such as UC Irvine, had similar demographic profiles.\(^{42}\) In other words, Chancellor Berdahl and other critics did not consider the UC campuses to be “diverse”—admittedly, in a different way than many other campuses—notwithstanding the non-majority status of white students.

Nor are these critics’ views an anomaly. When the University of Michigan’s law school affirmative action program was challenged in \textit{Grutter v. Bollinger},\(^{43}\) the university argued that it needed to achieve a “‘critical mass’ of each underrepresented minority group.”\(^{44}\) In the absence of an affirmative action ban like Proposition 209,\(^{45}\) University of Michigan did not have an unbalanced distribution of minority students; thus, its contention that it needed a critical mass of each underrepresented group was tantamount to arguing that a class of, say, 60 percent white students and 10–15 percent each of Latinos, blacks, and Asians was preferable to one of 60 percent white students and 40 percent of one or two minority groups. In so arguing, University of Michigan had plenty of support from administrators at other leading law schools. The deans of Georgetown Law


\(^{41}\) Id. Even if every single admittee who declined to identify his or her ethnicity was white, the Berkeley incoming class was 45 percent white, and 55 percent non-white.

\(^{42}\) See Weiss, \textit{infra} note 37, at 1.


\(^{45}\) In 2006, a majority of Michigan voters did approve a statewide initiative similar to Proposition 209. \textit{See} Monica Davey, \textit{South Dakotans Reject Sweeping Abortion Ban}, \textit{N.Y. Times}, Nov. 8, 2006, at P8. That initiative is the subject of ongoing litigation, with the Sixth Circuit having struck it down in 2012 on the grounds that the manner of its enactment violated the Equal Protection Clause. Coalition to Defend Affirmative Action v. Regents of the University of Michigan, 701 F.3d 466 (6th Cir. 2012) (en banc), \textit{cert. granted sub nom.}, Schuette v. Coalition to Defend Affirmative Action, 133 S. Ct. 1633 (2013).
Center, Duke Law School, University of Pennsylvania Law School, Yale Law School, Columbia Law School, University of Chicago Law School, New York University Law School, Stanford Law School, Cornell Law School, and Northwestern University School of Law all submitted an amicus brief in Grutter stating:

A diverse student body benefits all students, of all races and of all backgrounds. And, for law schools especially, racial and cultural diversity is crucial in order to prepare students to be effective and responsible lawyers, academics, and judges in an increasingly multi-racial, multi-ethnic, and multi-cultural world.  

Similarly, the AALS, the organization whose membership includes most U.S. law schools, filed an amicus brief that stressed the need for a racially integrated student body, the absence of which would lead to the loss of “an unknown and perhaps unknowable range of experiences and perspectives . . . ”  

Because the context of that argument was the legality of affirmative action, the focus is necessarily on underrepresented minority groups. Nevertheless, the law school’s lack of focus on other groups, such as Asian Americans, did not indicate a lack of interest in enrolling such students; rather, it was a practical calculation that Asian Americans did not need affirmative action to be represented in what the law school already considered to be sufficient numbers. Of course, it would be disingenuous to ignore the differences in statistical profiles between, say, Asian American students and African American students. For example, between testing years 2005–06 and 2008–09, Asian students scored on average about 10 points higher on the Law School Admissions Test (“LSAT”) than African American students scored.  

The University of Michigan, the law school deans, and other law schools supporting affirmative action may have publicly lamented the potential loss of diversity but were privately more concerned about the failure to achieve a measure of racial justice for African Americans and Latinos.  

Yale law professor Peter Schuck, after noting the apparent liberal homogeneity among college and university professors, speculates that such

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faculty members “tend to be knowledgeable about and sensitive to the historical injustices inflicted on blacks by slavery, Jim Crow, and the legacy of racism in America, and to support affirmative action . . . .”

Regardless of law schools’ underlying motives for supporting affirmative action measures, we still see that such measures uniformly aspire to have non-token numbers of black and Latinos relative to local demographics.

The view that diversity necessarily encompasses multi-racial composition is not limited to law schools. Consider, for example, criticisms of the California Institute of Technology (“Caltech”) for its supposed lack of diversity; the *Journal of Blacks in Higher Education* labeled it “[t]he Whitest of the Nation’s 25 Highest-Ranked Universities,” arguing that it “has been unable, or unwilling, to take steps to diversify its faculty and student body.”

The basis for this indictment stems from Caltech’s admittedly paltry number of African American students (and faculty), amounting to 0.9 percent of the student body in 1995. Things have not changed in recent years; the 2008 entering class had “less than 1 percent (2/236) . . . listed as ‘non-Hispanic black’” (and less than 6 percent Hispanic students).

Yet when one takes into account the racial distribution of all students, not just the Caucasian versus African American comparison, a different picture emerges. That same 2008 entering class was only 39 percent white and 40 percent Asian. By comparison, Harvard’s 2006 entering class was over 60 percent white—which constituted its “most diverse” class in history.

No doubt Harvard’s historic class is considered “more diverse” than Caltech’s 2006 entering class when using the conventional measure of higher percentages of underrepresented minorities, but at the same time, Harvard is still “whiter” than Caltech. *The Journal of Blacks in Higher Education*‘s claim that Caltech is the whitest top-ranked university is plainly incorrect, unless one ignores the Asian students who make up 40 percent of the class or treats them as “white.”

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51. See SCHUCK, supra note 5, at 162.
55. Id.; see also Editorial, College admissions’ proper mess: Editorial, INLAND DAILY BULLETIN (July 1, 2013), available at http://www.dailybulletin.com/opinions/ci_23576675/college-admissions-proper-mess-editorial (“Caltech alone among the elite privates has a freshman class that’s 40 percent Asian”).
56. See College Class of 2010 is the most diverse in Harvard history, HARV. UNIV. GAZETTE (Apr. 6, 2006), available at http://www.news.harvard.edu/gazette/2006/04.06/03-admissions.html.
whites for diversity purposes would seem to be a metastasized extreme of the “model minority” stereotype of Asians by ignoring their minority status. Under the model minority stereotype, Asians are smart and hardworking and therefore have achieved considerable academic and vocational success. Consequently, according to affirmative action opponents, those model minority traits demonstrate that racial preferences are not needed. The metastasized version would go even farther and strip Asians of their minority status altogether. I should emphasize that I am not implying that The Journal of Blacks in Higher Education actually intended to engage in such stereotyping of Asians, but while unanticipated, it is an unavoidable conclusion to be drawn from its assertion, and one that reflects a single-minded notion of diversity.

In addition, my point is not that Caltech is in fact more diverse than Harvard or that Caltech’s diversity is better. From the standpoint of aspiring African American engineers and scientists, Caltech is no doubt a much less inviting institution than, say, its peer, Massachusetts Institute of Technology, which is 6 percent African American. On the other hand, Caltech may be more inviting to Asian American students who want to be more than 10 percent of their student body. The point is narrower: the criticism of Caltech as being “not-diverse,” as opposed to being less inviting toward certain minority groups, assumes a single-minded vision of diversity.

II. CRITICAL MASS THEORY PROBLEMS

As noted above in Part I, seeking diversity is regularly justified as having educational and pedagogical value. With the United States becoming more and more diverse, law schools need to ensure that their graduates are well equipped to perform and adapt to developing issues in the United States and the global legal landscape.

A. The Scarcity of Native American Students and Critical Mass

Native American law students provide the clearest example of the clash between institutional benefits and individual costs of uniform diversity. Native Americans comprise less than 1 percent of the United States population, and according to the Law School Admissions Council

57. For more discussion on the model minority stereotype, see Harvey Gee, From Bakke to Grutter and Beyond: Asian Americans and Diversity in America, 9 TEX. J. C.L. & C.R. 129, 149–58 (2004).

58. On the tendency to draw unanticipated but negative stereotypes against certain ethnic groups, see Daniel Farber & Suzanna Sherry, Is the Radical Critique of Merit Anti-Semitic?, 83 CALIF. L. REV. 853 (1995) (arguing that Critical Race Theorists’ insistence that “merit” has no intrinsic meaning ends up being anti-Semitic because it denies any legitimate explanation for the disproportionate success of American Jews in the United States).

59. See infra Part III.A.2.
“(‘LSAC’), Native Americans constitute a similarly small percentage of the overall applicant pool to ABA-accredited law schools.\(^{60}\) Between 2000 and 2009, the overall number of self-identified Native Americans who registered for the LSAT each year ranged from 580 to 780.\(^{61}\) This means that even if every single Native American student who sat for the LSAT were admitted to at least one law school, the just under 200 ABA-accredited law schools would each average no more than three to four Native American students per year. The actual numbers would likely be lower.\(^{62}\)

However, as noted above in Part I, Grutter agreed with the prevailing academic view that it was necessary to provide a “critical mass” for each minority group.\(^{63}\) Unless one believes that critical mass can be achieved with as few as four students of a particular minority group, many law schools then in fact fail to provide anything close to a critical mass of Native American students.\(^{64}\) Chief Justice Rehnquist’s dissent in Grutter noted that the University of Michigan Law School provided no justification or explanation for why a critical mass of African Americans required six times as many students as it did for Native Americans.\(^{65}\) According to Rehnquist, the law school’s concept of critical mass was just a “sham” and a subterfuge for the fact that it was essentially admitting minority students in proportion to their size in the applicant pool.\(^{66}\)

Although Rehnquist dismissed the idea that critical mass could be different for different racial groups,\(^{67}\) the assertion is not ridiculous. Students from particular racial groups might see critical mass as, at a minimum, equal to their proportion of the U.S. population, and since that

\(^{60}\) See LSAC U.S. AND LEGAL PERCENTAGES, supra note 27.


\(^{62}\) In saying “more likely,” I note that LSAC and ABA data on the percentages of Native Americans who matriculate to law schools and who receive JDs from law schools is constant and essentially identical to the percentage of Native American applicants, suggesting that Native American students gain admission to law schools at approximately the same rate as everyone else. See LSAC U.S. AND LEGAL PERCENTAGES, supra note 27. This means it is unrealistic to expect that every Native American applicant would gain admission to some law school, and therefore the actual number of Native American law students would be fewer than three to four per school.


\(^{64}\) See Fisher v. University of Texas, 631 F.3d 213, 259 (5th Cir. 2011) (Garza, J., concurring) (“If, apart from the Top Ten Percent law, the University of Texas’s race-conscious admissions program added just three-to-five African-American students, or five-to-ten Hispanic students, to an entering freshman class of 6,700, that policy would completely fail to achieve its aims and would not be narrowly tailored.”), rev’d, 133 S. Ct. 2411 (2013). Schools in the U.S. News top 50 with one to four Native American students in their 2008 entering classes are Alabama, Boston College, Boston University, Chicago, Connecticut, Duke, Florida, George Mason, Georgetown, Georgia, Indiana, Tulane, UC Davis, UC Hastings, USC, William & Mary, and Yale. See infra Appendix 1.

\(^{65}\) Grutter, 539 U.S. at 382–83 (Rehnquist, C.J., dissenting).

\(^{66}\) Id. at 385–86.

\(^{67}\) See id. at 382.
proportion differs from one ethnic group to another, certain groups could benefit from different critical masses.

