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Affirmative Inaction: A Quantitative Analysis of Progress Toward “Critical Mass” in U.S. Legal Education

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NOTE

AFFIRMATIVE INACTION: A QUANTITATIVE ANALYSIS OF PROGRESS TOWARD “CRITICAL MASS” IN U.S. LEGAL EDUCATION

Loren M. Lee*

Since 1978, the Supreme Court has recognized diversity as a compelling government interest to uphold the use of affirmative action in higher education. Yet the constitutionality of the practice has been challenged many times. In Grutter v. Bollinger, for example, the Court denied its use in perpetuity and suggested a twenty-five-year time limit for its application in law school admissions. Almost two decades have passed, so where do we stand? This Note’s quantitative analysis of the matriculation of and degrees awarded to Black and Latinx students at twenty-nine accredited law schools across the United States illuminates a stark lack of progress toward critical mass since Grutter and reveals the continued need for affirmative action in law school admissions.

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INTRODUCTION

[D]uring most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

—Justice Thurgood Marshall¹

Affirmative action has been a central issue in American jurisprudence for decades² and remains at the forefront of many legal and political conversations today.³ The policy is designed to account for structural inequality that leads to fewer opportunities for groups that are marginalized on account of their race, color, religion, sex, or national origin.⁴ “The purpose of affirm-

1. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part).

2. *More History of Affirmative Action Policies from the 1960s*, AM. ASS’N FOR ACCESS, EQUITY & DIVERSITY, https://www.aaad.org/aaad/history_of_affirmative_action.asp [<https://perma.cc/E4FC-PAMS>].

3. See, e.g., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff’d*, 980 F.3d 157 (1st Cir. 2020). For discussion on how the Court’s textualist approach in the recent landmark decision in *Bostock v. Clayton County* could undercut affirmative action, see Jeannie Suk Gersen, *Could the Supreme Court’s Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, NEW YORKER (June 27, 2020), <https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action> [<https://perma.cc/245H-XRB2>] (“[T]here is reason to think that *Bostock*’s formalist articulations on discrimination will bolster a conservative decision to dismantle race-conscious admissions policies.”); *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding that discrimination on the basis of gender identity and sexual orientation is prohibited by Title VII).

4. See 45 C.F.R. § 80.3(b)(6)(i) (2019).

ative action,” as the Supreme Court has explained, “is not to make identified victims whole, but rather to dismantle prior patterns of . . . discrimination and to prevent discrimination in the future.”⁵ Advocates of affirmative action argue that it is necessary to ensure racial and gender diversity in education,⁶ while critics contend that it is unfair and perpetuates reverse discrimination, where more qualified candidates are passed over for diverse ones.⁷

The year 2021 marks eighteen years since the Court’s decision in *Grutter v. Bollinger*, which upheld the use of affirmative action in higher education.⁸ Writing for the majority, Justice Sandra Day O’Connor expected the policy to be unnecessary by 2028, twenty-five years later.⁹ To justify her prediction, she cited the increasing “number of minority applicants with high grades and test scores” in the twenty-five years since *Regents of the University of California v. Bakke*, the Court’s first foray into affirmative action.¹⁰ But are law schools on track to fulfill her prophecy?

This Note analyzes the matriculation of and degrees awarded to Black¹¹ and Latinx¹² law students nationally, which calls into question the progress that American law schools have made post-*Grutter*. Because banning affirmative action has especially serious adverse impacts on Black and Latinx enrollment,¹³ this Note focuses only on these two populations.¹⁴ Although the

5. Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC, 478 U.S. 421, 474 (1986).

6. See *Bakke*, 438 U.S. at 314–15 (opinion of Powell, J.); *Affirmative Action Fast Facts*, CNN (Nov. 15, 2020, 8:55 AM), <https://www.cnn.com/2013/11/12/us/affirmative-action-fast-facts/index.html> [<https://perma.cc/WDB4-QCYD>].

7. See Brief for Respondent in Opposition at 13, *Bakke*, 438 U.S. 265 (No. 76-811); see also *Grutter v. Bollinger*, 539 U.S. 306, 350–51 (2003) (Thomas, J., concurring in part and dissenting in part).

8. 539 U.S. 306.

9. *Grutter*, 539 U.S. at 343.

10. *Id.*

11. The decision to capitalize “Black,” but not “white,” is intentional throughout this piece. Many mainstream publications have made this choice as well. See, e.g., Nancy Coleman, *Why We’re Capitalizing Black*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/insider/capitalized-black.html> [<https://perma.cc/9ZM6-JZTB>]; Mike Laws, *Why We Capitalize ‘Black’ (and Not ‘White’)*, COLUM. JOURNALISM REV. (June 16, 2020), <https://www.cjr.org/analysis/capital-b-black-styleguide.php> [<https://perma.cc/YG96-YAH9>].

12. “Latinx” is a gender-neutral alternative to Latino or Latina. *‘Latinx’ and Gender Inclusivity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/word-history-latinx> [<https://perma.cc/C6BR-JJXK>]. The American Bar Association’s Latinx reporting includes students who self-identified as Mexican American, Puerto Rican, or Hispanic. See Email from Kenneth R. Williams, Data Specialist, Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass’n, to author (Oct. 28, 2019, 2:41 PM) (on file with the *Michigan Law Review*) (explaining that the data provided contains individual columns for “Mexican American,” “Puerto Rican,” and “Hispanic” students).

13. For example, the 1996 ban of affirmative action in California had a serious adverse impact on minority enrollment, especially of Black and Latinx students. Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 IOWA L. REV. 1549, 1569–70 (2011) (citing Jennifer M. Chacón, *Race as a Diagnostic Tool: Latina/os and Higher Education in California*, *Post-209*, 96 CALIF. L. REV. 1215 (2008)).

most recent case against affirmative action was brought by Asian Americans who were denied admission to Harvard University,¹⁵ this Note does not include analysis of Asian American students.¹⁶ Black and Latinx students are *more* underrepresented in universities today than they were thirty-five years ago,¹⁷ while Asian Americans students are richly represented on college and university campuses nationwide.¹⁸

Part I discusses the historical background of affirmative action. Part II examines Justice O'Connor's proposed time limit on affirmative action in *Grutter*. Part III provides an in-depth quantitative analysis of both matriculation of and degrees awarded to Black and Latinx students at twenty-nine accredited law schools across the nation from 2000 to 2019. The data set exposes the lack of progress law schools nationally have made toward diverse classrooms and courtrooms. Additionally, two case studies illuminate the consequences of overruling affirmative action at the state level, suggesting that even if critical mass is eventually attained, affirmative action is necessary to maintain classroom diversity.

14. Solely for the purpose of limiting the scope of this piece, Native American students and minority students who reported being two or more races are also not included in the analysis.

15. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 131 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020).

16. There is much debate surrounding affirmative action and Asian Americans, including the fundamental question of whether affirmative action benefits or hinders Asian American applicants. For discussion of the issue, see, for example, Moriah Balingit, *The Forgotten Minorities of Higher Education: What Affirmative Action Means for Low-Income Asians*, WASH. POST MAG. (Mar. 18, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/03/18/feature/does-affirmative-action-help-or-hurt-asians-who-dont-fit-the-model-minority-stereotype/> [<https://perma.cc/3K39-XQHW>]; Alvin Chang, *Asians Are Being Used to Make the Case Against Affirmative Action. Again.*, VOX (Aug. 30, 2018, 1:19 PM), <https://www.vox.com/2018/3/28/17031460/affirmative-action-asian-discrimination-admissions> [<https://perma.cc/CK6G-YKAY>]; Jeannie Suk Gersen, *The Uncomfortable Truth About Affirmative Action and Asian-Americans*, NEW YORKER (Aug. 10, 2017), <https://www.newyorker.com/news/news-desk/the-uncomfortable-truth-about-affirmative-action-and-asian-americans> [<https://perma.cc/XZE5-ZT8H>] (Korean American Harvard Law professor discusses affirmative action and the Harvard lawsuit); Jay Caspian Kang, *Where Does Affirmative Action Leave Asian-Americans?*, N.Y. TIMES MAG. (Oct. 1, 2019), <https://www.nytimes.com/2019/08/28/magazine/affirmative-action-asian-american-harvard.html> [<https://perma.cc/329K-GH8P>] (Asian American students currently enrolled in high school and college discuss the Harvard lawsuit).

17. Connor Maxwell & Sara Garcia, *5 Reasons to Support Affirmative Action in College Admissions*, CTR. FOR AM. PROGRESS (Oct. 1, 2019, 4:14 PM), <https://www.americanprogress.org/issues/race/news/2019/10/01/471085/5-reasons-support-affirmative-action-college-admissions/> [<https://perma.cc/AP8L-5YET>].

18. See Jeremy Ashkenas, Haeyoun Park & Adam Pearce, *Even with Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html> [<https://perma.cc/5A3E-CKEQ>].

I. HISTORICAL BACKGROUND OF AFFIRMATIVE ACTION

To understand the Supreme Court's ruling in *Grutter*, it is important to understand the Court's broader affirmative action jurisprudence. In *Brown v. Board of Education*, the Court deemed race discrimination against students in public education unconstitutional, ending "separate but equal" in education in 1954.¹⁹ This landmark decision acknowledged the rights of African American students after four Black children were denied admission to all-white schools.²⁰ After a decade of lower courts failing to meaningfully desegregate schools on a case-by-case basis,²¹ Congress continued the spirit of *Brown* when it enacted Title VI of the Civil Rights Act of 1964, which prohibits race discrimination by any program receiving federal financial assistance, including colleges and universities administering federally funded financial aid.²² The prohibition of racial discrimination and the institution of affirmative action are each means to a similar end: reducing the force of systemic racial disparities that have hindered the advancement of Black Americans.²³

The Court's decision in *Brown* did not result in the immediate integration of schools.²⁴ The oppressive effects of decades of segregation at inferior schools shackled Black students' ability to gain admission to selective college and graduate programs.²⁵ In response, many universities began affirmative

19. 347 U.S. 483 (1954).

20. *Brown*, 347 U.S. at 486–88.

21. James R. Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 VA. L. REV. 42, 42–43 (1967).

22. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d); see also Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 619 (1998).

23. The meaning of *Brown* and its implications for the affirmative action debate are contested. See, e.g., Jack M. Balkin, *Brown as Icon*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3, 10 (Jack M. Balkin ed., 2001) (explaining that, according to the view of supporters, "when governments try to remedy the effects of past discrimination and help minorities gain greater opportunities in education and employment, they are acting consistent with the spirit of *Brown*, because the real goal of *Brown* was genuine educational opportunity").

24. See *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968).

25. While *Brown* started to dismantle formal systems of segregation, informal segregation persists in schools today. See, e.g., Gary B. v. Whitmer, 957 F.3d 616 (6th Cir.) (holding that students in Detroit public schools, 95 percent of whom are Black, have a fundamental right to literacy), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); LastWeekTonight, *School Segregation: Last Week Tonight with John Oliver* (HBO), YOUTUBE (Oct. 31, 2016), <https://www.youtube.com/watch?v=o8yiYCHMAIM>; Will Stancil, *School Segregation Is Not a Myth*, ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/education/archive/2018/03/school-segregation-is-not-a-myth/555614> [<https://perma.cc/T2MW-QCAC>]. The resegregation of schools is strongly correlated with class and poverty. Balkin, *supra* note 23, at 6 ("Although only 5 percent of segregated white schools are

action programs.²⁶ The first affirmative action case to reach the Supreme Court was a challenge of one such program in 1974. The Court ultimately dismissed the case for mootness, suggesting the Court was interested in avoiding the question as long as possible.²⁷

Four years later, the Supreme Court issued its first ruling on a constitutional challenge to affirmative action in *Bakke*.²⁸ Allan Bakke, a white man, was twice denied admission to the Medical School of the University of California at Davis.²⁹ The university's admissions policy reserved sixteen seats in each entering class of one hundred for "qualified minorit[ies],"³⁰ a special program devised by the faculty to increase diversity.³¹ White students were not considered for the sixteen reserved seats.³² Bakke's qualifications, including college GPA and test scores, exceeded those of many minority students admitted in the two years that he was rejected.³³ Bakke challenged the constitutionality of the Medical School's special admission program, alleging it "operated to exclude him from the school on the basis of his race."³⁴

There was no single majority opinion in *Bakke*. Justice Lewis Powell joined Chief Justice Warren Burger and Justices Potter Stewart, William Rehnquist, and John Paul Stevens, holding that the use of formal racial quotas violates the Equal Protection Clause of the Fourteenth Amendment and further ordering Bakke to be admitted to the Medical School.³⁵ But Justice Powell also joined Justices William Brennan, Byron White, Thurgood Marshall, and Harry Blackmun, concluding that race can be used as one factor in admission, allowing the University to establish race-conscious programs in the future.³⁶ While strict racial quotas were struck down, Justice Powell stated that schools could consider race as a "plus" factor in admissions³⁷ but failed to define the precise meaning of the term.

in areas of concentrated poverty, over 80 percent of segregated [B]lack and Latin[x] schools are.").