But using national averages as the baseline would be unreasonable, since the Native American population is—like other racial minority groups—distributed unevenly throughout the country from state to state. Indeed, it would be especially problematic to use national averages as the baseline in the case of Native Americans, since more than a fifth of them— unlike other minority groups—live on reservations in which they are essentially the only racial group. But like other minority groups, geographic distribution across the country for those off-reservation Native Americans is far from uniform, with 187 of 3143 American counties having Native American populations in excess of 8 percent. Thus, while Native Americans may constitute approximately 2 percent of the U.S. population, it is hardly the case that most Native Americans have grown up in a relevant (i.e., local) environment in which they are but one in fifty. Even if the national averages were at all relevant for assessing whether any particular law school’s proportion of Native American students is “large enough,” then it would seem equally irrelevant whether any individual law school had a critical mass of any minority group so long as all law schools in the country combined did. Yet even then, it would be impossible for every law school to have entering classes with more than 1 percent Native American.

In short, there is no reason to believe that having one to four Native American students in a law school is any kind of critical mass. If there is no critical mass, then the particular law school is not receiving the full benefits of that aspect of diversity under the conventional view as advanced by the University of Michigan and its various supporters in Grutter.

Notice that there are a few ABA-accredited law schools that had zero Native American students in their 2008 entering classes. Quite obviously, those classes lost out on the diversity benefits that Native American students can bring. However, in this regard, one wonders how different the experience was for the non-Native American students compared to the experience at many law schools that had but one to four Native American students. There is one important difference between the schools: schools with zero Native American students did not pose the potential risk of engendering an isolating, alienating environment by only having an

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70. See id. at Appendix 1.
extremely small number of Native American students.

This is not to say that every single United States law school utterly fails to provide a critical mass of Native American students. Among the top law schools, the University of Arizona has a student body that is 4.5 percent Native American, and outside of the top fifty schools, there are law schools with the same or even higher percentages: Arizona State (4.5 percent), Oklahoma City University (5.8 percent), the University of Montana (8.3 percent), the University of Oklahoma (10.4 percent), and the University of New Mexico (11.7 percent).\(^{71}\) It is not a coincidence that those schools managed to attract a relatively sizable percentage of Native American students, given that Arizona, Oklahoma, and New Mexico are states with disproportionately large Native American populations.\(^{72}\)

However, given the tiny number of Native American law school matriculants overall, we cannot simultaneously applaud Arizona State, Oklahoma City, Montana, Oklahoma, and New Mexico for providing (relatively) large critical masses of Native American students and also expect that other law schools will strive to follow suit. The flip side of these five schools’ Native American enrollments is that some other schools will almost necessarily have zero Native Americans. Is an educational environment really benefitting from diversity if 0.5–1.5 percent of its student body consists of Native Americans? The conventional view of diversity would seem to think so, but why that is so is hard to see; whatever those benefits are, they must be measured against the possible and likely cost of that same 0.5–1.5 percent of the student body feeling isolated and alienated.

**B. Asian Americans, African Americans, Latinos and Critical Mass**

The story for Asians, African Americans, and Latinos is nowhere as stark as that for Native Americans, primarily because of the larger aggregate numbers for those minority groups. Even so, of the top fifty law schools, just four had student bodies that were more than 10 percent African American, and just 23 of the law schools had more than 7 percent African American students. Only half of the law schools had student bodies that were at least 10 percent Asian. That so many of the top fifty law schools, which presumably have more control over their student body composition, top out around 7–10 percent is evidence that such percentages generally constitute critical mass. And while the overall story may not be as stark for these minority groups as it is for Native Americans, there are still costs of such a rigid conception of critical mass.

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71. See ABA Demographic Statistics 2008, American Bar Association (copy on file with author).
72. For a U.S. Census Bureau map showing the locations of Native American populations in the United States, see http://www2.census.gov/geo/maps/special/AIANWall2010/AIAN_US_2010.pdf. On why the local diversity may matter, see infra Part III.B.
For a law school with 600 students, 7 percent would amount to 42 students, which may be a reasonably large enough population to form a viable ethnic student group even if not every one of those minority students joined the student group. On the other hand, the picture changes when we look at individual courses. In a standard large section class, such as a first year course or an upper division bar exam course, there might be 80–100 students. Seven percent of the class would be five to seven students, which is arguably enough to reap the benefits of in-class diversity, as there could be students of a multitude of geographical locations, genders, and other social demographics that could include intra-racial differences. In a smaller class, however, 7 percent can look much more isolated. With only twenty students, 7 percent would be 1.4—one or two students. This would mean that those one or two minority students would either have to bear the burden of being the face of their race in that class, or in the alternative suppress their views, thereby depriving the class of the benefit of their diverse backgrounds.

That analysis assumes a random distribution of students in courses, which might be a reasonable assumption for first year and other required courses. For other courses, however, students’ selection biases likely could result in a decidedly non-random distribution.\(^{73}\)

A law school can also respond to the problem of isolated minority students in small sections by not assigning them randomly, but instead concentrating the minority students in a smaller number of sections. In other words, rather than have ten sections of twenty students, each with one to two African American students, a law school could have five sections with three African American students and five sections with none, or even three sections with five African American students and seven with none.\(^{74}\) Notice the end result of this sort of concentration: some small sections are very diverse, and others are not at all diverse. Any law school that concentrates minority students into particular sections so as to dispel those students’ senses of isolation succeeds at the cost of depriving other sections

\(^{73}\) Cf. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 434 (2005) (noting that first year law grades are more competitive than upper division ones because in upper level courses “students have far more discretion in choosing subjects”). *But see Business Remains the Preferred Degree of African American College Students, but Black Students are Looking to Other Fields*, 27 J. BLACKS IN HIGHER EDUC. 36, 37 (Spring 2000) (noting that the top three preferred undergraduate majors for African American students are the same as those for white students, and “that the stereotypical view of the African American college student rushing into black studies majors is completely false”).

\(^{74}\) My anecdotal experience of teaching small section classes at a previous institution comports with this possibility. Some years, I had no minority students, and other years, I had a disproportionately large number of minority students. It could have been random chance, subject matter, or the product of deliberate assignment. *See also Richard Lempert, Reflections on Class in American Legal Education*, 88 DENV. U.L. REV. 683, 704–705 (2011) (noting that one post-Proposition 209 year resulted in UCLA Law School enrolling only five African American students who approached the administration and asked to be put into the same small section).
of the benefits of diversity in those small sections.

This concentration of minorities in a subset of small sections so as to reduce the likelihood of isolation and alienation leads to a distribution similar to that of Native American law students, with a few schools having significantly larger proportions and other schools with zero Native American students. In the same way, the cost of such concentration—namely, the deprivation of diverse viewpoints in the other small sections—may be less than the benefits that the minority students receive from not feeling isolated.

Of course, it is not likely that only one or two African American students represent the only minorities in a small section. There would probably be two or three Asian students and one to three Latinos. But if all it takes to put otherwise isolated minority students at ease is the presence of other, different minority students, then the whole critical mass debate could be reduced to looking simply at the white/non-white ratio. The relatively uniform conception of diversity stems from the assumption that there needs to be a critical mass of each racial group, not of minorities as a whole.

A recent empirical survey of undergraduate students at 28 different institutions by Dierdre Bowen provides some reason to be concerned about the conception of critical mass as being 7–10 percent of each minority group. As Professor Bowen noted, there may be an important difference between what admissions administrators believe constitutes critical mass versus what minority students believe constitutes critical mass.²⁵ She asked her survey subjects what their “ideal classroom environment” looked like, and the “overwhelming” response was “20% African American, 20% Asian, 20% Hispanic, 20% Other, and 20% White.”²⁶ To the extent that Professor Bowen’s survey results are generalizable to law schools, they would suggest that law schools, by seeking to enroll classes with 7–10 percent of each minority group, are actually failing to achieve meaningful critical mass.

They are failing in two ways. First, most of the top fifty law schools fell short—and significantly short in nearly all instances—of 20 percent of any particular minority group. Second, and of much greater concern, the ideal environment described in the responses to Professor Bowen’s survey involved an environment where no racial group predominates over any other. Were there only four racial groups, then critical mass would have been 25 percent of each group. A 70/10/10/10 split, on the other hand, means that each minority group would see itself as equal in size to other minority groups but significantly outnumbered by white students.

On the social front, there is a big difference between being 10 percent

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²⁶. Id. at 384.
of the student body versus being close to a plurality:

When Jonathan Hu was going to high school in suburban Southern California, he rarely heard anyone speaking Chinese. But striding through campus on his way to class at the University of California, Berkeley, Mr. Hu hears Mandarin all the time, in plazas, cafeterias, classrooms, study halls, dorms and fast-food outlets . . . .

“Here, many people speak Chinese as their primary language,” says Mr. Hu, a sophomore. “It’s nice. You really feel like you don’t stand out.”

With so many Asians at UC Berkeley, the campus dining halls have diversified not unlike the restaurants in Vancouver, British Columbia: “[T]here are residence halls with Asian themes; good dim sum is never more than a five-minute walk away; heaping, spicy bowls of pho are served up in the Bear’s Lair cafeteria. . . .” Not surprisingly, the “Asian feel” of the campus, as a New York Times reporter described it, is sometimes considered “Asian heaven” by Asian students.

Some research studies have found that minority students who find that they constitute only 7–10 percent of the overall class may not do as well as they would in an environment where they constitute a much larger proportion of the class. To be sure, these studies generally did not focus on law students. Still, a review of these studies is instructive. Linda Serra Hagedorn and others examined California community colleges and determined that the Latino students at those schools did better on average as the proportion of Latinos in the student body increased at a small but statistically significant level.

There is also relevant research regarding “historically black colleges and universities” (HBCUs) such as Howard University, where African American students predominate and whites are in the minority. At the undergraduate level, African American students at HCBUs appear better prepared for graduate school, as they are more likely to pursue higher

78. Id. As an aside, when I was in law school at Berkeley from 1992–95, just prior to the passage and implementation of Proposition 209, good dim sum was considerably more than five minutes away, and the Bear’s Lair certainly did not serve pho.
79. Id.
degrees and more likely to earn those degrees, than their counterparts who attend white-majority colleges and universities. Indeed, Howard Law School provides a good case study. Howard’s 2008 student body demographic was 74.9 percent African American, 4.4 percent white, 5.8 percent Asian, 2.6 percent Latino, and 0.7 percent Native American. This makes Howard incredibly diverse in white/non-white terms, but not so diverse in a multicultural sense. On one level, Howard represents the legacy of a time when most colleges and universities essentially excluded African Americans, forcing them to create their own fine educational institutions. But Howard also serves another purpose: for those African American students who, for whatever reason, do not want to attend law school in an environment where they are less than 10 percent of the class, Howard offers an academic environment where for once they are the dominant majority.

Somewhat less important is that when it comes to matters of voting, such as for class representatives or for student group funding, minority students who make up 10 percent or less of the student body may find themselves consistently on the losing side of such elections. This is not to say that Asian American students will always want to vote for Asian American class representatives, African American students for African American class representatives, and so on. However, since each minority group’s particular cultural and ethnic background shapes, to a certain extent, their identities, different groups may have different preferred candidates. Fragmentation of different minority groups may mean that if their preferred candidates do not have cross-racial appeal, none of those candidates will be elected in a winner-take-all system. To provide a sense of how relatively enfeebling it can be to be a student within the 7–10 percent of a student body, consider that California, despite being the most diverse across the three major minority racial groups of the continental

82. See Harold Wenglinsky, Students at Historically Black Colleges and Universities: Their Aspirations & Accomplishments 22 (ETS 1997); see also William F. Brazziel, Baccalaureate College of Origin of Black Doctorate Recipients, 52 J. Negro Educ. 102, 107 (1983) (noting African American Ph.D. holders were disproportionately more likely to have graduated from HBCUs).

83. Howard’s graduates include a number of extremely distinguished lawyers, judges, and politicians, such as U.S. Supreme Court Justice Thurgood Marshall; Douglas Wilder, former Governor of Virginia; former D.C. Mayors Sharon Pratt Kelly and Adrien Fenty; and federal judges Damon Keith (Sixth Circuit), Spottswood Robinson (D.C. Circuit), among others.

84. Cf. Jonathan Feingold & Doug Souza, Measuring the Racial Unevenness of Law School, 15 Berkeley J. Afr.-Am. L. & Pol’y 71, 78–79 (2013) (discussing how in most contexts, the racial baseline is “white,” but in other contexts, such as the National Basketball Association, “blackness is arguably the norm,” and white players are “vulnerable to race-dependent challenges that . . . Black teammates may never face”).

85. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 68 (1986) (noting that it is the “status of the candidate as the chosen representative of the particular racial group, not the race of the candidate, that is important”).
forty-eight states, has never had a non-white governor; Hawaii, which has been a state for 109 fewer years than California, has in its short existence had a Japanese American, a Native Hawaiian, and a Filipino American governor. Even if a student body were to shift to a system of cumulative voting to address this problem, as law professor Lani Guinier suggested with regard to general political elections, the degree of fragmentation inherent when each minority group amounts to no more than 7–10 percent of the student body may still leave members of those groups on the losing side of votes.

This does not necessarily imply that students from different minority groups cannot reach an agreement to combine their support for a compromise candidate or that minority students from one racial group would not voluntarily vote for a candidate from another racial group. One might expect that in some instances, the fragmentation of minority groups would have no impact on the selection of class representatives. However, the presupposition of diversity is that members of different racial groups bring different backgrounds, experiences, and outlooks that enrich the educational experience; therefore, there will be instances in which fragmentation impacts minority students from different racial groups differently, leading many to have frustration over their political powerlessness.

In short, while the numbers for African Americans, Latinos, and Asians are nowhere near as low as those for Native Americans, there are tangible differences between campuses that have the conventional diversity versus those where one minority group is a much larger proportion of the overall student body. While not every school should shift its conception of diversity to amass a much larger critical mass of one minority group, the existence of some such schools would provide a different experience and a choice to attend an “Asian [or Latino or African American] heaven.”

87. Id. at 94–101. In a cumulative voting scheme, the voter can cast one vote in each of the $N$ contested elections, or aggregate votes in fewer contests, including casting all $N$ votes for the most preferred candidate. As Guinier explained, if there are $N$ positions, then any group constituting at least $1/(N+1)$ of the population cannot be denied its preferred representative under cumulative voting if the members of that group aggregate their votes. If a law school has two class representatives per class year, and only class members can vote for their own representatives, then $N$ is 2, and the threshold for exclusion is 1/3, or 33 percent. Even if students are allowed to vote for any of the candidates, with $N = 6$, the threshold for exclusion is 1/7, or 14 percent—still above the specific percentages at most schools for each minority group. Thus, cumulative voting cannot assure minority students of the election of one preferred candidate.
88. For examples of racial tension or strife between African Americans and Latinos, see, e.g., Nicolas C. Vaca, The Presumed Alliance: The Unspoken Conflict Between Latinos and Blacks and What It Means for America (2004); Racial Tensions Blamed in Texas Prison Riot That Left Inmate Dead, L.A. Times, Apr. 27, 2000, at 29; Schools’ Racial Mix Boils Over, L.A. Times, June 14, 1991, at 1 (“In recent months, black and Latino students have clashed in Inglewood, while Latino, Vietnamese and Chinese students have fought in the San Gabriel Valley.”).
C. Small Critical Mass and Potential Monolithism

Some discussions of racial diversity and affirmative action tend to focus only on white/black or white/non-white diversity. While abstracting real world complexities to a simplified form can be helpful to understand the basic dynamics at play, it runs the risk of overlooking important principles. For that reason, much discourse today involves five general categories of race/ethnicity: Caucasian, African American, Asian American, Latino/Hispanic, and Native American. This account is considerably more satisfying than white/non-white and may be a reasonably accurate description of the way things work even though it overlooks some key intra-racial differences. For example, as Table 2 demonstrates, from a socioeconomic standpoint, Americans of East Asian descent (i.e., Chinese, Japanese, and Koreans) are different from those of Southeast Asian descent (i.e., Cambodians, Hmong, Laotians).


90. See, e.g., EGAN, supra note 77, at 24 (quoting UC Berkeley Chancellor Birgeneau as saying, “I think we’re now at the point where the category of Asian is not very useful. Koreans are different from people from Sri Lanka and they’re different than Japanese. And many Chinese-Americans are a lot like Caucasians in some of their values and areas of interest.”); see also Post of Ilya Somin, Asian American Applicants and Competing Rationales for Affirmative Action in Higher Education, THE VOLOKH CONSPIRACY (Oct. 17, 2009), available at http://www.volokh.com/2009/10/17/asian-americanapplicants-and-competing-rationales-for-affirmative-action-in-higher-education/ (“‘Asians’ are not a monolithic group. Japanese, Chinese, Indians, Filipinos, Vietnamese, and Cambodians all have very different cultures . . . Treating them all as an undifferentiated mass of ‘Asian Americans’ is a bit like saying that Norwegians, Italians, and Bulgarians are basically the same because they are ‘Europeans.’”).
Table 2. Socioeconomic Characteristics by Racial/Ethnic and Asian Ethnic Groups (numbers in percentages except for income)\(^9\)

<table>
<thead>
<tr>
<th>Race</th>
<th>College Degree</th>
<th>High Skill Occupation</th>
<th>Median Family Income</th>
<th>Living in Poverty</th>
<th>Public Assistance</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>25.3</td>
<td>21.4</td>
<td>$48,500</td>
<td>9.4</td>
<td>1.3</td>
</tr>
<tr>
<td>Black</td>
<td>13.6</td>
<td>12.3</td>
<td>$33,300</td>
<td>24.9</td>
<td>4.5</td>
</tr>
<tr>
<td>Latino</td>
<td>9.9</td>
<td>9.6</td>
<td>$36,000</td>
<td>21.4</td>
<td>3.5</td>
</tr>
<tr>
<td>Native American</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cambodian, Hmong, Laotian</td>
<td>9.2</td>
<td>9.8</td>
<td>$43,850</td>
<td>22.5</td>
<td>9.9</td>
</tr>
<tr>
<td>Indian</td>
<td>64.4</td>
<td>51.6</td>
<td>$69,470</td>
<td>8.2</td>
<td>0.9</td>
</tr>
<tr>
<td>Chinese</td>
<td>46.3</td>
<td>41.9</td>
<td>$58,300</td>
<td>13.1</td>
<td>1.8</td>
</tr>
<tr>
<td>Filipino</td>
<td>42.8</td>
<td>29.7</td>
<td>$65,400</td>
<td>6.9</td>
<td>1.6</td>
</tr>
<tr>
<td>Japanese</td>
<td>40.8</td>
<td>32.0</td>
<td>$61,630</td>
<td>8.6</td>
<td>0.9</td>
</tr>
<tr>
<td>Korean</td>
<td>43.6</td>
<td>27.0</td>
<td>$48,500</td>
<td>15.5</td>
<td>1.6</td>
</tr>
<tr>
<td>Vietnamese</td>
<td>13.8</td>
<td>22.6</td>
<td>$51,500</td>
<td>13.8</td>
<td>4.8</td>
</tr>
</tbody>
</table>

Based on the table above, the “model minority” status ascribed to Asians can be traced primarily to Chinese, Japanese, Korean, Indian, and Filipino individuals whose median family income, poverty rate, college graduation rate, and public assistance percentage are all comparable to, or in some instances, significantly better than those for Caucasians. The stereotype that “Asians” emphasize the importance of education is perhaps validated by the fact that over 40 percent of Chinese, Filipino, Japanese, Koreans, and Indians have college degrees, compared to 25 percent of Caucasians and smaller percentages of African Americans, Latinos, and Native Americans who have college degrees. For Southeast Asians other than Filipinos, however, the college graduate percentages of 9.2 to 13.8 are well below that of the Caucasians’ percentages and comparable to the blacks and Latinos’ graduate percentages. Further, the poverty rates for most Asians, except for Cambodians, Hmong, and Laotians, are well below 20 percent. Cambodians, Hmong, and Laotians, whose 22.5 percent poverty rate matches the 20 plus percent rate for African Americans, Latinos, and Native Americans. As the Education Trust-West observes, “the all-encompassing ‘Asian’ and ‘Pacific Islander’ categories hide vast

underlying differences among subgroups."  

Given the strong correlation between standardized test scores and family income, in the absence of affirmative action for non-Filipino Southeast Asians, the “Asians” in a class are likely to be mostly Chinese, Indian, and Korean. But if Asians—that is, all Asians—constitute 10 percent of a class, then the underrepresented Southeast Asians will likely make up a tiny fraction of the overall class, with overall numbers perhaps similar to the number of Native Americans. If this were the case, Southeast Asians may feel that they are part of a critical mass only when lumped together with other Asian Americans—but other Asian Americans who in many ways have significantly different backgrounds and experiences. To the extent that institutions seek to specifically enroll Cambodian, Hmong, and Laotian students to help show the unreliability of the “model minority” image, this goal may still go unrealized in the absence of a critical mass of Southeast Asian students. The question, therefore, is how can a law school amass a critical mass of such underrepresented Asian American students?

A law school could set a goal of say, 3–5 percent “underrepresented Asian” students to enroll and use preferential treatment to help achieve that goal. But this goal would either result in a larger percentage of overall Asian American students, or if not, then result in “negative action” against highly represented Asian Americans (i.e., Chinese, Korean, etc.), as the school would be redistributing spots that otherwise would have gone to those groups of Asian Americans.

Even among Asian Americans of roughly comparable socioeconomic status, there are cultural differences that may be relevant to legal education. The Japanese American population in the United States was subjected to internment in concentration camps during World War II, a fate that Chinese and Korean Americans escaped. Even for the Japanese Americans who did not

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94. Consider the racial demographics at UC Berkeley’s undergraduate campus, where students of Chinese (21 percent of the entering class), Indian (6–8 percent), and Korean (5 percent) dominate compared to Vietnamese (3 percent) and the catchall “other Asian” (1 percent). See UC Berkeley Fall Enrollment Data, Office of Planning and Analysis, available at http://opa.berkeley.edu/statistics/enrollmentdata.html.

95. Cf. Bowen & Bok, *supra* note 7, at 236 (“A greater number of black students almost certainly ensures more variety within the black student population; . . . more individuallas with their own special interests, personal histories, hobbies, and so on.”).

not experience these horrors themselves, the visceral feelings of ancestors can be seared into one’s persona and influence and impact how one views the law and legal issues. For example, in a 2007 article, I argued against rigid adherence to citizenship as the criteria for whether a person should be treated as a criminal defendant or a military detainee—and that in particular, Yaser Esam Hamdi was appropriately treated as the latter despite his American citizenship. This was a position contrary to everyone ranging from Dean Erwin Chemerinsky to Justice Scalia, whose views represent opposite ends of a wide ideological spectrum. My argument was that a person should not be subjected to criminal punishment (as opposed to incapacitative detention) merely because he fits within a nation’s legal conception of citizenship, absent some showing of some connection to that nation. I arrived at this conclusion in part because of my own experience as a native born American with immigrant parents; it is possible that under China’s citizenship rules, I could be considered its citizen despite never having even visited it. Thus, if citizenship were the pure determinative factor, in a war between China and the United States, if I were to join the United States’ military and be captured, I could theoretically be prosecuted by China for treason. University of Colorado law professor Aya Gruber raised a potential concern: Professor Gruber’s mother, who is of Japanese descent, was born in the internment camps. As a result, Professor Gruber was sensitized to any analysis that would treat some United States citizens differently than others. The point is that one person of Chinese descent and one of half-Japanese descent could highlight different concerns on a legal issue, notwithstanding the fact that they are both considered to be “Asian.”