26. See HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* 3–10 (2000).

27. *DeFunis v. Odegaard*, 416 U.S. 312, 319–20 (1974) (per curiam) (holding that the case was moot because the petitioner was already in his last year of law school and was scheduled to graduate regardless of the decision of the Court).

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

29. *Id.* at 276–77 (opinion of Powell, J.).

30. *Id.* at 289.

31. *Id.* at 272–73.

32. *Id.* at 288 n.26.

33. *Id.* at 277.

34. *Id.* at 277–78.

35. *Id.* at 271 (Powell, J., announcing the judgment of the Court); *id.* at 421 (Stevens, J., concurring in the judgment in part, dissenting in part).

36. *Id.* at 272 (Powell, J., announcing the judgment of the Court); *id.* at 326 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part, dissenting in part).

37. *Id.* at 317–18 (opinion of Powell, J.). While only one justice announced "plus" factor considerations in *Bakke*, the Court has continued to apply this principle. See, e.g., *Fisher v.*

Bakke identified the educational value of diversity—not the remedial interest in correcting past injustices—as the legitimate government interest in affirmative action.³⁸ The decision emphasized that a diverse student body allows students to learn from each other's experiences and challenge each other's beliefs, cultivating a more intellectually stimulating environment and reducing the weight of stereotypes.³⁹ Justice Marshall, writing separately, refused to accept Justice Powell's justification for affirmative action, insisting that because "[t]he position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment . . . bringing the Negro into the mainstream of American life should be a state interest of the highest order."⁴⁰

Twenty-five years after *Bakke*, the Court granted certiorari in *Gratz v. Bollinger* and *Grutter v. Bollinger*.⁴¹ In *Gratz*, two white Michigan residents who were denied admission to an undergraduate college at the University of Michigan challenged the constitutionality of the school's affirmative action policy.⁴² The Court held that the undergraduate admission policy, which utilized a selection index that automatically favored minority applicants without individualized consideration, was unconstitutional.⁴³ In *Grutter*, Barbara Grutter, a white Michigan resident rejected from the University of Michigan Law School, brought a similar constitutional challenge to the Law School's admission policy.⁴⁴ The Court held that the Law School's admission policy, which utilized "a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment," was constitutional, affirming and further clarifying *Bakke*.⁴⁵

In *Grutter*, the Court again recognized diversity of the student body as a compelling interest justifying the use of race-conscious affirmative action programs.⁴⁶ In her majority opinion, Justice O'Connor cited a variety of reasons supporting that conclusion, including diminishing the force of stereo-

Univ. of Tex., 570 U.S. 297, 305 (2013); *Gratz v. Bollinger*, 539 U.S. 244, 270–71 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).

38. *Bakke*, 438 U.S. at 314 (opinion of Powell, J.).

39. *Id.* at 311–12 ("[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education. . . . The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring))).

40. *Id.* at 395–96 (Marshall, J., concurring in part and dissenting in part).

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

42. 539 U.S. at 251.

43. *Gratz*, 539 U.S. at 274–75.

44. *Grutter*, 539 U.S. at 316–17.

45. *Id.* at 328, 337, 343.

46. *Id.* at 343.

types,⁴⁷ enhancing classroom discussion and the overall educational experience,⁴⁸ and ensuring diversity among the country's future leaders.⁴⁹ In her view, the positive effects of affirmative action in law school admissions extend beyond the classroom. When diverse lawyers serve in positions of power, it shows that our society values racial inclusivity and signals to the public that the justice system is unbiased and impartial, promoting public confidence and trust in our system's outcomes.⁵⁰ But these benefits only materialize if affirmative action is successful in increasing student body diversity; thus, this Note focuses on the long-term effectiveness of affirmative action policies in law schools like the one the Court upheld in *Grutter*.

II. *GRUTTER*: EIGHTEEN YEARS LATER

Grutter was a victory for affirmative action in higher education, written by a justice who publicly opposed affirmative action. Justice O'Connor, a conservative known for striking down affirmative action programs in other contexts,⁵¹ cast the decisive vote and sided with four liberal justices in *Grutter* to uphold the use of affirmative action in education. "She didn't like affirmative action," one of her former clerks explained, "though she was the one to save it."⁵² But Justice O'Connor, at the close of her opinion, denied that it could be used in perpetuity: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in student body diversity] approved today."⁵³ This suggested time limit reflects Justice O'Connor's ambivalence about racial preferences and distaste for victimhood and identity politics.⁵⁴ This also indicates that Justice O'Connor be-

47. See *id.* at 319–20, 333. By facilitating interracial interactions on campus, law schools "produce lawyers capable of leadership in a multiracial society." Brief of the Harvard Black L. Students Ass'n, Stanford Black L. Students Ass'n & Yale Black L. Students Ass'n as *Amici Curiae* Supporting Respondents at 7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Brief of the BLSAs].

48. *Grutter*, 539 U.S. at 319; see also Brief of 13,922 Current L. Students at Accredited Am. L. Schs. as *Amici Curiae* in Support of Respondents at 6, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Brief of 13,922 Current Law Students]. Racial diversity fosters an intellectually stimulating environment, encouraging discussions of challenging social, political, and legal issues and instilling values of cooperation and tolerance. Brief of the BLSAs, *supra* note 47, at 8.

49. See *Grutter*, 539 U.S. at 332. "Racial diversity is . . . vital to the credibility and legitimacy of the legal profession." Brief of the BLSAs, *supra* note 47, at 3.

50. See *Grutter*, 539 U.S. at 332–33; see also Brief of the BLSAs, *supra* note 47, at 20; cf. Sandra Day O'Connor, *The Quality of Justice*, 67 S. CAL. L. REV. 759, 760 (1994) ("When people perceive . . . bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law.").

51. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); see also EVAN THOMAS, *FIRST: SANDRA DAY O'CONNOR* 353 (2019).

52. THOMAS, *supra* note 51, at 261.

53. *Grutter*, 539 U.S. at 343; see *infra* note 58 and accompanying text.

54. THOMAS, *supra* note 51, at 347, 353.

lieved that twenty-five years was long enough to make the racial breakdown of the student population in law schools mirror the racial breakdown of the population of the country as a whole.⁵⁵ Thus, affirmative action policies would no longer be needed to promote the compelling interest of diversity in higher education.

The meaning of Justice O'Connor's parting words in *Grutter* is quite ambiguous. On one hand, she may not have intended this remark to have legal significance, or, more likely, it may have been a premonition about the evolution of the law.⁵⁶ On the other hand, Justice Clarence Thomas read the majority opinion as "*holding* that racial discrimination in higher education admissions will be illegal in 25 years."⁵⁷ One thing is clear: Justice O'Connor's 25-year prediction is not the holding of *Grutter*, as Justice Thomas would like to assert.⁵⁸ Justice O'Connor did, however, maintain that "race-conscious admissions policies *must* be limited in time"⁵⁹ because a permanent justification for racial preferences would offend the Equal Protection Clause: abrogating all governmentally imposed discrimination on the basis of race.⁶⁰

Interpreting Justice O'Connor's prophecy as a literal timeline on affirmative action aligns with the Court's general aversion to restorative policies based on race. Chief Justice John Roberts famously explained, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁶¹ In *Washington v. Davis*, for example, the Court reversed the D.C. Circuit's finding of a constitutional violation by the Washington, D.C. police department where its qualifying test resulted in a greater proportion of Black applicants failing the test than white applicants, creating a disparate impact.⁶² And in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court overturned the school districts' assignment plan that ensured schools were racially balanced, encouraging desegregation.⁶³ As these examples show, the Court is far more comfortable acknowledging discrimination than rectifying it.⁶⁴ Justice O'Connor's reluctance to allow af-

55. See *Grutter*, 539 U.S. at 331–33. To be clear, Justice O'Connor did not explicitly state that this was the ultimate goal of affirmative action, but this Note argues that it is a good metric. See *infra* notes 76–80 and accompanying text.

56. Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541, 542 (2003).

57. *Grutter*, 539 U.S. at 351 (Thomas, J., concurring in part and dissenting in part) (emphasis added).

58. *Id.* at 328 (majority opinion) ("Today, we *hold* that the Law School has a compelling interest in attaining a diverse student body." (emphasis added)).

59. *Id.* at 342 (emphasis added).

60. *Id.* at 341–42 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

61. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

62. 426 U.S. 229, 232–33 (1976).

63. 551 U.S. at 709–11.

64. Compare *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding segregation in public schools was a denial of equal protection under the Fourteenth Amendment), with *Parents In-*

firmative action to continue for the long term is yet another example of the Court's overall judgment that these policies are a necessary evil that should be cabined as much as possible.

Almost fourteen years after she wrote the majority opinion in *Grutter*, Justice O'Connor acknowledged "[t]hat may have been a misjudgment. . . . There's no timetable. You just don't know."⁶⁵ As a woman in the legal profession in the mid-twentieth century, Justice O'Connor herself was a victim of discrimination and beneficiary of affirmative action.⁶⁶ White women, in fact, benefit from affirmative action as much as—if not more than—men and women of color.⁶⁷

During Justice O'Connor's nearly twenty-five years on the Court, she hired men and women as law clerks in roughly equal numbers, but only 3 percent of her clerks were Black.⁶⁸ Justice O'Connor defended this gap by explaining that the Supreme Court limits its clerk hiring pool to law review editors at top law schools,⁶⁹ few of whom are Black. Lack of diversity in law schools leads to a lack of diversity on the courts and in judges' chambers. This lack of diversity was precisely the motivation behind the policy at issue in *Grutter*.

Justice O'Connor did not specify the proportion of underrepresented students that would make the use of racial preferences in admissions unconstitutional, but the Court's reasoning in *Grutter* does shed some light. In the case, the Court upheld Michigan Law School's policy of enrolling a "critical mass" of underrepresented students.⁷⁰ All who testified on behalf of the Law School refused to quantify this "critical mass" as any "number, percentage, or range of numbers or percentages,"⁷¹ instead referring to it as "meaningful numbers," or "meaningful representation," which reduces feelings of isolation and encourages classroom participation.⁷² Representation that feels

involved in Cmty. Schs., 551 U.S. 701 (finding the method of desegregating public schools unconstitutional), and *Milliken v. Bradley*, 418 U.S. 717 (1974) (same).

65. THOMAS, *supra* note 51, at 354.

66. Evan Thomas, *Why Sandra Day O'Connor Saved Affirmative Action*, ATLANTIC (Mar. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/how-sandra-day-oconnor-saved-affirmative-action/584215/> [https://perma.cc/JG38-MAVB].

67. See, e.g., Sally Kohn, *Affirmative Action Has Helped White Women More than Anyone*, TIME (June 17, 2013) <https://ideas.time.com/2013/06/17/affirmative-action-has-helped-white-women-more-than-anyone/> [https://perma.cc/3DQH-J7Y6]; Victoria M. Massie, *White Women Benefit Most from Affirmative Action — And Are Among Its Fiercest Opponents*, VOX (June 23, 2016, 12:00 PM), <https://www.vox.com/2016/5/25/11682950/fisher-supreme-court-white-women-affirmative-action> [https://perma.cc/46BL-5L8U].

68. Thomas, *supra* note 66.

69. *Id.* The author of this piece was one of three Black students in the *Michigan Law Review* Volume 118 Associate Editor class and was the only Black woman.

70. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

71. *Grutter*, 539 U.S. at 318–19, 335–36. This strategy prevented the Law School's affirmative action program from being perceived as the dreaded Q-word—a quota—which was deemed unconstitutional in *Bakke*. *Id.* at 335–36.

72. *Grutter*, 539 U.S. at 318–19.

“meaningful” to one student, however, is likely to leave others feeling unsatisfied: student experiences often vary widely even among shared racial identities.⁷³ Presumably, under Justice O’Connor’s sunset provision, once a “critical mass” of underrepresented students could be enrolled at the Law School without consideration of race, the use of race as a factor in admissions would be constitutionally barred.