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98. See Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. NAT’L SECURITY L. & POL’Y 73, 86 (2005) (“If the Court had followed a separation of powers approach in Hamdi, it would have ruled that the executive branch has no authority to detain an American citizen as an enemy combatant.”); Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) (arguing that the government’s options were to prosecute Hamdi for treason or to persuade Congress to suspend habeas corpus).
100. In actuality, the Chinese citizenship question is complicated. Article 5 of the Nationality Law of the People’s Republic of China states:

Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.

Nationality Law of the People’s Republic of China, art. 5, available at http://www.china-embassy.org/eng/ywzn/lxwy/vpna/faq/t10012.htm. Because my parents were not naturalized Americans at the time I was born, whether I would have Chinese citizenship under Chinese law depends on whether my parents were deemed to “have both settled abroad.” At my birth, they were both lawfully present in the United States under student visas while studying in graduate school, which does not answer the question clearly either way. See id.
The terms “African American,” “Latino,” and “Hispanic” similarly mask important cultural and ethnic differences among their members. Angela Onwuachi-Willig has explored the ways in which current affirmative action policies tend to favor “mixed-race[,] light-skinned Blacks,” and “first- and second-generation Blacks,” who tend to come from more affluent and educated families, at the expense of “legacy Blacks” (i.e., descendants of slaves, as opposed to immigrants or descendants of immigrants). She also explains that “there are vast differences among immigrant Blacks from various countries.” As a result, she argues that affirmative action programs should specially benefit legacy blacks, who have suffered the worst effects of discrimination and oppression.

Kevin Johnson similarly notes that intra-Latino tension “is almost inevitable in light of the immigration and the ongoing diversification of the Latino community.” Philip Anderson echoes his point writing, “In our desire for simplicity, it is all too easy to view Hispanics as a monolithic whole. The truth is that the Hispanic population is a diversified collection of many communities and cultures, including Mexicans, Puerto Ricans, Cubans, immigrants from Central America and others from South America, each with its own set of values, history and imperatives.”

So long as the total minority population at law schools hovers around 30 percent, there can be some degree of diversification across minority groups or within one minority group, but it will be difficult to have both. It is a choice about diversity breadth or depth.

102. Id. at 1198.
103. Id. at 1198, 1231. Onwuachi-Willig does not argue that affirmative action should benefit only legacy blacks. She notes that children and grandchildren of immigrant blacks end up losing much of the advantages enjoyed by the immigrant generation, and are also in need of preferential treatment. Her point is legacy blacks stand in a different position than immigrant blacks.
104. Kevin R. Johnson, Immigration and Latino Identity, 19 CHICANO-LATINO L. REV. 197, 199–200 (1998). Of course, intra-racial tension is not exactly the same concept as intra-racial diversity. To the extent that intra-racial tension arises from differing perspectives on social/political issues, however, such tensions serve the general purpose of demonstrating that there are a variety of viewpoints even among members of a single minority group.
105. Philip S. Anderson, Embracing Diversity, Examining the Justice System, 80 ABA J. 70, July 1999; see also Maurice R. Dyson, Towards An Establishment Clause Theory of Race-Based Allocation: Administering Race-Conscious Financial Aid After Grutter and Zelman, 14 S. CAL. INTERDISC. L.J. 237, 256 (2005) (“No longer should it be acceptable for admissions staff to lump a diffuse number of distinct racial and ethnic groups such as persons from Jamaica, Trinidad, Dominica, Guyana, Barbados, Haiti, St. Lucia, St. Vincent, Grenada, St. Kitts/Nevis, Antigua, Cape Verde, Kenya, Eritrea, and Nigeria under the rubric ‘black’ or ‘African American’ in order to diversify their student body.”); Gloria Sandrino-Glasser, Los Confundidos: De-Conflating Latinos/as’ Race and Ethnicity, 19 CHICANO-LATINO L. REV. 69, 73 (1998) (“Although Latinos are often united by language and culture, the population is far from monolithic. Thus, the discourses emerging from each of these different nationalities and spates of migrations are vitally different.”).
D. Relevance of the Local Community’s Diversity

As demonstrated previously, American metropolitan areas exhibit a far greater variety of diversity than the top law schools. Some might contend that the diversity of the local community (or even the state) of the law school is irrelevant to the question of what kind of diversity to which the law school should aspire. Vikram Amar and Kevin Johnson argue that the influential U.S. News and World Report law school rankings should not only include a category assessing the student diversity at each law school, but also judge each school under uniform standards without regard to geography. 106 Amar and Johnson point out that the U.S. News rankings are designed—and understood—“to measure, albeit imprecisely, how good a job each law school is doing in producing top-notch lawyers and leaders for national and international roles in the bar, bench, business community, government and academy.” 107 Because a diverse environment leads to a better educational experience, they conclude that law schools should not be treated “differently simply because they happen to be located in cities or states that themselves lack broad diversity.” 108

There is undeniable merit to this argument. Yet the racial diversity of a law school’s local community is irrelevant to the law school’s own diversity only if one discounts the impact on the minority students themselves of such mismatch between the student body and the local community. If the local community is significantly less diverse than the student body, minority students may be more likely to experience dissatisfaction with their law school experiences. Law school lasts three years, during which non-law-school-related satisfaction may be diminished in a variety of ways. Access to ethnic food, either in restaurants or in grocery stores, may be limited, if not completely absent, thus potentially amplifying students’ feelings of homesickness. 109 (This is not to say that only Chinese-American students would feel the absence of Chinese

107. Id.
108. Id.
109. See, e.g., Sam Oches, Meet Your Consumer: The U.S. continues to be a melting pot of age, race, and status—and so does your consumer, QSR Magazine, Nov. 2012 (noting research that “[s]ome 90 percent of Asians, 88 percent of Hispanics and Latinos, and 72 percent of African Americans . . . order ethnic food at least once a month” and observations by a food service expert that Latinos and Asians value “authenticity of the food”). This factor is dependent on not just the percentage of the local population that consists of the minority group, but also its absolute size. For example, the two cities that I lived in most recently, Portland, Oregon, and Iowa City, Iowa, are relatively close in percentage of Asians—6.5 percent to 5.6 percent—but because Portland’s metropolitan population is about 15 times that of Iowa City’s, its variety of Asian restaurants is much larger. Iowa City has no dim sum restaurants, whereas Portland has at least four that I am aware of.
restaurants. In general, however, it is reasonable to believe that people socialized in their own ethnic culture will be the ones who miss its manifestations the most). Other cultural opportunities may be missing as well. And from a professional perspective, if the local legal community is much less diverse than the law school, minority students may feel isolated and alienated and be less likely to integrate with that legal community.

Even if minority students feel comfortable on campus due to the diversity of the student body, that perception may change once the students step outside the campus to eat, shop, drink, or otherwise interact with the local community.

In February 2010, the Diversity Committee at Lewis & Clark Law School surveyed minority law students about a variety of topics relating to race and legal education. In response to the question, “[i]f the racial/ethnic diversity of Portland or Lewis & Clark is different from the diversity of the place you recently called home, what role do you think these differences have played, if any, in your law school experience?” Some students wrote:

“It has deterred me from taking the bar exam in Portland and practicing here.”

“The lack of diversity in Portland made a significant difference in my law school experience and was a large part of my reason to move out of Oregon when I graduated law school. I always felt out of place in Portland so I never felt settled and it only added to the loneliness of law school.”

“It has made it more difficult to remain here.”

“School is a lot more diverse than the rest of Portland. I don’t think it has affected my school experience much, but I’d say my experiences off campus and in Portland are a lot different.”

“L&C law school is much more diverse than Portland so I don’t think the

110. “Absence,” of course, is hyperbole. For example, the Panda Express chain can be found in 43 states, with 1634 separate restaurants. See The Panda Story 2011, http://www.pandaexpress.com/company/#story/story-2011. Moreover, there are more Chinese restaurants in the United States than McDonald’s, Burger King’s, and Wendy’s put together, suggesting that even relatively small communities are likely to have at least one Chinese restaurant. See Lee, infra note 132, at 9. Panda Express has its fans, but it doesn’t really satisfy me when I have a craving for Chinese food. While I am hardly an expert on Chinese food (although I grew up in a household with many Chinese dinners, and I’ve frequently dined in the Chinatowns of Los Angeles and San Francisco, as well as in Monterey Park), I do have a sense of what Chinese food can taste like, and to the extent that my upbringing is fairly typical, it’s an illustration of the point that my culinary experience, as regarding Chinese cooking, is much better in Portland than it was in Iowa City.

111. For example, Chinese New Year, which typically occurs in late January or early February, is traditionally celebrated for two weeks with a variety of activities and performances such as lion and dragon dancing and lantern viewing See, e.g., Things To Do, Lan Su Garden, http://www.lansugarden.org/things-to-do/events/chinese-new-year/.

112. On the importance of minorities meshing with the local legal community, see Mary Helen McNeal, Slow Down, People Breathing: Lawyering, Culture and Place, 18 CLINICAL L. REV. 183 (2011).
law school environment is very different.”
“A significant role. Portland has a tendency to magnify our minority, so
I’m always reminded that I’m not like everyone else here.”
“At times there is a subtle feeling of alienation that creates doubt about
whether or not I can see myself settling in Portland.”
“People tend to be pretty naive about how to act towards people who are
different in Portland. I don’t think it has affected me in any way, other
than making me feel a little lonely.”

This is not to say that all of the survey respondents reported such
reactions. A number of others made positive comments about the diverse
environment and the law school’s efforts. The point is that some number of
minority students perceived Portland—as distinct from Lewis & Clark Law
School—as being significantly less diverse than they would have preferred,
which negatively impacted their law school experiences.

Moreover, Amar’s and Johnson’s argument about the irrelevance of
the local community’s diversity rests heavily on the assumption that law
schools are responding to the U.S. News vision of being “national”
programs that send graduates everywhere. Because many law school
graduates end up practicing in the state where they went to law school, it
seems too facile to ignore the local community’s diversity. Consider the
following responses to the same Lewis & Clark survey question from
above:
“A major role . . . without a Latino middle class in Oregon and an
established Latino business community, [their] client pool is very
limited.”
“I see the efforts of the school and the Oregon State Bar to make the
environment more diverse. But I have failed to see the legal community
fully embrace this idea especially when it comes to the opportunities that
may be perceived to be available.”

It is true that not every graduate practices locally, and it may well be
that a disproportionately high number of minority law graduates practice in
a geographic region other than the one in which they attended law school.
But that is far from an ideal answer to whether law schools should simply
ignore the local area’s racial and ethnic diversity in seeking to recruit
minority students, because graduates will presumably have better

http://lawprofessors.typepad.com/legalwhiteboard/2012/09/location-location-location-geography-matters-in-law-school-employment-2010-2011.html (noting that “For the Classes of 2010 and 2011, there were 144 and 145 law schools, respectively, for which more than 67 percent of their employed graduates are located in the state in which the law school is located or an adjacent state, and 104 law schools for which more than 80 percent of their employed graduates are located in the state in which the law school is located or an adjacent state”).
employment prospects in the law school’s state than in a different state, particularly when looking at law schools outside the top 25 or so.\textsuperscript{116}

III. AN ANALOGY TO DIVERSITY IN CITIES

The common reactions to the unconventional diversity at University of California campuses (particularly the undergraduate campuses) suggest it is not easy to visualize a school with, say, 60 percent white students and 40 percent students of a single minority group as being “diverse.” Focusing on the lost benefits due to the absence of other minority students overlooks the benefits resulting from the larger presence of the one minority group that is present. By looking at the racial diversity of American cities (and one notable Canadian example), we can see how a given location can in fact be racially diverse—and reflect that diversity—without necessarily hewing to the racial distribution that law schools seem to seek.

A. Diversity of American States and Cities

The United States is a racially diverse nation, with substantial numbers of people of African, Asian, and Latino descent. According to the 2010 census, just under 66 percent of the population is non-Hispanic white, about 16 percent are Hispanic/Latino, 12 percent are African American or black, and just under 5 percent are Asian American.\textsuperscript{117} Thus, whites are still the majority racial group in the country, though not in many metropolitan areas such as Los Angeles County\textsuperscript{118} or even the entire state of Hawaii.\textsuperscript{119} Moreover, in thirty years or so, no racial group will constitute a majority of the U.S. population.\textsuperscript{120}

By contrast, the countries that are most similar to the United States (i.e., English-speaking, former British colonies) have larger majority white populations. Canada’s “visible minority population” amounted to less than one-sixth of the entire population in its 2006 census, with more Asians than blacks and Hispanics combined.\textsuperscript{121} This means that Hispanics alone

\textsuperscript{116}. One response might be that a key step toward diversifying homogenous locations (such as Professors Johnson and Amar’s examples of Maine and Kansas) is to increase the number of minority professionals—such as lawyers—in those locations. While this is not an implausible argument, it does seem to use minority students as instrumentalities to achieve a desired goal. Whatever else one thinks about the propriety of doing so, a law school basing its diversity goals on such a justification should, at a minimum, disclose such intent to minority applicants.

\textsuperscript{117}. See 2010 Census U.S. CENSUS DATA, available at \url{http://www.census.gov/2010census/data/}.

\textsuperscript{118}. See 2012 estimate of Los Angeles County, U.S. CENSUS DATA, available at \url{http://quickfacts.census.gov/qfd/states/06/06037.html} (estimating white & non-Latino population at 27.3 percent, compared to 48.2 percent for Latino/Hispanic).


\textsuperscript{120}. See, e.g., America’s tipping point: Whites to be minority in children under age 5 by next year, \textit{DAILY MAIL} (U.K.), June 13, 2013.

\textsuperscript{121}. See Visible minority groups, 2006 counts, for Canada, provinces and territories—20%
comprise a larger percentage of the American population than all minorities do in Canada. The United Kingdom has an even larger majority white population, estimated at over 85 percent in 2011, as does Australia (approximately 90 percent white). With its significant indigenous Maori population (approximately 15 percent), New Zealand is somewhat more diverse than Canada, Australia, and the United Kingdom; whites comprise just over two-thirds of the population, and most of the remainder is of Asian or Pacific Islander descent.

The United States, however, is not uniformly diverse. Different states—and within states, different cities—have significantly different proportions not just of whites and minorities, but also the distribution within the different minority groups. For example, as a percentage of each state’s population, Asian Americans range from the majority in Hawaii (57 percent including those of mixed ethnicity) to essentially non-existent in West Virginia (less than 1 percent). Looking at the distribution of the Asian American population another way, only a dozen or so states have an Asian American population percentage at or above the national average, meaning that the Asian population is concentrated in a small number of states. This is also borne out by the fact that almost half of all Asians in the United States live in California or New York alone, and that nearly 75 percent of all Asians in the United States live in ten states (California, New York, Texas, Hawaii, New Jersey, Illinois, Washington, Florida, Virginia, or Pennsylvania). Similarly, about half of the country’s Latino population lives in California or Texas.

At the city/metropolitan level, the picture is even more pronounced. For example, the Phoenix metropolitan area’s diversity is concentrated

sample data,


125. Heather Gerken refers to this kind of diversity as “second-order diversity.” She specifically talks about diversity within the electoral decision making process See Heather Gerken, Second-Order Diversity, 118 HARV. L. REV. 1099, 1108 (2005).


largely in its Latino population, which is approximately seven times the size of its African American and about ten times the size of its Asian American population. To put it another way, the Latino population in the Phoenix area is more than three times larger than its African American, Native American, and Asian American populations combined. Appendix 2 presents the racial distribution of the fifteen largest U.S. cities.

The different racial demographics have a noticeable effect on the character of various cities. For example, Vancouver, British Columbia, has a city population of about 600,000, and a metro population over 2.3 million. There is no racial majority in Vancouver—whites comprise 49 percent of the population, with Asians making up most of the rest (45 percent). There are very few Latinos or blacks in Vancouver. An adjacent city, Richmond, has an Asian majority.

Vancouver’s large Asian population—much of it ethnic Chinese—gives it a distinctly Asian feel. Its Chinatown district has night markets on Fridays, Saturdays, and Sundays during the summer, following a

129. See Population and Dwelling Counts, for Canada, Census Metropolitan Areas, Census Agglomerations and Census Subdivisions (Municipalities), 2011 and 2006 Censuses, STATISTICS CANADA, available at http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&IT=303&SR=1&S=51&O=A&RPP=9999&PR=0&CMA=933. Vancouver, of course, is not an American city. I focus on it here because my observations there during a visit in 2010 in large part inspired me to write this article. One could replace Vancouver with Honolulu and very similar observations would hold true. A staff colleague of mine who grew up in Hawaii once told me that Asian American friends, after visiting the Island State, often say something along the lines of, “So this is what it’s like to be white. If you get bad service, you know it’s just bad service.”
131. Id.
133. Although English and French are both official languages of Canada, the only places I saw French writing in the downtown area during my visit were Canadian federal buildings. On the other hand, I did see a number of street signs with writing in English and Chinese. To put this in context, although I grew up in California—the mainland state with the largest Asian percentage—Vancouver seemed more Asian than Los Angeles or Berkeley; indeed, the nearest analogue I could imagine was Monterey Park, California (62 percent Asian), where my non-English speaking grandparents retired and were able to get by speaking only Chinese. The street signs in Monterey Park are also printed in Chinese as well as English. Walking along downtown Vancouver, there were areas where I saw about as many, if not more, Asians than whites.
Vancouver’s Asian character manifests itself in other tangible ways. There are so many Asian restaurants that one could find more than just generic “Chinese” restaurants offering Westernized staples like *kung pao* chicken and *moo shu* pork. During my trip, I ate at restaurants specializing in *congee* (rice soup), *dim sum* (Cantonese appetizer-sized steamed buns and other delicacies, traditionally distributed by way of carts), and Shanghai cuisine. This is not surprising; because such a high proportion of the population is of Asian descent (and within that group, mostly Chinese), it makes sense for Asian restaurants to distinguish themselves from other Asian restaurants, and even more specifically, for Chinese restaurants to distinguish themselves from other Chinese restaurants, and so on.

With fewer Asian Americans and more non-Asian minorities—something resembling what most law schools look like—there would be fewer Asian restaurants and hence less incentive to differentiate by specialty. While there would presumably be an increase in other ethnic restaurants, if the total minority population were fragmented, there might not be much support for any specialty restaurants. Instead, there would be diversity of ethnic restaurants akin to the food court at a local mall: generic Chinese restaurant (e.g., Panda Express), sandwich shop (e.g., Subway), generic Italian restaurant (e.g., Sbarro), and generic taco stand (e.g., Taco Time).

To be sure, one can sometimes find such specialized Asian restaurants in large cities with smaller Asian populations. Portland (6.5 percent Asian) has at least one Chinese restaurant that provides only hot pot cooking, but not surprisingly, this is located near Portland State University’s engineering building, which has a large Asian enrollment. Portland is also large enough to have a few *dim sum* restaurants, mostly clustered together near an Asian supermarket. This suggests that size matters; in a larger metropolitan setting, the population base may be large enough to support more diverse subspecialties in ethnic cuisine, even though the racial group is a small percentage of the overall population. Obviously size is but one factor of many: I spent one year in Oklahoma City (4 percent Asian), which has a population about the same size as Portland, but the selection of Chinese food was much narrower than that...
in Portland.  

B. The Cities Analogy

As discussed earlier, American cities vary significantly in the composition of their racial diversity. Some cities have relatively small proportions of minorities. Others have larger proportions of minorities, but differ in their distribution across various minority groups. Broadly speaking, Southern cities have higher percentages of African Americans compared to other parts of the nation, while Latinos populate the Southwest and Asian Americans tend to cluster on the West Coast or large cities in Illinois, New York, or Texas. Thus, American cities exhibit far more diverse diversity distributions than American law schools do. The cities analogy may tell us something about the results from having some law schools deviate from the conventional distribution of minority students.

1. Self-Aggregation

Recall that the key premise of promoting diversity is that it enhances the educational experience for all students. The mechanism for such enhancement presupposes a degree of interaction between minority and non-minority students. If minority students self-aggregate and keep to themselves, then the benefits of diversity—which constitute the compelling state interest necessary to survive strict scrutiny—are diminished, if not absent. As it turns out, there is such self-aggregation, or voluntary self-clustering by individual minority group members, when it comes to city neighborhoods. As law professor Peter Schuck notes:

Ethnic groups in the United States have always clustered together in enclaves until they felt comfortable in the dominant culture—but they have also clustered afterward to some extent. For straightforward economic and social reasons, as well as for more elusive psychological ones, much of this clustering would occur even in the absence of discrimination, as the clustering of even higher-income Latinos and Asians today suggests.

Consider, for example, the Los Angeles metropolitan area, which is


138. Apparently, Oklahoma City does have an “Asia district,” but its website is badly out-of-date, and its “Dining” page lists only four restaurants, one bakery, and one café. See Oklahoma City Asian District, http://www.okcasiandistrict.com/index.php.

139. Cf. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (striking down University of Oklahoma’s policy of enrolling black student but still segregating him apart from other students). McLaurin was not a case about diversity as such, but rather equal protection, so the holding is premised on the harm to McLaurin specifically. Nevertheless, it is apparent that the University of Oklahoma may have been “integrated” in a formalistic sense, but it was not at all “diverse” (even apart from critical mass) if the minority student was being kept apart from the non-minority students.

140. SCHUCK, supra note 5, at 209.
IS “DIVERSITY” DIVERSE ENOUGH?

undoubtedly one of the most multicultural areas in the country, with the following demographics: whites (32 percent); Latinos (22 percent); Asians (14 percent); African Americans (7 percent); biracial or multiracial (3 percent); and “some other race” (20 percent). As the New York Times’ “Mapping America: Every City, Every Block” interactive website demonstrates, however, the Los Angeles metropolitan area is surprisingly segregated. (See Appendix 2 for a reproduction.) The website, which analyzed census data from 2005 to 2009, depicts different racial groups in different colors on the map. The triangle that is bounded by the 10, 110, and 405 freeways—generally known as south central L.A.—is nearly entirely African American or Latino. The area directly east of the 110 freeway—that is, east L.A.—is almost all Latino. Pasadena looks fairly integrated, but just south of it are heavily Asian communities of Monterey Park and Alhambra, which are in turn surrounded by Latino communities. The parts of the city that are heavily white are West Hollywood, Beverly Hills, and beach communities like Santa Monica and Manhattan Beach. There are, to be sure, other areas in Southern California that look well-integrated. But even in a place as multicultural as Los Angeles, there are many minorities who live in neighborhoods mostly made up of people of the same race.