Given the undefined nature of “critical mass” as presented by the Law School, it is easy to see why the Court refused to pinpoint a number or percentage itself. To be clear, critical mass and equal population representation are not synonymous. In fact, the Court emphasized that “outright racial balancing . . . is patently unconstitutional” in both *Bakke* and *Grutter*.⁷⁴ Representation, however, is important for its own sake because “increased representation raises the possibility of reaching the Court’s goals for affirmative action”⁷⁵ as articulated by the Court. As a baseline matter, we know that representation at Michigan Law School was insufficient to achieve critical mass at the time *Grutter* was argued in 2003. Since critical mass remains undefined, this piece analyzes representation as a proxy for critical mass.

A goal of affirmative action should—at the very least—be to ensure that American institutions, even the most elite, reflect the demographics of the country’s population.⁷⁶ As the Court emphasized in *Bakke*, our future depends on leaders who are exposed to the beliefs of a student body that is as

73. Cf. Brief of 13,922 Current Law Students, *supra* note 48, at 3–5.

74. *Grutter*, 539 U.S. at 330 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (“Racial balance is not to be achieved for its own sake.”)); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

75. Jessica Rose Kalbfeld, *Critical Mass for Affirmative Action: Dispersing the Critical Cloud*, 53 LAW & SOC’Y REV. 1266, 1300 (2019). Kalbfeld writes:

“[I]ncreased minority student representation is associated with better outcomes for both isolation and stereotype reduction If there are more minority students, it is more likely that students from minority groups will feel less isolated [I]ncreased diversity gives majority group students the opportunity to encounter a wide variety of types and viewpoints within groups that they may otherwise assume to be monolithic.”

Id. at 1299–1300.

76. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”); Suk Gersen, *supra* note 16 (“We should not want the composition of our [e]lite universities to be wildly out of proportion to the racial composition of our country.”). See also Amber Fricke & Angela Onwuachi-Willig, *Do Female “Firsts” Still Matter? Why They Do for Female Judges of Color*, 2012 MICH. ST. L. REV. 1529, 1546 (“But, simply having a few more female judges of color is not enough. Women of color must join the federal judiciary at rates greater than mere token representation. Having a critical mass of women of color on the bench makes it possible for women of color judges to perform their jobs without being saddled with the additional duty of speaking for all women of color.”).

diverse as this nation.⁷⁷ The population of the United States is more racially diverse than ever before.⁷⁸ Clients of future lawyers will be more diverse, requiring law students to learn to communicate across differences while respecting, appreciating, and understanding their clients' backgrounds and cultures.⁷⁹ Interactions in educational environments provide the foundation for developing the skills necessary to successfully represent clients by building trust and rapport within a diverse body of peers.⁸⁰ As our nation becomes more diverse, the same should be reflected in its law school classrooms.⁸¹

If Justice O'Connor's twenty-five-year prediction is correct, the data should show an increase in both matriculation of and degrees awarded to Black and Latinx students in law schools nationwide. Additionally, these increases should correspond with the increase in total Black and Latinx populations in the United States. That is, the percentage of Black and Latinx graduates of law schools should be approaching the relative percentage of the total population by 2028, twenty-five years after *Grutter*. But if the data show little to no progress in these indicators, Justice O'Connor's prediction will be disproven, validating the continued need for affirmative action beyond the twenty-five-year prediction unless dramatic change occurs in the immediate future. Based on the data presented in Part III, society has a long way to go before law school classrooms reach critical mass or closely match the diversity of the national population.

77. *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

78. See *A More Diverse Nation: Distribution of Race and Hispanic Origin by Age Groups*, U.S. CENSUS BUREAU (June 20, 2019), <https://www.census.gov/library/visualizations/2019/comm/age-race-distribution.html> [<https://perma.cc/3E2R-5SJ6>]. The American Community Survey Demographic and Housing Estimates for 2018 shows the total U.S. population was 327,167,439, with 197,033,939 white residents (60.22%), 40,305,870 Black residents (12.32%), and 59,763,631 Hispanic residents (18.27%). *American Community Survey Demographic and Housing Estimates*, U.S. CENSUS BUREAU [hereinafter U.S. CENSUS BUREAU, *ACS Estimates*], <https://data.census.gov/cedsci/table?q=DP05%3A%20ACS%20DEMOGRAPHIC%20AND%20HOUSING%20ESTIMATES&g=&lastDisplayedRow=27&table=DP05&tid=ACSDPIY2018.DP05&vintage=2018&hidePreview=true> [<https://perma.cc/FB9J-67AU>].

79. Brief of 13,922 Current Law Students, *supra* note 48, at 7.

80. *Id.*

81. Instead of comparing matriculation and degrees awarded to the national population, they could be compared to the demographics of college graduates since, in general, only individuals with at least a bachelor's degree are eligible to apply to law school. Increasing the diversity of law schools depends on increased diversity of undergraduate colleges. But both Black and Latinx students are more underrepresented at undergraduate institutions today. See Ashkenas et al., *supra* note 18. Therefore, measuring diversity of law schools based on the output of undergraduate institutions—where representation is not improving—would perpetuate the systemic underrepresentation of Black and Latinx students in legal education, since the output of undergraduate institutions does not accurately reflect the changing demographics of the population. See Maxwell & Garcia, *supra* note 17.

III. PRESENTATION OF THE DATA: HAS REPRESENTATION IMPROVED?

A. Methodology

Twenty-nine of the 201 total accredited law schools are included in this analysis.⁸² To ensure that the twenty-nine-school sample size is reflective of the composition of law schools nationally, the schools included in this analysis were selected based on their region and ranking. Because the populations of some regions are more racially diverse than others and some regions contain more law schools than others, the density of law schools within each region was calculated to ensure equal proportion between this data subset and the national distribution. Because it includes law schools of a variety of U.S. News and World Report rankings,⁸³ the data will indicate whether there is a correlation between prestige and minority enrollment and graduation.

The following methodology was used to determine how many schools would be selected from each region. First, all 201 accredited law schools were divided into one of the five regions identified by the National Geographic U.S. regions map: West, Midwest, Northeast, Southwest, and Southeast.⁸⁴ Next, each region's law school density was calculated to ensure that the twenty-nine-school sample size contains a proportional number of law schools from each region. A region's law school density is the proportion of accredited law schools within that region relative to the national total.⁸⁵ For example, the West has 35 accredited law schools; so, the West's law school density is 35 divided by 201—almost 18%.⁸⁶ The densities for the remaining regions are just over 22% for the Midwest and Northeast,⁸⁷ approximately

82. In an ideal world, this piece would include data from all 201 schools. Unfortunately, the data is not available in a format that is easily accessible for aggregated analysis. Due to the time-consuming nature of manually compiling this data, analyzing all 201 schools was not feasible. Thirty is a significant number in statistics: data starts to behave “normally” when the sample size is “greater than 25 or 30.” See ROBERT V. HOGG, ELLIOT A. TANIS & DALE L. ZIMMERMAN, *PROBABILITY AND STATISTICAL INFERENCE* 202 (9th ed. 2015). For details on the decision to include 29 schools instead of 30, see *infra* note 91.

83. *2021 Best Law Schools*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> [<https://perma.cc/7PWX-RZT8>].

84. See Appendix A, Figure A1. The West includes Alaska, California, Colorado, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming. The Southwest includes Arizona, New Mexico, Oklahoma, and Texas. The Midwest includes Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. The Southeast includes Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia. The Northeast includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

85. A region's density is calculated by taking the number of accredited law schools within that region and dividing it by the national total.

86. To be exact, the law school density of the West is 17.4%.

87. The Midwest and Northeast each contain 45 of the 201 accredited law schools, each accounting for 22.4% of the total.

8% for the Southwest,⁸⁸ and nearly 30% for the Southeast.⁸⁹ Finally, to determine how many schools from each region would be used in the final sample, each region's density was multiplied by 29, the desired total sample size. As a result, 5 schools were selected from the West,⁹⁰ 6 from the Midwest, 6 from the Northeast,⁹¹ 3 from the Southwest,⁹² and 9 from the Southeast.⁹³

To determine which schools would be selected, the schools within each region were sorted according to their U.S. News & World Report ranking.⁹⁴ Next, the top two schools within each region according to the U.S. News rankings were selected.⁹⁵ The remaining schools from each region were randomly selected. Table 1, below, lists the selected schools from each region.

88. The Southwest contains 17 of the 201 accredited law schools, accounting for 8.5% of the total.

89. The Southeast contains 59 of the 201 accredited law schools, accounting for 29.4% of the total.

90. More specifically, 17.4% of 29 is 5.05 schools, so the number was rounded down to 5.

91. I originally intended to include 30 schools in the analysis, but 22.4% of thirty is 6.72 schools for both the Midwest and Northeast. Using 6 schools for one region and 7 for the other would skew the overall data set. Instead of rounding the 6.72 figure up to 7, I opted to select 6 schools for both the Midwest and Northeast, bringing the total number of schools included in this analysis down to 29.

92. Technically, 8.5% of 29 is 2.47 schools. To prevent the Southwest from only containing data from the top 2 schools, the number was rounded up to 3.

93. In fact, 29.4% of 29 is 8.53 schools, so the number was rounded up to 9.

94. 2021 *Best Law Schools*, *supra* note 83.

95. *Id.* U.S. News and World Report ranks law schools from 148 to 194 together as "148." *Id.* In his dissent in *Grutter*, Justice Thomas suggested that less elite schools—those with reduced admission standards for students of all races—are more diverse. *See infra* note 141 and accompanying text.

TABLE 1: SCHOOLS SELECTED FROM EACH REGION

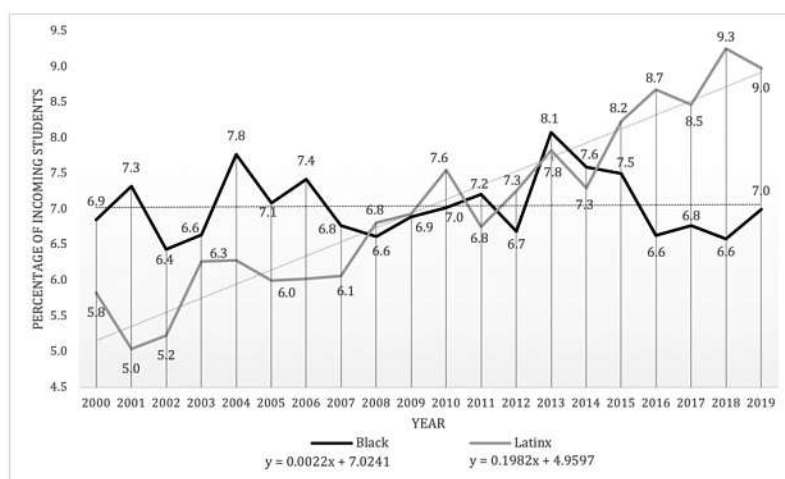
Region (# selected)	Top 2 (Ranking)	Selected by Randomizer (Ranking)
West (5)	1. Stanford University (#2) 2. University of California, Berkeley (#9 tie)	3. University of Southern California (#18 tie) 4. University of Utah (#45) 5. Gonzaga University (#118 tie)
Midwest (6)	1. University of Chicago (#4 tie) 2. University of Michigan (#9 tie)	3. University of Iowa (#27 tie) 4. University of Cincinnati (#83 tie) 5. St Louis University (#90 tie) 6. Northern Kentucky University (#148)
Northeast (3)	1. Yale University (#1) 2. Harvard University (#3)	3. New York University (#6) 4. Villanova University (#62 tie) 5. Syracuse University (#111 tie) 6. Vermont Law School (#141 tie)
Southwest (3)	1. University of Texas, Austin (#16) 2. Arizona State University (#24 tie)	3. University of Tulsa (#111 tie)
Southeast (9)	1. University of Virginia (#8) 2. Duke University (#12)	3. Georgetown University (#14) 4. University of Alabama (#31 tie) 5. University of Tennessee (#70 tie) 6. University of Arkansas (#90 tie) 7. Louisiana State University (#96 tie) 8. Mercer University (#126 tie) 9. Florida Coastal University (#148)

The data used for this analysis were gathered from the American Bar Association's standard 509 information report for each year and school since 2000.⁹⁶ Each year corresponds to the calendar year, not the academic year. For example, "2012" includes both the graduating class of 2012 and the first-year law students who began in the fall of 2012.

96. The data from 2011 to 2019 is available on the American Bar Association's (ABA) website in the Section of Legal Education and Admissions to the Bar, *Standard 509 Information Reports*, AM. BAR ASS'N, <http://www.abarequireddisclosures.org/Disclosure509.aspx>. The data from 2000 to 2010 was provided by the ABA's Data Specialist and is no longer available to the public. Email from Kenneth R. Williams, *supra* note 12; Email from Kenneth R. Williams, Data Specialist, Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, to author (Oct. 31, 2019, 4:53 PM) (on file with the *Michigan Law Review*).