There is a lesson to draw from this observed self-segregation. The conception of Los Angeles as a “diverse” place is both true and also arguably misleading, in that the city (or for that matter, the metropolitan area) is in some ways an artificially constructed frame of reference. Los Angeles is diverse and multicultural, but many neighborhoods and even entire cities in the region are actually not so diverse. In such neighborhoods, there may or may not be much cross-racial interaction. Second, this self-segregation may demonstrate that even in a “diverse” environment, many minorities prefer to live in neighborhoods where they are a local majority.

This self-segregation in cities can be applied to the diversity in schools. In the 1990s, conservative writer Dinesh D’Souza decried what he called “Balkanization” as American university campuses—a phenomenon where minority students deliberately self-segregated with others of their own race. D’Souza used balkanization to criticize affirmative action,
arguing that the supposed benefits of diversity—cross-cultural and cross-racial interaction—were largely absent. D’Souza’s account relied on anecdotes, observations, and individual interviews, and in that regard, it lacks the fine-grained empirical data presented in the Bowen & Bok study.

Still, the conventional wisdom that a minority student presence in classes—especially those with significant racial dimensions, such as (but not limited to) constitutional law, criminal procedure, and immigration—enhances and deepens discussion certainly seems plausible. The Bowen & Bok study mostly identifies the value produced within classes, however, D’Souza captures the out-of-class environment. For more evidence of what D’Souza contends, consider field research by Richard Sander and Stuart Taylor that demonstrates that when it comes to forming study groups, white and Asian students often form groups together but without African Americans or Latinos.

As with cities, law schools may be diverse yet display a degree of self-segregation that reduces (but does not eliminate) the overall benefits of diversity. In turn, this suggests that the lost benefits resulting from concentrating racial diversity in one minority group may be less than supposed.

2. What Level of Diversity Are We Talking About?

Put another way, the cities analogy suggests that not enough attention has been focused on the level of generality at which we should be diverse. Assuming that we keep the national demographics constant, what are the different ways we can imagine distributing our racial diversity across cities? One extreme would be that 68 percent of our cities would be all white, 15 percent would be all Latino, 10 percent would be all African American, and 5 percent would be all Asian American. Moving along the spectrum, we would see our current set of affairs—nearly all cities have some diversity, but varying distributions of diversity. Still further along the spectrum, every city would look like Dallas in terms of racial diversity; that is, uniform diversity. Still further along, at the other extreme, we would be diverse not just at the city level, but the individual level: every one of us would be multiracial.

Law schools right now fall closest to the “every city looks like Dallas” point. But we could shift from that point without necessarily altering the racial diversity of the aggregate graduates in any given year. In other words, if we take the entire class of law students at all U.S. law schools, it seems uncontroversial to assert that at the very minimum, something like

145. Id. at 46, 50–51.
146. See RICHARD SANDER & STUART TAYLOR, JR, MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT 104 (2012).
147. To be clear, I am certainly not advocating for such an outcome. Personally, I would find that unsettling and would not want to live in any of those cities.
10–15 percent should be Latino, 10–15 percent should be African American, and 10–15 percent should be Asian American. But that is not the same as saying every school should aspire to that same breakdown. One or a few law schools can be 20–25 percent African American and these schools would have to be balanced by one or a few other law schools that are 0–5 percent African American.

The key conclusions of the Bowen & Bok study stated that the recipients of racial preferences had strong career outcomes and that society benefitted from this cadre of well-educated and well-credentialed minorities. It also concluded that all students benefitted from the presence of minority students by developing important soft skills in interacting with diverse populations. The first two of the three positive outcomes do not require that each school have the same or similar kind of diversity. Rather, what is important is that across all comparable institutions (and in particular, elite institutions) there exists sufficient diversity. If having an elite degree is important to minority graduates’ careers, nothing in the Bowen & Bok study suggests that there is any significant difference between having those degrees spread out among all elite schools versus concentrated in, say, two or three elite schools. One would have to imagine that it somehow makes a positive difference in career outcomes to have 300 African American students graduating, say, 100 apiece from Harvard, Yale, Stanford, and Chicago, compared to all 300 from Harvard. It is possible that there might be marginally better results for a group of minority graduates with degrees from a wide swath of elite schools, in that there would be, in effect, a larger alumni pool available from which to benefit in terms of initial connections for job searches and the like; where an employer has graduates from various elite schools who have interests in hiring fellow alums, this wider alumni pool could be beneficial. Even so, once we expand the analysis to include all three major minority groups, this marginal advantage would disappear in the sense that the alumni benefits would be spread out among all the minority graduates.

In the same way, the societal benefit from elite minority graduates in terms of being role models and of participating in civic leadership positions would not seem to depend on those degrees being earned from a variety of elite schools, as opposed to a sufficient number of degrees from elite schools.\footnote{The U.S. Supreme Court does not seem to have suffered any loss of credibility despite the fact that eight of the nine Justices attended Harvard or Yale (or 7 ½ if one splits Justice Ginsburg’s attendance between Harvard and Columbia).}

IV. LIMITATIONS AND CAUTIONARY PRINCIPLES

So far, I have argued that American law schools exhibit a strikingly uniform sense of what constitutes racial diversity, that our cities have a
wider variety of racial distribution with attendant benefits, and that if some law schools varied their racial demographics there might be overall benefits for minority students who want a different experience. In this Part, I discuss some limitations and precautionary principles about the implementation of this proposal.

A. Discrimination vs. Directed Preference

Currently, law schools have a number of ways of influencing the racial makeup of their classes by expanding the pool of minority applicants and minority admitted students through: (1) targeted recruiting; (2) race-based scholarships; and (3) preferential treatment in admissions. In the absence of such measures, a law school presumably would have fewer students of the particular minority group than the school desires.

Targeted recruiting consists of efforts to persuade applicants from the desired demographic group to apply for admission to the particular law school. This can be especially effective if the law school makes an effort to recruit applicants who would not have otherwise considered applying to that school. An increase in the number of minority applicants in the application pool should, all things being equal, increase the number of admits from that minority group.

Race-based scholarships can increase the yield rate from admitted minority applicants by making the law school seem more economically attractive, compared to peer schools whose tuition and fees will be higher in the absence of equivalent scholarships.149

Preferential treatment—that is, affirmative action—in admissions consists of taking an applicant’s race into account and according some “plus” for those from underrepresented races.150 As a result, some students gain admission who might not have had they been of a different race.

A law school wanting to increase its critical mass in one minority group could use any or all of these approaches. For example, if a school were seeking African Americans, it could contact African American student groups at various colleges and universities (targeted recruiting), or it could engage in affirmative action for African American applicants. Finally, the school could also offer admitted scholarships to admitted African American students.

It is important to note the difference between choosing not to extend directed preferences toward one or more minority groups versus discriminating against members of such groups. Suppose that a law school has had relative success at attracting students of minority group X but a

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149. On the possible legality of such race-based scholarships by public institutions, see Dyson, supra note 105 at 258–66.
relative lack of success at attracting students of minority groups Y and Z. If the school were to decide to concentrate its directed preference at members of group X, it would not be discriminating against members of groups Y and Z so long as it continued to admit applicants from those groups under the same conditions as it admits non-minority students.

Naturally, applicants from groups Y and Z who are denied admission to such a law school may feel disappointed. However, so long as the law school believes that concentrating minority diversity among one racial group is actually pedagogically justified because of the greater critical mass, its judgment would benefit from the same level of judicial deference. As the Court explained in *Grutter v. Bollinger*, “[t]he Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer” because of the “‘complex educational judgments in an area that lies primarily within the expertise of the university.’”\(^ {151}\) This conclusion followed earlier cases holding that a university’s academic decisions are entitled to deference,\(^ {152}\) and that a university had freedom “to make its own judgments as to . . . the selection of its student body.”\(^ {153}\) (Whether any particular affirmative action program is narrowly tailored to achieve the compelling interest of diversity, however, will be reviewed without any deference to the university.)\(^ {154}\)

Thus, even if a law school were to decide that it should focus its diversity efforts on one particular minority group, it should not (and cannot) refuse to admit members of other minority groups when those applicants would merit admission without any sort of racial preference. It is one thing to decline to attract people to a program; it is altogether different to push willing people away.

### B. Limitations of the Cities Analogy

#### 1. Free Mobility

An important assumption behind the cities analogy for law schools is that of free mobility: that is, people can choose where to live because of climate, culture, politics, or jobs. Analogously, then, law students should have a choice of, among other things, the racial distribution of law schools.

On the other hand, some people may live where they do because they have no choice in the matter. If a state or city is heavily populated by one

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154. See Fisher v. Univ. of Texas, 113 S.Ct. 2411, 2419–20 (2013); see also Ozan O. Varol, *Strict in Theory, But Accommodating in Fact?*, 75 Mo. Law Rev. 1243, 1247 (2010) (arguing that *Grutter* erroneously deferred to the law school as to whether diversity was a compelling state interest).
minority group because that group voluntarily chose to move there, such as Asian Americans in many of the West Coast cities, there would seem to be no reason for society to be concerned about such apparent concentration/self-segregation. Only the most extreme assimilationists would find fault with such preference. On the other hand, if a state or city is heavily populated by a minority group even though many members of that group would prefer to live elsewhere but cannot because of lack of wealth or a feeling of being unwelcome, then society might well be less comfortable with what might seem to be involuntary concentration/self-segregation.

The analogous distinction as applied to schools is prestige instead of wealth. If minorities of one racial group end up forming a large proportion of students at some law schools because they prefer to have a large critical mass, that may be analogous to, say, Asian Americans’ apparent preference for living on the West Coast. If minority law students are forced to attend those schools because they are unable (in the absence of preferential treatment) to attend other schools where they would prefer to attend even though they would be a much smaller proportion of students, that becomes less about personal choice and more about forced segregation.

If one ignores the issue of affirmative action and the continuing debate over the concept of merit and racial privilege, then the free mobility assumption should be reasonable. Asian Americans, for example, have LSAT scores that are close to, if not higher than, those for whites. If many law schools choose not to engage in affirmative action on behalf of Asian Americans, then it should not be surprising that Asian Americans tend to be overrepresented at West Coast law schools (particularly in California), and underrepresented in law schools in the South, on the assumption that Asian Americans prefer to stay in areas such as the West Coast where they are a larger part of the population. This may be unfortunate for southern law schools that want to attract Asian American students, but it may also make California law schools comforting environments for those same Asian American students.

However, it is simply unrealistic to ignore affirmative action altogether. As California’s experience since the passage of Proposition 209 has demonstrated, race-neutral admissions practices that emphasize college grades and LSAT scores are likely to result in the underrepresentation of African Americans and Latinos. In the absence of affirmative action, the overall number of minority law graduates might not decrease, but there will


be fewer such graduates from the most prestigious public law schools.  

2. Visits

A second limitation of the city analogy is that the law school experience is three years long, whereas the diversity “flavor” of cities is both indefinite (if one lives there) or temporary (if one visits on a trip). Visiting a different city for a few days or even a week is generally feasible, particularly for a vacation. One can visit another city, experience its cultural flavor, and return home enriched. Visiting another school can be logistically difficult and may result in considerable added expenses incurred by the student.

These costs and challenges, however, are not reasons to abandon any efforts to broaden the conception of diversity in law schools. No student would ever be forced to incur such costs or to face such challenges; they would result only because of a student’s exercise of a voluntary option, which presumably would occur only if the student felt that the benefits of visiting would outweigh the costs.

C. Coordination Problems

Thus far, I have suggested that law students as a group would be better off if there were more variation in how American law schools arrange the racial diversity in their student bodies. A key assumption in the analysis was that the overall numbers of law graduates of each minority group would remain more or less constant, and furthermore, that the distribution

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157. See 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 NYU L. REV. 1 (1997). In a highly controversial empirical study, Richard Sander argued that affirmative action hurt its beneficiaries by elevating them to law schools for which they were uncompetitive, resulting in poor academic records and decreased bar passage rates, than if there had been no affirmative action. See Sander, supra note 73. This “mismatch” argument was first raised in ROBERT KLITGAARD, CHOOSING ELITES 174–75 (1985), but Sander’s analysis attempted to quantify the impact of the mismatch. Sander’s article provoked numerous responses. Even if his normative point is correct, it is outside the scope of this paper.

158. During the years I lived in the Midwest, trips to Los Angeles once or twice a year regularly resulted in copious consumption of Chinese food of a variety and quality that was lacking in Iowa.

159. I use “visiting” in the sense of spending a semester or a year at a law school different from the school from which one will graduate. This is distinct from transferring, where one switches permanently to a different law school from the school where one originally matriculated. Transferring would be the equivalent under the cities analogy of moving to a different city. Like visiting, transferring incurs significant costs and disruptions. See generally LSAC, Transferring to Another Law School, available at http://www.lsac.org/jd/applying-to-law-school/transferring-law-schools.

160. While a full-scale discussion of cognitive biases is well beyond the scope of this Article, it bears mentioning here that even if students consistently underestimate the costs involved in visiting, it would be overly paternalistic to deny them the option. For any given student, there is a degree of uncertainty as to the actual costs involved; there is no guarantee that the student will in fact develop mentor-mentee relationships that would not have developed had the student visited elsewhere, or such relationships or extracurricular leadership positions on law review or moot court would make a meaningful difference in the student’s subsequent career.
of minority students would hold constant regardless of the approximate level of prestige of the schools.

There would likely be problems in achieving such an outcome absent coordination, particularly when the number of comparable and high-prestige schools is small. For example, Yale, Harvard, and Stanford do a better job than most other schools in placing their graduates as federal law clerks, law professors, and Supreme Court justices. Not surprisingly, these are the most selective and competitive law schools from which to gain admission. If these prestigious schools were all to be closed to certain minority groups, there would likely to be a negative future impact on the diversity of law clerks, professors, and judges.

If we focus on those three law schools, the likelihood is small that they could each independently concentrate their minority enrollment on one particular racial group and still have the overall proportion of minority graduates from all three schools approximate what they would have been if all five schools pursued uniform diversity. If they are acting truly independently, then what would have to happen is that a law school with a larger class size, such as Harvard, would have to balance out the smaller law schools, such as Stanford and Yale, with the former pursuing one minority group and the latter pursuing different minority groups. What happens if one or more schools guesses “wrong” as to what the others might do, and one or more minority groups gets left out?

One solution would be to coordinate the actions of the schools in question. In a given year, they might agree that school #1 will concentrate affirmative action efforts on racial group A, while school #2 will concentrate affirmative action efforts on racial group B, and so on. This would not mean that school #1 would automatically deny admissions to any applicants of racial groups B and C, only that it would not give preferential treatment to those applicants. The result would be that each of those schools would each have greater numbers of a particular racial group, and yet, there would be about the same number of minority graduates from such elite schools as there are presently.

161. In terms of schools with the highest percentage of 2011 graduates who obtained federal clerkships, Yale topped the list at 34.5 percent, followed by Stanford at 24.1 percent. Seven others (Harvard, Duke, NYU, Michigan, Vanderbilt, Virginia, and Berkeley) were over 10 percent. See Robert Morse, Which Law Schools’ Grads Get the Most Judicial Clerkships?, MORSE CODE: INSIDE THE COLLEGE RANKINGS (Apr. 11, 2013), available at http://www.usnews.com/education/blogs/college-rankings-blog/2013/04/11/which-law-schools-grads-get-the-most-judicial-clerkships.


163. Harvard counts fifteen graduates among Supreme Court Justices, Yale eight, and Stanford two. Columbia (four) and Michigan (three) exceed Stanford, but also have much larger alumni bases.
One major problem with this solution is that it is probably illegal. In the 1990s, the Justice Department sued the eight Ivy League universities and the Massachusetts Institute of Technology for alleged antitrust violations due to their agreement “to distribute financial aid exclusively on the basis of need and to collectively determine the amount of financial assistance commonly admitted students would be awarded.” The Ivies agreed to a consent decree to stop the practice without admitting guilt, but MIT went to trial and lost. The Third Circuit reversed the trial court, and MIT later reached an agreement with the Justice Department whereby it and other non-profit colleges and universities could discuss “common principles” regarding financial aid.

What is important to note is that the Third Circuit’s reversal was due to the district court’s failure “to adequately consider the procompetitive and social welfare justifications proffered by MIT . . . .” The appellate court agreed with the trial court that colleges’ financial aid collaboration was “anticompetitive ‘on its face.’” However, the appellate court concluded that the district court had not adequately considered the nature of higher education and the procompetitive aspects of the financial aid price-fixing, which supposedly “benefit[ed] talented but needy prospective students who otherwise could not attend the school of their choice.” In other words, the financial aid price-fixing did not actually limit the choices of needy students; it increased the options by removing cost of education as a factor. Whether this is true is arguable, but it is very different from a proposal to collaborate where schools would preferentially admit a specific group of minority applicants. In the latter hypothetical, the collaboration of elite law schools would reduce the admission choices of a number of talented minority students to those schools “designated” to seek them out.

The problem identified here stems from using three schools as the cutoff instead of six, or eight, or even ten. There is no doubt a degree of

167. Brown University, 5 F.3d at 661.
169. Brown University, 5 F.3d at 661.
170. Id. at 673.
171. Id. at 678.
172. See, e.g., Salbu, supra note 164, at 296–98 (arguing that the removal of cost considerations is actually harmful, because it deprives students of one basis for differentiating amongst schools).
arbitrariness involved in deciding where to set the cutoff. With more schools added to the mix, the likelihood increases that comparable schools’ can independently concentrate on particular minority groups, and yet have approximately the overall appropriate distribution of minority students. This suggests that law schools with a small number of true peers are not in a position to shift their conception of diversity from the standard multicultural view; the same, however, need not be true of most other schools.

D. The Impact of U.S. News & World Report and Other Rankings on Varying Diversity

A final possible obstacle to the successful implementation of a more diverse conception of diversity among law schools involves the way that law school rankings—in particular, those by U.S. News & World Report—use entering student test scores as a major component of their calculations. As scholars have pointed out, the U.S. News rankings are strongly correlated to the LSAT scores of each school’s entering class; “about 90% of the overall differences in ranks among schools can be explained solely by the median LSAT score of their entering classes...” In the aggregate, minority groups perform differently on the LSAT, with Asian Americans (mean LSAT 152) scoring on average higher than Latinos (mean LSAT 146–148), who in turn score higher than African Americans (mean LSAT 142).

This disparity between Asian Americans and other groups in average test scores means that rankings-sensitivity may make schools reluctant to deviate from current racial compositions of first year classes. Given the mean scores of those minority groups, a law school whose entering class is 65 percent white will likely have a higher LSAT median if the 35 percent of minority students is mostly Asian American than if it were mostly African American... The exact median LSAT increase (or decrease) needed to change a particular law school’s U.S. News ranking will obviously vary, with higher-ranked schools needing a larger increase to

173. See Stephen P. Klein & Laura Hamilton, The Validity of the U.S. News and World Report Ranking of ABA Law Schools (1998), available at http://www.aals.org/reports/validity.html; Alex M. Johnson, Jr., The Destruction of the Holistic Approach to Admissions: The Pernicious Effect of Rankings, 81 IND. L.J. 309, 312 (2006) (noting “the near-perfect correlation between the median LSAT score and the school’s ranking”); but see Theodore Seto, Understanding the U.S. News Law School Ranking, 60 SMU L. REV. 493, 495–96 (2007) (discussing author’s discovery that Yale Law School would have been ranked #1 in the 2007 rankings even if it had a median LSAT of 153, and that Harvard Law School would have remained ranked #3 even if it had a median LSAT of 180); id. at 549 (“Drs. Klein and Hamilton should have written more carefully... [The quoted sentences] are statements about correlation [not causation]”).

174. See Dalessandro et al., supra note 49, at 19.

move up. However, for many schools in the mid-range, perhaps two points would be enough to increase their U.S. News score enough to raise their ranking by five places.  

In the past, rankings sensitivity led some schools to “game” the system by engaging in a variety of behavior that at times verged on being deceptive. At one time, U.S. News used only the LSAT and grade point average data from full-time law students matriculating in the fall semester. A number of law schools benefitted from this rule by having their incoming classes split into large fall start date cohorts and small spring or summer start date groups, or into part-time/evening programs, with the non-fall starters having lower average test scores and grades. Law schools also admitted large numbers of transfer students, whose tuition payments benefitted the law schools’ finances without diluting the LSAT and GPA data from the entering class.

Finally, in what one hopes is truly an aberration, in 2011, the University of Illinois and Villanova University law schools reported discovering that their LSAT numbers for the past several years had been fraudulently inflated. Illinois commissioned an internal investigation by outside counsel, which placed the sole blame for the direct falsification of data on the former dean of admissions. The report noted the law school’s inadequate controls, including the admissions dean’s financial incentive to bring in classes with higher LSATs and GPAs—which aligned with the law school’s desire to improve its U.S. News ranking.

As we can see, the U.S. News rankings have, rightly or wrongly, affected law school operations. In many instances, that effect may only

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176. See Seto, supra note 173, at App. E. Note that the top law schools are unable to improve their rankings through increased LSAT medians.
177. See id. at 498 (citing U.S. NEWS & WORLD REPORT).
179. See, e.g., Seto, supra note 173, at 556; Whitman, supra note 175 (second “item” of discussion); BRIAN Z. TAMANAHA, FAILING SCHOOLS 89–90 (2012).
have been to reinforce what a school would have chosen to do even in the absence of the rankings. In other instances, concern about the rankings appears to have led some law schools to structure certain aspects of their operations specifically in response. If the rankings are powerful enough to exert such distorting influence on so many law schools, it may be unrealistic to expect that a significant number would risk their LSAT medians dropping due to the concentration of a distinct minority population in a group with lower average LSAT scores.

This is a serious, perhaps intractable, problem. One response is that if a law school believes that concentrating its minority diversity in one group makes pedagogical sense for that school, it should do so without any consideration of the rankings. As some of the previous discussion of rankings gaming suggests, however, this is simply not realistic. Indeed, the common practice of providing most financial aid in the form of so-called merit scholarships (as opposed to need-based ones) provides a direct analogue. In short, the typical law school lists its annual tuition at what we might call the “sticker price.” For particularly desirable students, the school then offers a discount off that sticker price in the form of a merit scholarship. The desirable students might be minorities, but most often are high LSAT scoring applicants. Critics of this cross-subsidy have decried the net effect, which is to make the students who are likely to have the most trouble in the job market subsidize the ones who are likely to have the best job prospects. Yet, even if one opposes this outcome, it can be institutionally impossible to resist, as David Yellen, Loyola-Chicago’s Dean, explains:

Let me pause here for a moment to describe how hard it is to resist these

182. See, e.g., TAMANAH, supra note 179, at 97; William D. Henderson & Rachel M. Zahorsky, The Law School Bubble: How Long Will It Last if Law Grads Can’t Pay Bills?, ABA J., 34 (Jan. 2012) (“W]hile some scholarships are financed through law school endowments, most are cross-subsidies by incoming students: Student A pays full tuition—largely financed through loans—so that student B can receive a discount.”).