B. National Trends

The national and regional data trends are presented and discussed below.⁹⁷ The national percentages for matriculation of and degrees awarded to Black and Latinx students are presented first, followed by U.S. population data for Black and Hispanic residents and the ratios of national matriculation and degrees awarded to the U.S. population by race. Next, the regional percentages of matriculation and degrees awarded are presented in the following order: West, Midwest, Northeast, Southwest, and Southeast.

FIGURE 1: MATRICULATION NATIONALLY BY PERCENTAGE⁹⁸

As discussed in Part II, if Justice O'Connor's twenty-five-year prediction is correct and law schools are to reach "critical mass" by 2028, the data should show an increase in both matriculation of and degrees awarded to both Black and Latinx students in law schools nationally. What Justice O'Connor considered an inevitability is, unfortunately, not reality.⁹⁹ Over the twenty-year period of this study, the average enrollment of Black stu-

97. For the data presentation of each individual school, please refer to the Appendix. Loren M. Lee, *Affirmative Inaction: A Quantitative Analysis of Progress Toward "Critical Mass" in U.S. Legal Education*, MICH. L. REV., <http://michiganlawreview.org/affirmative-inaction-a-quantitative-analysis/> (click "Download Appendix" at bottom of page).

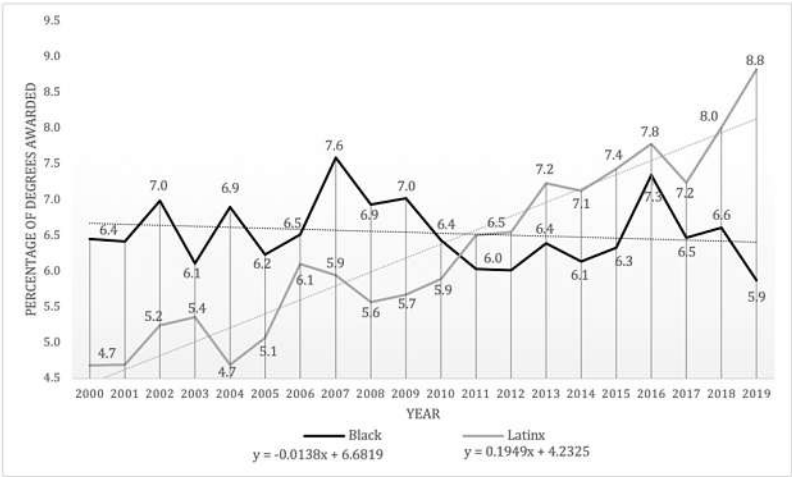
98. The thinner, straight line in each figure is a trendline or "best fit" line. These trendlines reflect the general pattern or overall direction of the data. The slope (the number preceding the 'x' variable) of each trendline is included below the legend of each graph. If the trendline has a negative slope, then the overall data is decreasing over the twenty-year period. If the trendline has a positive slope, then the overall data is increasing over the twenty-year period. Each trendline and corresponding equation was generated by Microsoft Excel.

99. Justice O'Connor expected the use of affirmative action to be unnecessary by 2028, twenty-five years after the *Grutter* decision. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

dents is 7.0%.¹⁰⁰ Although the data show a clear increase in the enrollment of Latinx students over the same period, their average enrollment is identical: 7.0%. Considering the national population percentage of each of these minority groups, 7.0% is nowhere near critical mass (see Figure 3; Figure 4).

Although the averages are identical, the data tell vastly different stories about these two populations of color. While the percentage of Latinx students matriculating at law schools nationally has nearly doubled over the past twenty years, from 5.8% in 2000 to 9.0% in 2019, Black matriculation has oscillated, ranging from a low of 6.4% in 2002 to a high of 8.1% in 2013 (see Figure 1).¹⁰¹ When the Supreme Court decided *Grutter* in 2003, Black students represented 6.6% of students enrolling in law schools nationally. Strikingly, the percentage was identical in 2018, and only four-tenths of a percent higher in 2019, the most recent reporting year.¹⁰²

FIGURE 2: DEGREES AWARDED NATIONALLY BY PERCENTAGE



Nationally, the data on degrees awarded tell a similar story to the data on matriculation. As with matriculation, the percentage of degrees awarded to Latinx students has also nearly doubled over the past twenty years, from 4.7% in 2000 to 8.8% in 2019 (see Figure 2). In 2011, the percentage of degrees awarded to Latinx students nationally surpassed that of Black students. With both enrollment of and degrees awarded to Latinx students continuing

100. The averages in the section were calculated in Excel. Lee, *supra* note 97.

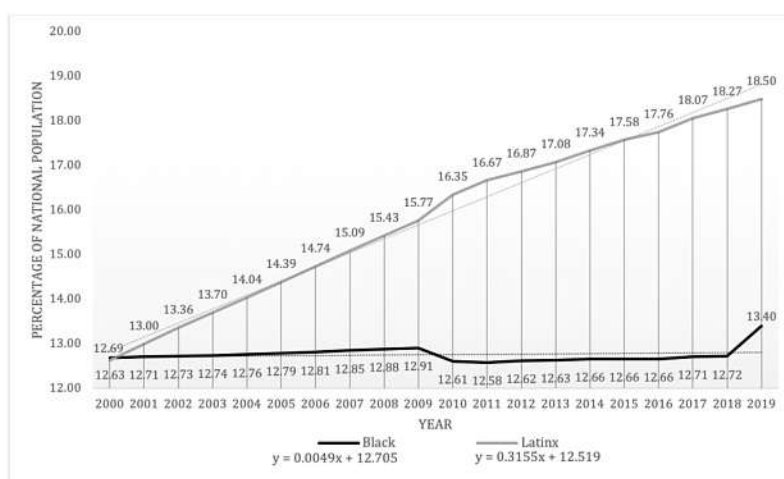
101. The trendline for the matriculation of Black students nationally appears to be flat, but it does have a negative slope (decreasing).

102. In 2003, the combined total first-year class among the 29 schools included in this analysis was 7,404 with 492 Black students. In 2019, the combined total first-year class was only 6,501 with 455 Black students.

to rise, we can expect an increasing amount of Latinx lawyers entering the workforce in the future.

In contrast, the percentage of degrees awarded to Black students has been trending downward from 2000 to 2019 (see Figure 2).¹⁰³ This number reached a high of 7.6% in 2007, then dipped to 6.0% in 2011 and 2012. While the percentage seemed to be steadily recovering after 2012, Black students received only 5.9% of the degrees awarded by the twenty-nine law schools in 2019, a new low for the studied period.

FIGURE 3: PERCENTAGE OF UNITED STATES POPULATION BY RACE¹⁰⁴



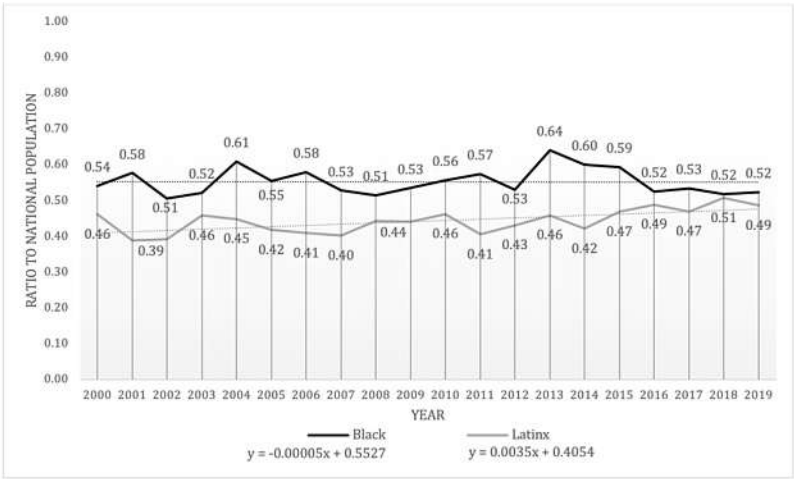
Without consideration of changes to the national population of these two minority groups, the changes in matriculation and degrees awarded to Black and Latinx students do not accurately reflect whether progress can be attributed to affirmative action policies. The total population of Latinx residents in the United States has increased dramatically over the past twenty years, from 12.63% in 2000 to 18.50% in 2019 (averaging 15.83% over the twenty-year period) (see Figure 3). This rise helps explain the increase in

103. The trendline for degrees awarded to Black students nationally is relatively flat and also has a negative slope.

104. See *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/IPE120218> [<https://perma.cc/VA8N-9YQC>] (providing data estimates for 2019); U.S. CENSUS BUREAU, *ACS Estimates*, *supra* note 78 (providing data estimates for 2011 through 2018); KAREN R. HUMES, NICHOLAS A. JONES & ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, *OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010* (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> [<https://perma.cc/7PUD-UNPJ>] (providing data estimates for 2010); *Section 1. Population, Estimates and Projections by Age, Sex, Race/Ethnicity*, U.S. CENSUS BUREAU (Dec. 15, 2010), <https://www.census.gov/library/publications/2010/compendia/statab/130ed/population.html> [<https://perma.cc/F76X-EV3L>] (Table 6 provides data estimates for 2000 through 2009).

matriculation of and degrees awarded to Latinx law students. A dramatic increase in the national Latinx population predictably leads to an increase in Latinx college graduates and law school applicants (see Figure 1).¹⁰⁵ In contrast, the total population of Black residents has remained comparatively stable over the past twenty years, from 12.69% in 2000 to 13.40% in 2019 (averaging 12.76% over the twenty-year period) (see Figure 3).

FIGURE 4: RATIO OF NATIONAL LAW SCHOOL MATRICULATION TO U.S. POPULATION BY RACE¹⁰⁶



The national Latinx ratios plotted above highlight the necessity of accounting for demographic changes when analyzing these data. From 2000 to 2019, the percentage of Latinx students matriculating at law schools nationally has nearly doubled (see Figure 1). During the same time, the national

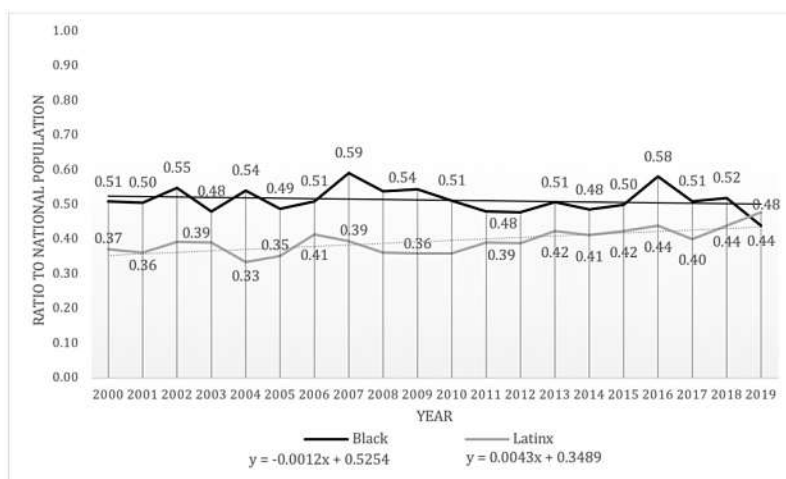
105. America Counts Staff, *Number of Hispanic Students More than Double in 20 Years*, U.S. CENSUS BUREAU: AM. COUNTS (Oct. 24, 2017), <https://www.census.gov/library/stories/2017/10/hispanic-enrollment.html> [<https://perma.cc/VQA8-FP5S>] (“From 1996 to 2016, Hispanic students enrolled in schools from nursery school to college went from 8.8 million to 17.9 million. Hispanics now make up 22.7 percent of all students in the United States.”). For a discussion of the barriers faced by Latinx students in college, see, for example, Chris Quintana, *More Latino Students than Ever Are Trying to Get Their Degree, but It’s Fraught and Costly*, USA TODAY (May 23, 2020, 8:27 PM), <https://www.usatoday.com/in-depth/news/nation/2020/01/06/more-hispanic-students-than-ever-go-college-but-cost-high/2520646001/> [<https://perma.cc/43PQ-N3HF>].

106. The ratios plotted in Figure 4 were calculated by dividing the matriculation percentage of a racial group by its percentage of the national population. A ratio of 1 would indicate that the matriculation percentage is equal to the respective population percentage. A ratio of 0.50 would indicate that the matriculation percentage is half of the respective population percentage. A ratio of 2.0 would indicate that the matriculation percentage is twice the racial group’s percentage of the total population.