183. Henderson & Zahorsky, supra note 182 (“The cross-subsidy is fueled by competition among schools to maximize prestige as measured by U.S. News rankings.”); David Segal, Law Students Lose the Grant Game as Schools Win, N.Y. TIMES (Apr. 30, 2011) at B1 (noting that at some law schools, the scholarship recipients must maintain a certain GPA to keep their scholarships, and that sometimes, because of the grading curve, not all recipients are able to do so); Robert Morse, U.S. News Looks At the Rise in Merit Aid at Law Schools, Inside the Morse Code (May 5, 2011) available at http://www.usnews.com/education/blogs/college-rankings-blog/2011/05/05/us-news-looks-at-the-rise-in-merit-aid-at-law-schools (quoting law professor Jerry Organ “I think there is little doubt that schools with ‘competitive’ scholarship programs . . . where 60% of first-year students receive a scholarship but only 30% or 35% are able to meet the stipulation that is required to renew the scholarship—are front-loading merit-scholarship dollars to generate the best objective criteria profile [GPA and LSAT] they can for purposes of the U.S. News rankings”).

184. See, e.g., TAMANAH, supra note 179, at 98–99 (“No one would intentionally design this financing scheme, which is indefensible on its own terms, but that is how it works in practice.”). The criticism assumes that the merit scholarship recipients perform well in law school, and that the students paying full tuition perform poorly.
trends. Imagine you were dean of a law school some time after *U.S. News* took hold. Soon you realize that you are losing many of the best type of students you had been attracting in recent years. Why? Because another school in your city or region, ranked around where you are, has begun offering them large merit scholarships. You could choose to ignore the trend and allow the quality of your student body to decline. Or you could begin to offer such merit scholarships yourself. If there is a viable third choice, I don’t know what it is.  

In other words, law schools face a Tragedy of the Commons, in that many, if not almost all, feel pressure to take a course of action to avoid losing ground to competitors. Yet, when all those schools take that course of action, in the long run, they over-consume the resource. In this case, the merit scholarships drive up overall tuition in order to provide sufficient revenues to fund those same scholarships.

As a result, change may have to come elsewhere from outside law schools. Pre-law advisors and undergraduate minority student organizations could recommend that minority students who are interested in a larger critical mass attend certain law schools—that is, to steer such African American students toward a few appropriate law schools, similar Latino students toward a few other appropriate law schools, and so on. These pre-law advisors and undergraduate student organizations could also press minority applicants to give strong consideration to law schools located in the geographic region in which they want to practice. Those who prefer to live somewhere where their racial group will be a significant portion of the population will naturally congregate at schools located in such cities. These are far from perfect solutions and may matter only at the margins, but could be a start toward achieving the unconventional diversity suggested by this Article.


189. On whether external change from such third-parties can meaningfully impact law school operations, consider the “scam blog” movement, which argued the past few years that law schools were essentially scams that were deceiving applicants with false job placement and salary figures. This movement can be rightly said to have played a significant role in the more transparent employment data that law schools have been posting. See, e.g., TAMANAH, supra note 179, at 146–59; see also Ethan Bronner, *Law Schools’ Applications Fall As Costs Rise and Jobs Are Cut*, N.Y. TIMES (Jan. 31, 2013),
E. The Impact of Fisher

The latest affirmative action case, *Fisher v. University of Texas*,\(^{190}\) may force major changes in how universities carry out their affirmative action programs. However, it may amount to little more than a reminder that academic institutions should not engage in practices that too closely resemble numerical quotas.

Coming ten years after the University of Michigan affirmative action cases,\(^{191}\) *Fisher* involved a challenge to the University of Texas’ affirmative action program, which had been conformed to Michigan’s holistic “race plus” approach,\(^{192}\) with one addition: the state legislature had enacted a “Top Ten Percent Law” that guaranteed admission to the University of Texas to in-state students graduating in the top ten percent of their high school classes.\(^{193}\) (Due to significant segregation among Texas high schools, a relatively large number of minority students attending minority-majority high schools qualified under this plan.)\(^{194}\) Affirmative action opponents saw *Fisher* as a prime opportunity for overturning *Grutter* and ending affirmative action at public institutions,\(^{195}\) particularly because the “10 percent plan” suggested that there were race-neutral ways to achieve diversity.\(^{196}\) However, the Court delivered a minimalist opinion that reaffirmed diversity as a compelling state interest, but emphasized that the means used to achieve such interest must still be narrowly tailored—
that is, that such programs are still to be reviewed under strict scrutiny.

The minimum that Fisher can be understood to hold is that courts will defer to a university’s judgment that racial diversity enhances the educational experience, but not to the manner in which the university achieves that diversity. Thus, a university that uses numerical quotas or ignores serious race-neutral alternatives may find its affirmative action program struck down, even though racial diversity is a compelling state interest. Under such a reading of Fisher, public law schools that choose to vary their diversity would both receive the same deference to the judgment that such diversity enhances the education experience and face the same constraints to demonstrate that the manner in which such diversity is achieved is narrowly tailored.

On the other hand, it is not inconceivable that lower courts implementing Fisher will apply strict scrutiny aggressively, invalidating most racial preferences as not being narrowly tailored to the compelling interest of diversity in higher education. If so, law schools would most likely be unable to vary their conceptions of diversity any more than they would be able to implement their traditional racial preferences. In short, Fisher is likely to present an obstacle to the proposal of varying diversity only if it leads to the wholesale invalidation of affirmative action programs.

CONCLUSION

Critical mass is a deliberately fuzzy concept, not susceptible to being pinned down to a fixed number. But with many law schools shrinking their class sizes in response to the decline in applications, critical mass—that is, having enough minority students so that they will not feel alienated or isolated—will become somewhat harder to attain. Smaller overall classes mean that the same proportion of minority students will nevertheless be a smaller total number, and if the overall class size is sufficiently small, there may not be critical mass, even though the percentages remain the same. Schools concerned about their ability to maintain critical mass under such conditions should consider whether they

197. See id. at 2419–20 (“Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.”).


200. As an extreme example, when my son was in Kindergarten, his class was approximately 7.5 percent Asian, which is slightly above Portland’s Asian percentage. However, that 7.5 percent was based on my son and another boy who was half-Asian; that is, 1.5 out of 20.
would be better off focusing their diversity on one or two groups. Although William Bowen and Derek Bok have provided perhaps the deepest empirical defense of affirmative action and diversity, there is nothing inconsistent about being more diverse about what diversity means, as even they acknowledge:

One of the great advantages of the American system of higher education is that it is highly decentralized, allowing a great deal of experimentation and adaptation to suit the varying needs of society, students, and the marketplace. Even among the relatively similar institutions included in the C&B universe, colleges and universities differ enormously in their traditions, circumstances, and priorities. Especially in considering as complex a set of issues as those we have been discussing, there is much to be said for allowing different institutions to come to different conclusions as to what is the right approach for them.  

It is important to keep in mind that I am not advocating a large-scale admissions policy revolution by law schools. The conventional view of diversity has been largely successful in the ways demonstrated by the Bowen & Bok study, among others. But it is also important to note that even varying the mix of minority students but keeping the overall percentage of minority students around 30–35 percent is hardly a radical step. Diversifying our conception of diversity could certainly encompass some majority-minority institutions (a direction that some of the University of California campuses are already heading).

Consider Howard University’s law school. It strikes me that law students, perhaps mostly, but not limited to, African Americans, are better off for having a choice to attend a school that does not hew to the usual multicultural-with-whites-in-the-majority approach. Such a law school provides an environment where the minority students are not a small minority (i.e., less than 10 percent) of the entire student body, but in fact, the plurality group, and some students may perform better or simply prefer to spend three years in such an environment. Of course, no one should be forced to attend a school with unconventional diversity; so long as many law schools retain the usual mix of minority and non-minority students, there should be plenty of opportunities for minority students interested in the conventional experience.

Law schools need not all strive to look the same in terms of racial demographics. Simply put, some variance in what constitutes diversity may provide greater overall benefits than loss at those particular institutions.

201. BOWEN & BOK, supra note 7, at 286 (emphasis added).
203. Cf. Wendy Brown-Scott, Race Consciousness in Higher Education: Does “Sound Educational Policy” Support the Continued Existence of Historically Black Colleges?, 43 EMORY L.J. 1, 75–78 (1994) (arguing that preservation of historically black institutions is necessary to ensure availability of “content culturally relevant to African American students and enlightening to whites”).
Appendix 1:
2008 Minority Student Percentages at Top 50 Law Schools\textsuperscript{204}

<table>
<thead>
<tr>
<th>School</th>
<th>Af-Am</th>
<th>Am-Ind.</th>
<th>Asian</th>
<th>Hisp.</th>
<th>Total Minority</th>
</tr>
</thead>
<tbody>
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<td>Alabama</td>
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<td>0.8</td>
<td>1.2</td>
<td>1.2</td>
<td>11.7</td>
</tr>
<tr>
<td>American</td>
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<td>1.0</td>
<td>11.8</td>
<td>10.0</td>
<td>34.0</td>
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<td>9.1</td>
<td>8.4</td>
<td>28.3</td>
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<td>0.1</td>
<td>12.1</td>
<td>3.5</td>
<td>24.0</td>
</tr>
<tr>
<td>Boston U</td>
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<td>13.2</td>
<td>2.2</td>
<td>20.5</td>
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<td>2.2</td>
<td>7.4</td>
<td>5.0</td>
<td>18.3</td>
</tr>
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<td>Chicago</td>
<td>7.2</td>
<td>0.7</td>
<td>12.8</td>
<td>5.3</td>
<td>29.8</td>
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<td>2.9</td>
<td>8.4</td>
<td>4.7</td>
<td>23.1</td>
</tr>
<tr>
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<td>14.1</td>
<td>1.9</td>
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</table>

\textsuperscript{204} Table created from data from \textit{ABA Demographic Statistics 2008}, American Bar Association (copy on file with author). Schools in italics are those located in states with bans on affirmative action by public entities.
<table>
<thead>
<tr>
<th>School</th>
<th>Af-Am</th>
<th>Am-Ind.</th>
<th>Asian</th>
<th>Hisp.</th>
<th>Total Minority</th>
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Appendix 2:
2010 Minority Percentages at Top 15 US Cities

<table>
<thead>
<tr>
<th>City</th>
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<th>Am-Ind.</th>
<th>Asian</th>
<th>Hisp.</th>
<th>Total Minority</th>
</tr>
</thead>
<tbody>
<tr>
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<td>28.6</td>
<td>66.8</td>
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<td>11.2</td>
<td>48.4</td>
<td>69.9</td>
</tr>
<tr>
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<td>5.5</td>
<td>28.9</td>
<td>67.8</td>
</tr>
<tr>
<td>Houston</td>
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<td>6.0</td>
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<td>73.5</td>
</tr>
<tr>
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<td>6.3</td>
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<td>62.4</td>
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<td>3.2</td>
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<tr>
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<td>63.1</td>
<td>73.3</td>
</tr>
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<td>16.0</td>
<td>28.9</td>
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<td>5.6</td>
<td>37.9</td>
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</table>

205. All statistics come from the 2010 U.S. Census, available at http://www.census.gov/2010census. Note that these are the population data for cities, not metropolitan areas, which explains the high overall minority representation. For example, the coastal city of Santa Monica, immediately west of Los Angeles, is approximately 65 percent white, and West Hollywood is 74 percent white.
Appendix 3: Los Angeles Racial Demographic Distribution by Location

Note: In this picture, each dot equals 500 people. Green represents Caucasians, blue represents African Americans, yellow represents Hispanics/Latinos, and red represents Asians.