Latinx population has also increased dramatically (see Figure 3).¹⁰⁷ This suggests that the increase in Latinx representation has been driven by rapid national population growth rather than direct action by the law schools.¹⁰⁸

In contrast to the increases in Latinx matriculation and population, both the matriculation of Black students at U.S. law schools and the Black population in the United States have remained relatively stable over the past twenty years (see Figure 1; Figure 3). As a result, the ratio has been fairly constant (see Figure 4). While the percentage of Latinx students matriculating surpassed that of Black students in 2008 (see Figure 1), Black students have consistently reflected a higher representative ratio in law school classrooms compared to their U.S. population (see Figure 4). It is worth noting, though, that the ratio of matriculation to total U.S. population for Black students was lower in 2019 (0.52) than in 2000 (0.54), the first year of this study, and identical in 2003, the year *Grutter* was decided.

FIGURE 5: RATIO OF NATIONAL LAW SCHOOL DEGREES AWARDED TO U.S. POPULATION BY RACE



The pattern for degrees awarded is virtually identical to that of matriculation: the ratios for both populations are relatively flat (see Figure 5). Again, the Latinx ratio is gradually improving, while the Black ratio is decreasing. In

107. Luis Noe-Bustamante, Mark Hugo Lopez & Jens Manuel Krogstad, *U.S. Hispanic Population Surpassed 60 Million in 2019, but Growth Has Slowed*, PEW RSCH. CTR.: FACT TANK (July 7, 2020), <https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60-million-in-2019-but-growth-has-slowed/> [<https://perma.cc/8TV6-H8BU>] (showing the Latinx population in the United States reached almost 61 million in 2019, up from 35.7 million in 2000).

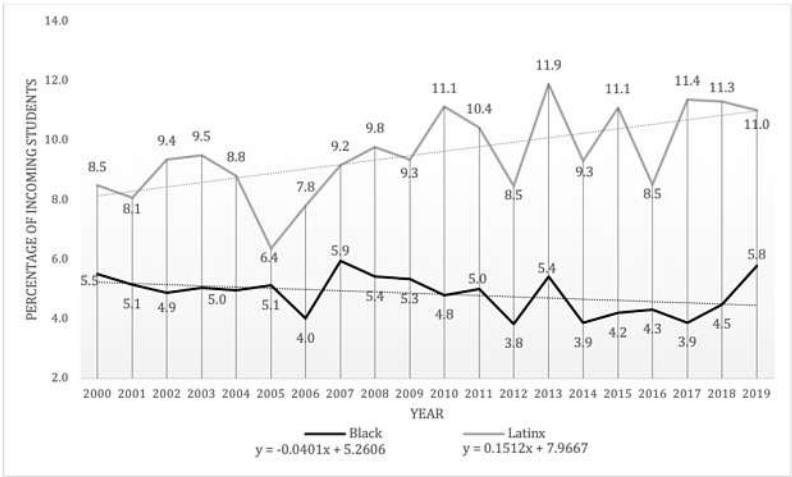
108. In 2000, the ratio of Latinx matriculation to total respective U.S. population was 0.46. The ratio only improved to 0.49 in 2019.

2019, the ratio of degrees awarded to Latinx students surpassed that of Black students.

C. Regional Trends

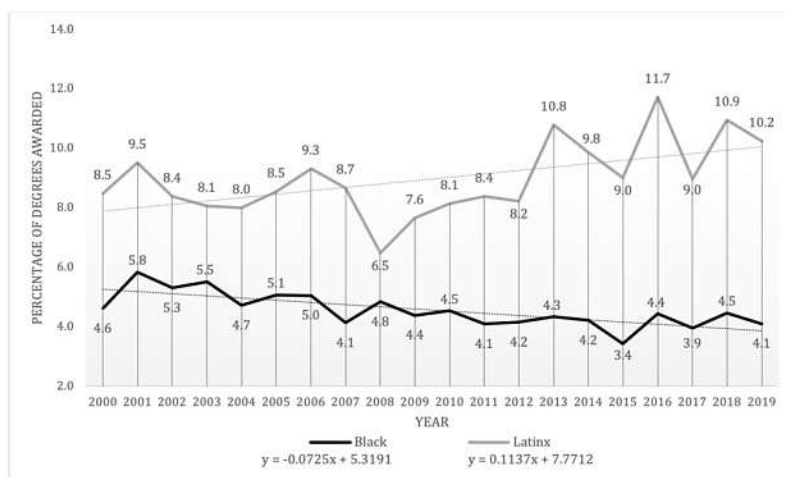
1. The West Region

FIGURE 6: MATRICULATION IN THE WEST REGION BY PERCENTAGE



Like the national average, matriculation of Latinx students is increasing in the West, while that of Black students is decreasing (see Figure 6). The enrollment of Latinx students in this region is several percentage points higher than the national average (9.6% compared to 7.0% nationally) (compare Figure 6 with Figure 1). The enrollment of Black students in this region, however, is consistently several percentage points lower than the national average over the twenty-year period (4.8% compared to 7.0% nationally). While the West saw a spike in Black enrollment in 2019, it was still more than a full percentage point lower than the national average (6.9% nationally compared to 5.8% in the West).

FIGURE 7: DEGREES AWARDED IN THE WEST REGION BY PERCENTAGE



Similar to both the national average and matriculation in this region, the percentage of degrees awarded to Black students in the West is decreasing and is consistently several percentage points lower than the national average (4.6% compared to 6.5% nationally) (compare Figure 7 with Figure 2). The percentage of degrees awarded to Latinx students, however, is increasing and is consistently several percentage points higher than the national average (9.0% compared to 6.3% nationally).

a. A Case Study: University of California, Berkeley

In 1996, California voters banned affirmative action in public education with Proposition 209.¹⁰⁹ One of Justice O'Connor's bases for upholding affirmative action in *Grutter* was the negative impact that banning affirmative action had at public law schools in California.¹¹⁰ Justice Thomas, however, was not convinced: "The sky has not fallen at . . . the University of California, Berkeley . . ."¹¹¹ In his dissent, Justice Thomas compared enrollment of Black and Latinx students in 1996, the last reporting year prior to the enforcement of Proposition 209, with enrollment in 2002, the most recent reporting year in which Berkeley had not used the "express racial

109. California's constitution bars the state from "grant[ing] preferential treatment . . . on the basis of race . . . in the operation of . . . public education." CAL. CONST. art. I, § 31(a). The state of Washington also banned affirmative action in public education in 1998. WASH. REV. CODE § 49.60.400 (1998). No public law school in Washington is included in this data set.

110. See THOMAS, *supra* note 51, at 351–52 ("There was a chart showing the impact on California schools after the referendum abolishing affirmative action. That's what got to her . . . It showed a steep drop-off in minorities. She couldn't accept the effect on elite institutions.").

111. *Grutter v. Bollinger*, 539 U.S. 306, 367 (2003) (Thomas, J., concurring in part and dissenting in part).

discrimination” of an affirmative action plan.¹¹² Because total Black and Latinx student enrollment in 2002 exceeded 1996 levels, Justice Thomas concluded that overturning affirmative action does *not* have a detrimental effect on minority enrollment rates.¹¹³

Justice Thomas’s argument is fundamentally flawed. In 1996, 20 Black students and 28 Latinx students enrolled in Berkeley’s first-year class.¹¹⁴ Six years later in 2002, the number of first-year Black students decreased to 14, while the number of first-year Latinx students increased to 36.¹¹⁵ These totals alone do not tell the whole truth. In 1996, 263 students matriculated at Berkeley Law School,¹¹⁶ meaning 7.6% of incoming students were Black and 10.6% were Latinx. Combined Black and Latinx enrollment for 1996 was 18.2%. In 2002, 277 students matriculated at Berkeley Law School,¹¹⁷ meaning 5.1% of incoming students were Black and 12.7% were Latinx. Thus, combined Black and Latinx enrollment for 2002 was 17.8%. While this is not a dramatic decrease in combined enrollment, these six years clearly show a detrimental effect on Black enrollment: matriculation of Black students decreased by nearly one-third. Increased enrollment of one minority group cannot justify the drastic decrease of another. Black students cannot be left behind.

112. *Id.*

113. *Id.*

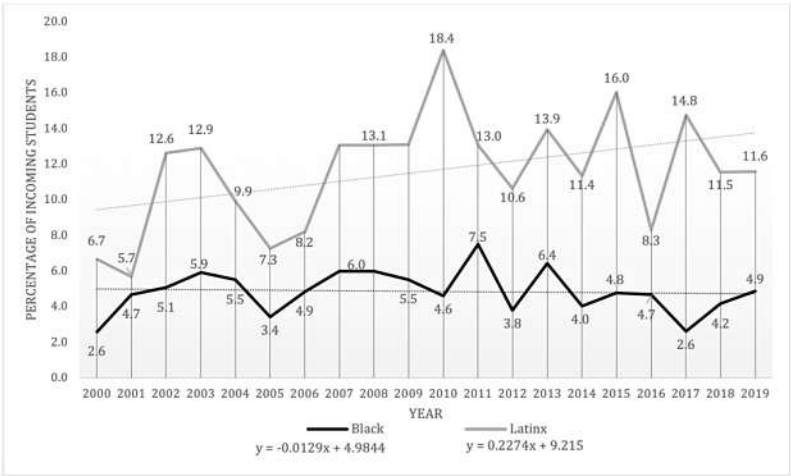
114. *Id.*

115. *Id.*

116. Email from Kenneth R. Williams, Data Specialist, Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass’n, to author (Jan. 16, 2020, 12:46 PM) (on file with the *Michigan Law Review*).

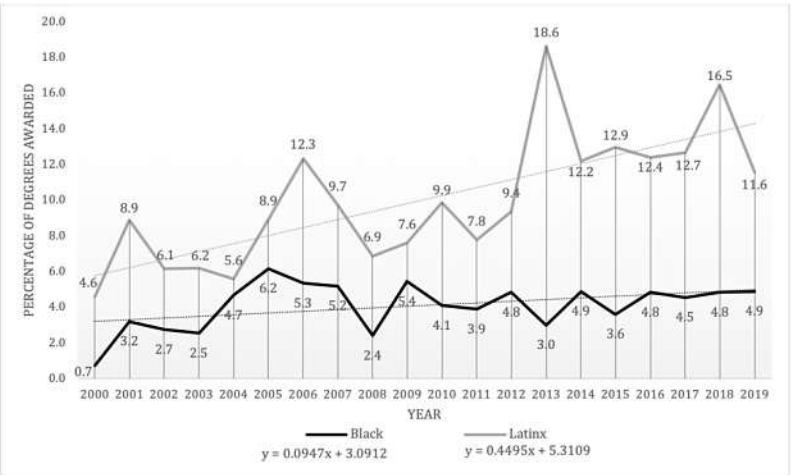
117. See Email from Kenneth R. Williams, *supra* note 12.

FIGURE 8: MATRICULATION AT UNIVERSITY OF CALIFORNIA, BERKELEY LAW SCHOOL BY PERCENTAGE



From 2000 to 2019, the average matriculation of Black students at Berkeley Law has continued to decrease and consistently fails to meet the national average (5.0% compared to 7.0% nationally) (compare Figure 8 with Figure 1). Consistent with Justice Thomas’s 2003 observation,¹¹⁸ Latinx enrollment is increasing and consistently exceeds the national average (12.2% compared to 7.0% nationally).

FIGURE 9: DEGREES AWARDED AT UNIVERSITY OF CALIFORNIA, BERKELEY LAW SCHOOL BY PERCENTAGE



118. See *Grutter*, 539 U.S. at 367 (Thomas, J., concurring in part and dissenting in part).

Unlike matriculation at Berkeley Law, the percentage of degrees awarded to Black students is increasing, though it remains several percentage points below both the national and regional averages (4.1% compared to 6.5% nationally and 4.6% regionally) (compare Figure 9 with Figure 2 and Figure 7).¹¹⁹ Because the matriculation percentage of Black students is decreasing, but the percentage of degrees awarded is increasing, either Black students are transferring to Berkeley Law or non-Black students are dropping out at a faster rate than Black students.¹²⁰ The percentage of degrees awarded to Latinx students is increasing and remains well above both the national and regional averages (10.0% compared to 6.3% nationally and 9.0% regionally).

The 1996 amendment to the California Constitution banning the use of affirmative action in public education does not apply to private institutions.¹²¹ The University of California, Berkeley is the only public law school affected by Proposition 209 that is included in this data set: as private institutions, Stanford University and the University of Southern California (USC) are both unaffected by Proposition 209.¹²² If the use of race-conscious admissions leads to more diverse law schools, then enrollment of and degrees awarded to Black and Latinx students should be higher at Stanford Law and USC Law than at Berkeley Law.

TABLE 2: AVERAGES FOR CALIFORNIA LAW SCHOOLS INCLUDED IN THIS DATA SET¹²³

School (Ranking)	Average Matriculation of Black Students	Average Matriculation of Latinx Students	Average Degrees Awarded to Black Students	Average Degrees Awarded to Latinx Students
Berkeley (#9 tie)	5.0%	12.2%	4.1%	10.0%
Stanford (#2)	7.6%	12.6%	6.7%	12.1%
USC (#18 tie)	8.0%	10.5%	8.1%	10.8%

119. These averages, and those in the remainder of the paragraph, were calculated across the full dataset.

120. An analysis of both drop-out and transfer rates is important to the affirmative action conversation but is not included in this Note.

121. CAL. CONST. art. I, § 31(a).

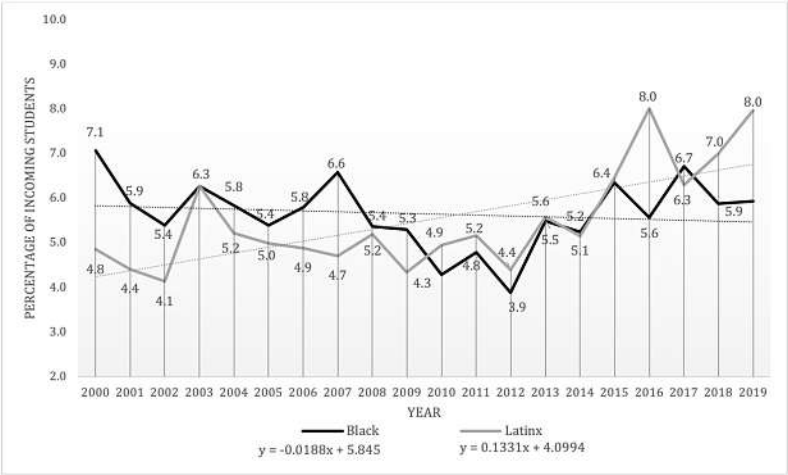
122. See *Stanford University*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-colleges/stanford-university-1305> [<https://perma.cc/P4ZG-ENPQ>]; *University of Southern California*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-colleges/university-of-southern-california-1328> [<https://perma.cc/H18H-N8LT>].

123. In 2019, the Black population of the state of California was lower than the national average at 6.5%, while the Latinx population was dramatically higher at 39.4%. *QuickFacts: California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/CA> [<https://perma.cc/4DKX-3YGS>].

The data show that private institutions have more diverse enrollment than public institutions in California (see Table 2). Average matriculation of both Black and Latinx students at Stanford Law exceeds that of Berkeley Law. The same is true for degrees awarded to both minority groups. While the average percentage of Black students who enrolled at USC exceeds that of Berkeley, average matriculation of Latinx students at USC is almost 1.7% lower than Berkeley’s over this twenty-year period. Degrees awarded to both minority groups at USC exceed that of Berkeley. These data support the conclusion that Proposition 209 has had a detrimental effect on Black and Latinx enrollment at public law schools in California.

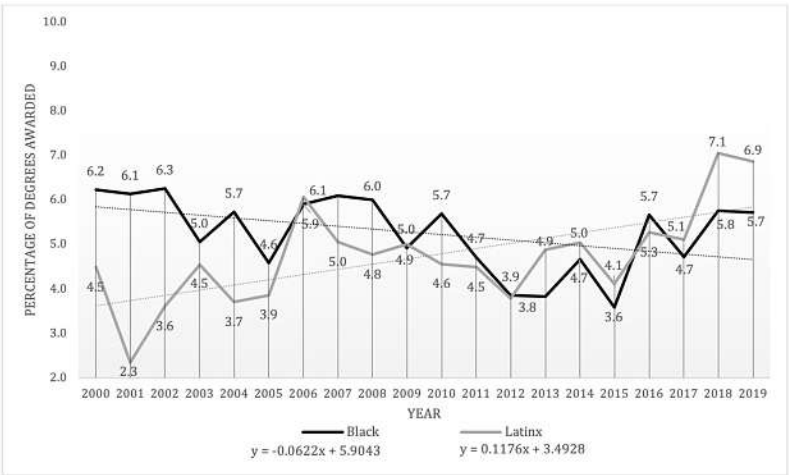
2. The Midwest Region

FIGURE 10: MATRICULATION IN THE MIDWEST REGION BY PERCENTAGE



Consistent with the national average, Latinx enrollment is increasing, and Black enrollment is decreasing in the Midwest (compare Figure 1 with Figure 10). The average matriculation rates for both minority groups are lower than the national average: Black enrollment averaged 5.6% over the twenty-year period and Latinx enrollment averaged 5.5%, compared to 7.0% nationally (compare Figure 10 with Figure 1). While the region saw a dramatic decrease of Black enrollment from 2000 to 2012 (7.1% to 3.9%), enrollment has been above that low point in the past seven years (see Figure 10).

FIGURE 11: DEGREES AWARDED IN THE MIDWEST REGION BY PERCENTAGE



As is true with matriculation, the percentage of degrees awarded to Black students is decreasing in the Midwest, while degrees awarded to Latinx students is increasing (compare Figure 11 with Figure 10). Again, both averages remain below the national average: the Midwest awarded 5.3% of degrees to Black students over the twenty-year period (compared to 6.5% nationally) and 4.7% to Latinx students (compared to 6.3% nationally) (compare Figure 2 with Figure 11).

a. A Case Study: University of Michigan

In direct response to the decision in *Grutter*, the state of Michigan passed Proposal 2 in 2006.¹²⁴ The Proposal amended the Michigan constitution to prohibit the state’s use of racial preferences in higher education admission systems.¹²⁵ The Michigan Constitution now mandates that public colleges and universities in Michigan, the focus of both *Grutter* and *Gratz*, “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public education.”¹²⁶

124. See *Victory in Schuette*, CTR. FOR INDIVIDUAL RTS. (Mar. 22, 2014), <https://www.cir-usa.org/cases/schuette-v-bamn/> [<https://perma.cc/LG23-BDDC>].

125. *Id.* The amendment was challenged in court, but the U.S. Supreme Court eventually found that it did not violate the Fourteenth Amendment and held that individual states could ban affirmative action. *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291 (2014).

126. MICH. CONST. art. I, § 26, cl. 1.

FIGURE 12: MATRICULATION AT THE UNIVERSITY OF MICHIGAN LAW SCHOOL BY PERCENTAGE

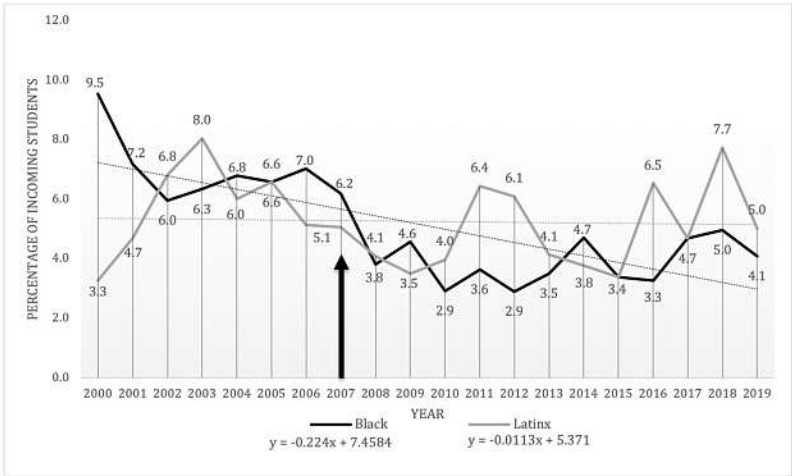
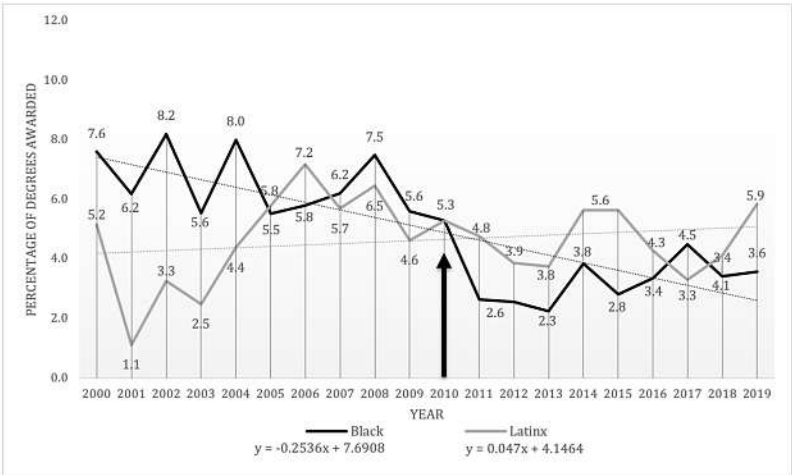


FIGURE 13: DEGREES AWARDED AT THE UNIVERSITY OF MICHIGAN LAW SCHOOL BY PERCENTAGE



Michigan Law provides a stark example of the consequences of overruling affirmative action. In contrast to any of the individual regions, enrollment of both Black and Latinx students is decreasing at Michigan Law (see

Figure 12).¹²⁷ From 2000 to 2006, Black student enrollment was on par with the national average (compare Figure 12 with Figure 1). From 2001 to 2005, Latinx student enrollment exceeded the national average. Since 2007, the year of the first incoming entering class *after* Proposal 2 was passed, shown by the arrow in Figure 12, enrollment of both Black and Latinx students at Michigan Law has consistently been far below the national average.

The average percentage of degrees awarded to Black students at Michigan Law was 6.6% for the graduating classes of 2000 through 2009, which includes incoming classes *before* Proposal 2 was passed (see Figure 13). From 2009 to 2019, that average dropped by nearly half, to 3.4%. Since 2010, the year of the first graduating class affected by Proposal 2 (shown by the arrow in Figure 13), the percentage of degrees awarded to both Black and Latinx students has been considerably lower than the corresponding national average (compare Figure 13 with Figure 12). Until 2009, the average percentage of degrees awarded to Latinx students at Michigan Law was increasing (see Figure 13). Although the percentage has fluctuated, the average has been decreasing since 2010.¹²⁸

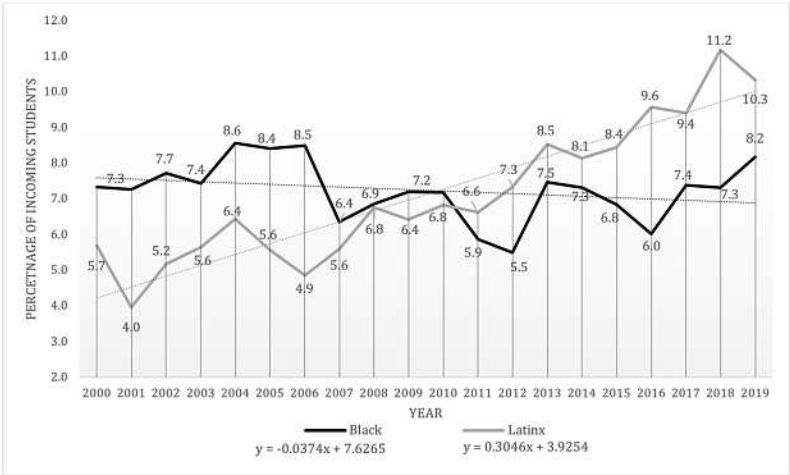
This case study illuminates an unfortunate reality: prohibiting affirmative action plans in law school admissions has a detrimental effect on Black and Latinx enrollment. When the day finally comes that the composition of our law school classrooms achieves critical mass, this study suggests that overruling affirmative action would *still* have harmful consequences. Since the progress toward critical mass at Michigan Law immediately reversed once affirmative action was repealed in the state, affirmative action is a necessary equalizer to avoid future enrollment plummets nationally—even if law schools nationally achieve parity.

127. Of the twenty-nine schools in the sample set, only four have decreasing matriculating percentages for Latinx students: Stanford, University of Southern California, Arizona State University, and the University of Michigan.

128. The slope of this trendline for degrees awarded to Latinx students from 2000 to 2009 is 0.3646 while the slope of the trendline from 2010 to 2019 is -0.0041.

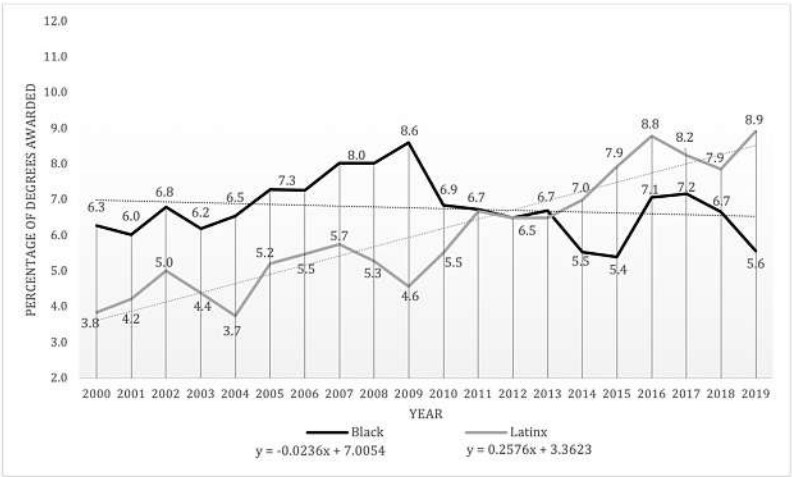
3. The Northeast Region

FIGURE 14: MATRICULATION IN THE NORTHEAST REGION BY PERCENTAGE



Matriculation trends in the Northeast are consistent with the West, the Midwest, and the national average: enrollment of Black students is decreasing, while enrollment of Latinx students is increasing (compare Figure 14 with Figure 6, Figure 10, and Figure 1). Latinx enrollment has nearly doubled in this region over the twenty-year period (see Figure 14). Average enrollment of both minority groups exceeds the national average: 7.2% for Black students and 7.1% compared to Latinx students, compared to 7.0% nationally (compare Figure 14 with Figure 1).

FIGURE 15: DEGREES AWARDED IN THE NORTHEAST REGION BY PERCENTAGE

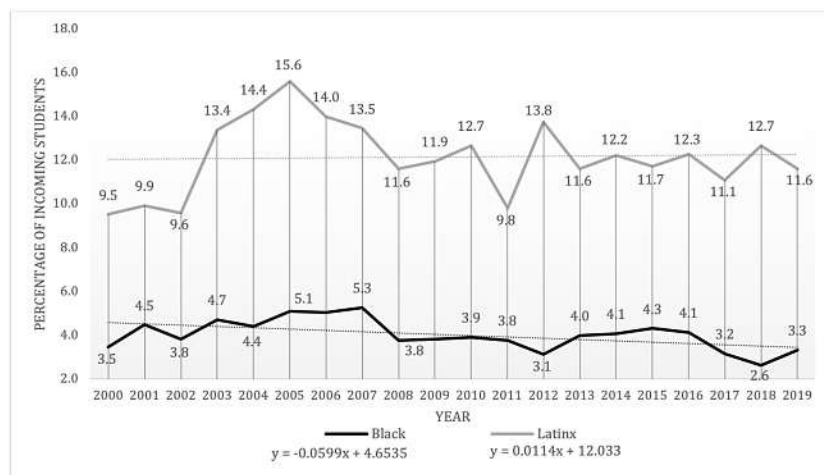


Similarly, the trends for degrees awarded in the Northeast mirror the previous regions and the national average (compare Figure 15 with Figure 2). The percentage of degrees awarded to Black students in the Northeast is decreasing, while the percentage of degrees awarded to Latinx students has more than doubled (see Figure 15). The average percentage of degrees awarded to Black students during the twenty-year period is 6.8% (compared to 6.5% nationally), and the average for Latinx students is 6.1% (compared to 6.3% nationally) (compare Figure 15 with Figure 2). Given that the average percentage of degrees awarded to both groups is lower than the enrollment percentage, either Black and Latinx students are dropping out, or students who do not identify as Black or Latinx are transferring into schools in the region.¹²⁹

129. See *supra* note 120.

4. The Southwest Region

FIGURE 16: MATRICULATION IN THE SOUTHWEST REGION BY PERCENTAGE

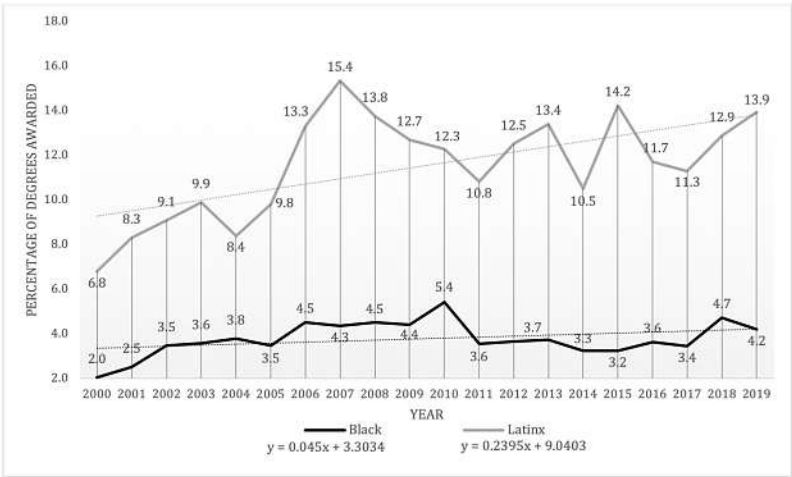


Consistent with the national average, Black enrollment in the Southwest is decreasing while Latinx enrollment is increasing (see Figure 1; Figure 16). However, the rate of increase is nowhere near the national rate or that of any other individual region (compare Figure 16 with Figure 1, Figure 6, Figure 10, Figure 14, and Figure 18).¹³⁰ Even considering the minimal rate of increase in Latinx enrollment, the average percentage of Latinx enrollment in this region over the twenty-year period far exceeds the national average (12.2% compared to 7.0% nationally) (compare Figure 16 with Figure 1).¹³¹ Additionally, the Southwest shows the clearest divide between the enrollment of Black and Latinx students, with matriculation of Latinx students between two and nearly five times higher than Black students each year (see Figure 16). Black enrollment in this region remained two to four percentage points lower than the national average each year (averaging 4.0% over the twenty-year period, compared to 7.0% nationally) (compare Figure 16 with Figure 1).

130. In other words, the trendline for Latinx matriculation in the Southwest is the flattest of any region, but the slope is still positive.

131. In 2004 and 2005, the matriculation percentage of Latinx students in the Southwest exceeded the national population percentage of Latinx residents (14.4% Latinx enrollment compared to 14.04% of the national population in 2004, and 15.6% Latinx enrollment compared to 14.39% of the national population in 2005). In other words, for two years included in this study, the Southwest achieved a level of diversity with respect to Latinx matriculation that would satisfy Justice O'Connor's criteria for repealing affirmative action.

FIGURE 17: DEGREES AWARDED IN THE SOUTHWEST REGION BY PERCENTAGE

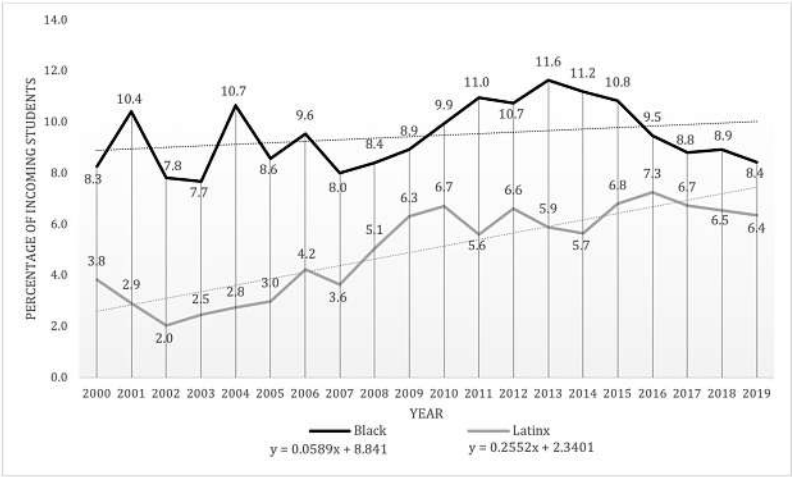


On the other hand, the percentage of degrees awarded to Black students in the Southwest is increasing (see Figure 17).¹³² Despite the increase, the percentage of degrees awarded to Black students averaged 3.8% over the twenty-year period (compared to 6.5% nationally) (compare Figure 17 with Figure 2). The percentage of degrees awarded to Latinx students has nearly doubled in twenty years and remains well above the national average each year (11.6% in the Southwest compared to 6.3% nationally).

132. Since the matriculation percentage of Black students is decreasing, but the degrees awarded percentage is increasing within this region, Black students must be transferring into the three schools included in this sample set. See *supra* note 120.

5. The Southeast Region

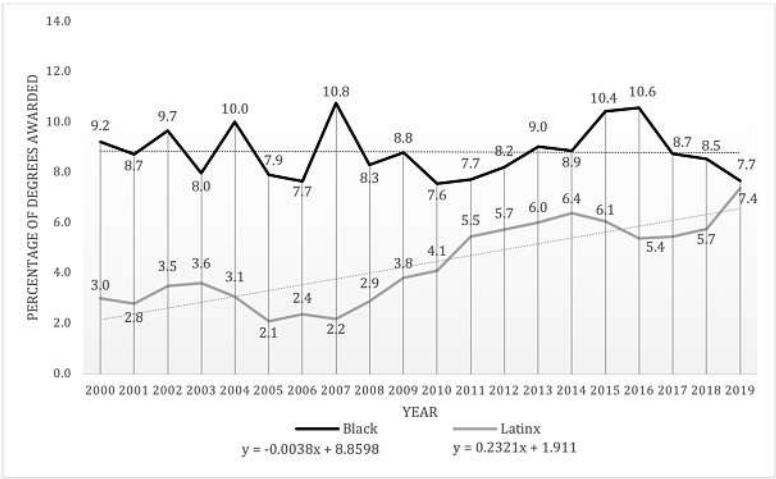
FIGURE 18: MATRICULATION IN THE SOUTHEAST REGION BY PERCENTAGE



The Southeast, the largest region of the data set, is the only region in which Black enrollment is increasing (compare Figure 18 with Figure 6, Figure 10, Figure 14, and Figure 16). Additionally, the Southeast is the only region in which Black enrollment consistently surpasses the national average by up to four percentage points and remains higher than Latinx enrollment during the entire twenty-year period (compare Figure 18 with Figure 1).¹³³ The average matriculation of Black students in this region is 9.5%, the highest of any individual region and 2.5% higher than the national average (compare Figure 18 with Figure 1, Figure 6, Figure 10, Figure 14, and Figure 16). Latinx enrollment is increasing dramatically—faster than the national rate—and it is on track to surpass Black enrollment in the Southeast in the very near future (compare Figure 18 with Figure 1). Average Latinx enrollment in this region, however, remains below the national average over the twenty-year period (5.0% compared to 7.0% nationally).

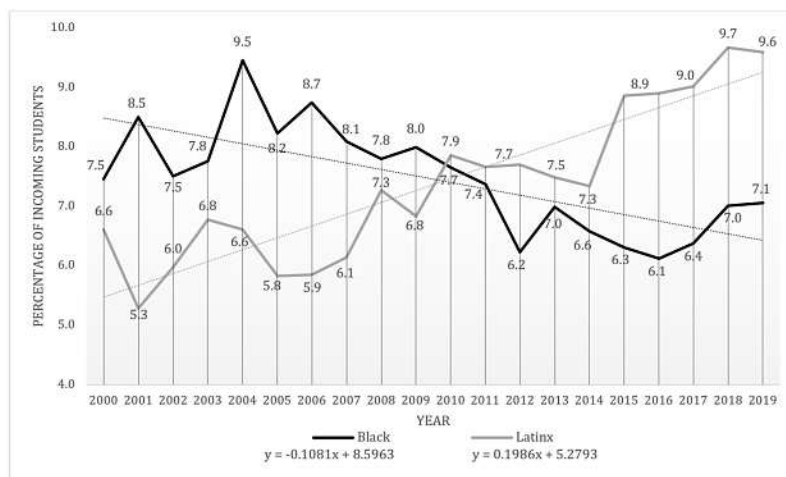
133. It is worth noting that the Southeast has the highest concentration of Black residents compared to any other region in the United States. See *United States African-American Population*, CENSUSSCOPE, http://www.censusscope.org/us/map_nhBlack.html [https://perma.cc/3A6P-S865].

FIGURE 19: DEGREES AWARDED IN THE SOUTHEAST REGION BY PERCENTAGE



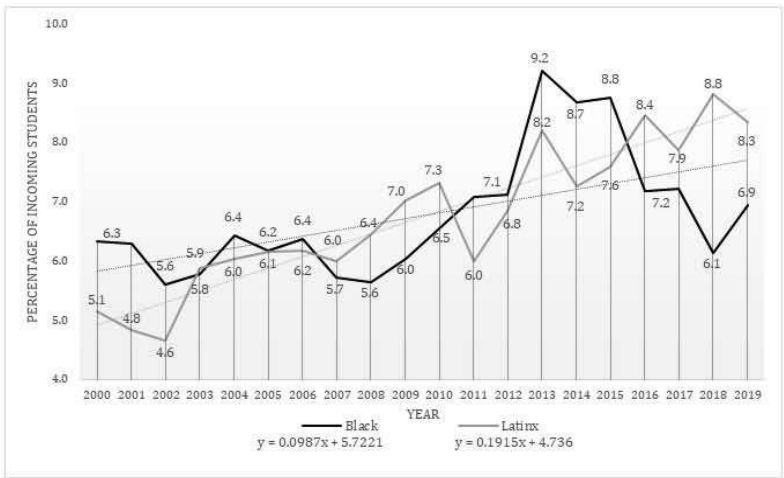
The Southeast is the only region in which the percentage of degrees awarded to Black students consistently surpasses the national average by up to 3%, averaging 8.8% overall during the twenty-year period (compared to 6.5% nationally) (compare Figure 19 with Figure 2). For nineteen years of the twenty-year period, the percentage of degrees awarded to Black students in the Southeast remained higher than that of Latinx students (see Figure 19). While matriculation in this region is increasing, the percentage of degrees awarded to Black students is decreasing (compare Figure 18 with Figure 19). The percentage of degrees awarded to Latinx students is increasing but averages only 4.3% over the twenty-year period (compared to 6.3% nationally) (see Figure 2; Figure 19).

D. Trends by Ranking

FIGURE 20: MATRICULATION IN LAW SCHOOLS INCLUDED IN THE T-14 BY PERCENTAGE¹³⁴

134. There were ten law schools within the T-14 included in this analysis: Yale University (Northeast); Stanford University (West); Harvard University (Northeast); University of Chicago (Midwest); New York University (Northeast); University of Virginia (Southeast); University of Michigan (Midwest); Duke University (Southeast); University of California, Berkeley (West); and Georgetown University (Southeast). Two of these ten schools (20%) are public and in states that have banned affirmative action, which may skew the results: University of Michigan and University of California, Berkeley. See *supra* notes 109, 126.

FIGURE 21: MATRICULATION IN LAW SCHOOLS OUTSIDE THE T-14 BY PERCENTAGE¹³⁵



Matriculation of Latinx students within the ten “Top-14” (T-14)¹³⁶ law schools has consistently met or exceeded the national average, while matriculation of Latinx students in the nineteen law schools outside of the T-14 only exceeded the national average in 2005 and 2006 (and, even then, by only one or two tenths of a percentage) (compare Figure 20, Figure 21, and Table 3 with Figure 1).

TABLE 3: AVERAGES FOR T-14 AND NON-T-14 LAW SCHOOLS INCLUDED IN THIS DATA SET

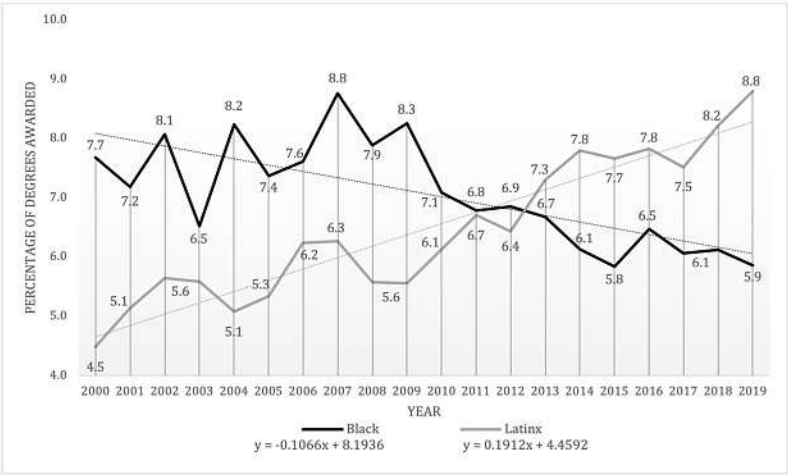
	Average Matriculation of Black Students	Average Matriculation of Latinx Students	Average Degrees Awarded to Black Students	Average Degrees Awarded to Latinx Students
Top-14	7.5%	7.4%	7.1%	6.5%
Outside the Top-14	6.8%	6.7%	6.0%	6.1%

135. The remaining nineteen law schools are included here. One of these nineteen schools (5.3%) is public and in a state that has banned affirmative action: Arizona State University. Arizona voters passed Proposition 107 in 2010, banning the consideration of race in public universities. Scott Jaschik, *Arizona Bans Affirmative Action*, INSIDE HIGHER ED (Nov. 3, 2010), <https://www.insidehighered.com/news/2010/11/03/arizona-bans-affirmative-action> [https://perma.cc/XF4Q-QC3H].

136. *Why Are the “Top 14” Law Schools Called the “Top 14”?*, POWERSCORE (June 11, 2016), <https://blog.powerscore.com/lSAT/bid-211356-why-are-the-top-14-law-schools-called-the-top-14/> [http://perma.cc/EG4U-RYBZ].

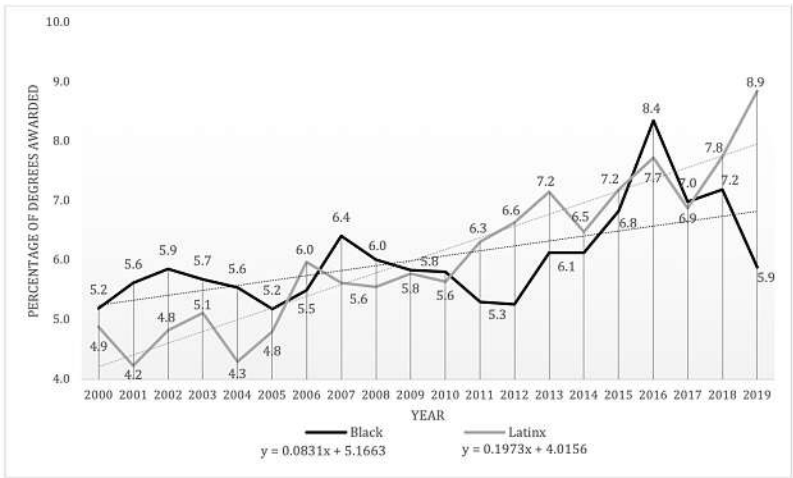
Although matriculation percentages of Black students in the T-14 are decreasing, the average over twenty years remains higher than both the national average and that of the nineteen law schools outside of the T-14 (compare Figure 20 with Figure 1 and Figure 21). Black enrollment shows opposite trends between these two data sets: it is decreasing within the ten T-14 law schools, but it is increasing within the other nineteen (compare Figure 20 with Figure 21). Considering that matriculation of Black and Latinx students at the ten T-14 schools exceeded that of Black and Latinx students at the nineteen less prestigious institutions for the majority of this twenty-year period, the inherent negative correlation that Justice Thomas expected between elite status and minority enrollment does not exist.¹³⁷

FIGURE 22: DEGREES AWARDED BY LAW SCHOOLS INCLUDED IN THE T-14 BY PERCENTAGE



137. See Figure 20 & Figure 21.

FIGURE 23: DEGREES AWARDED BY LAW SCHOOLS OUTSIDE THE T-14 BY PERCENTAGE



Among the non-T-14 schools covered in this analysis, the percentage of degrees awarded to Black students is increasing, in contrast to the national average (compare Figure 23 with Figure 2). The percentage of degrees awarded to Black students at the ten T-14 law schools met or exceeded the national average each year from 2000 to 2015 (compare Figure 22 with Figure 2).¹³⁸ The same is true for Latinx students at the ten T-14 law schools from 2001 to 2018, except in 2012.¹³⁹ The percentage of degrees awarded to Black students in the nineteen schools outside the T-14, however, did not exceed the national average until 2015, while the percentage of degrees awarded to Latinx students did not exceed the national average during the entire twenty-year period (compare Figure 23 with Figure 2).¹⁴⁰

In his dissent in *Grutter*, Justice Thomas suggested that if schools like the University of Michigan Law School became less elite by reducing their admission standards for students of all races, more students of color would be admitted without the need for “racial discrimination.”¹⁴¹ The facts pre-

138. The percentage of degrees awarded to Black students at the ten T-14 law schools exceeded the national average again in 2019 due to the dramatic decrease in the national average.

139. In 2012, the national average exceeded that of the T-14 by just one tenth of a percent.

140. In 2000, the average percentage of degrees awarded to Latinx students in the nineteen schools outside the T-14 exceeded the national average by just two tenths of a percent.

141. See *Grutter v. Bollinger*, 539 U.S. 306, 361 (2003) (Thomas, J., concurring in part and dissenting in part) (“The interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions ‘standards’ that, in turn, create the Law School’s ‘need’ to discriminate on the basis of race.”).

sented here invalidate Justice Thomas's assumption that less-elite schools have more diverse student bodies.

IV. REASONABLE ALTERNATIVES?

If the Court follows through with Justice O'Connor's prediction to ban affirmative action twenty-five years after *Grutter*, it is unlikely that any alternative to the consideration of race will be effective. Creating percentage plans that guarantee admission to public colleges for top graduates from each high school in the state, as upheld in *Fisher v. University of Texas*,¹⁴² would not be effective for graduate programs. Percentage plans are functionally incompatible with law school admissions procedures, which consider students from across the nation and take into account, most importantly, strong academic achievement, including undergraduate GPA or LSAT score, as well as recommendations, leadership ability, and motivation for attendance.¹⁴³ Percentage plans are impractical in this context due to the volume of undergraduate institutions from which the nation's law schools recruit and accept students. Additionally, the ability of percentage plans to admit a meaningful number of diverse applicants to competitive universities requires the existence of segregated high schools.¹⁴⁴ Outside of historically Black colleges and universities, four-year undergraduate institutions composed of primarily students of color do not exist in significant numbers within the United States.¹⁴⁵

Adding socioeconomic factors to admissions by giving an advantage to students who face economic hardship but show impressive academic performance is also unlikely to succeed as an alternative to race-conscious admissions. Consideration of socioeconomic status in isolation without the consideration of race is unlikely to produce a racially diverse student body. Although Black and Latinx residents are disproportionately poor,¹⁴⁶ white residents drastically outnumber both populations at the lowest income lev-

142. 136 S. Ct. 2198, 2208–09, 2213–15 (2016).

143. See, e.g., Shawn P. O'Connor, *Learn the 5 Deciding Factors in Law School Admissions*, U.S. NEWS & WORLD REP. (Nov. 12, 2012, 10:00 AM), <https://www.usnews.com/education/blogs/law-admissions-lowdown/2012/11/12/learn-the-5-deciding-factors-in-law-school-admissions> [<https://perma.cc/G6MA-BF42>].

144. *Fisher*, 136 S. Ct. at 2213 (“Percentage plans are ‘adopted with racially segregated neighborhoods and schools front and center stage.’” (quoting *Fisher v. Univ. of Tex.*, 570 U.S. 297, 335 (2013) (Ginsburg, J., dissenting))).

145. See, e.g., Brief of the BLSAs, *supra* note 47, at 23–25; TOMAS MONARREZ & KELIA WASHINGTON, URB. INST., RACIAL AND ETHNIC REPRESENTATION IN POSTSECONDARY EDUCATION (2020), https://www.urban.org/research/publication/racial-and-ethnic-representation-postsecondary-education/view/full_report [<https://perma.cc/Z8HU-72WB>].

146. The average household income for white residents in 2018 was \$98,261, while the average household income for Black residents was \$58,665 and \$70,945 for Hispanic residents in the same year. *Income and Poverty in the United States: 2018*, U.S. CENSUS BUREAU, tbl.A-2 (Sept. 2019), <https://www.census.gov/data/tables/2019/demo/income-poverty/p60-266.html> [<https://perma.cc/9ASY-CC4X>].

els¹⁴⁷ and are more likely than applicants of color to have test scores that qualify them for admission to elite law schools.¹⁴⁸ Because socioeconomic status considerations fail to focus on the disparities that are particular to people of color, this alternative does not rival the consideration of race.¹⁴⁹

CONCLUSION

[I]n order to treat some persons equally, we must treat them differently.

—Justice Harry Blackmun¹⁵⁰

If the Court continues to recognize diversity as a compelling government interest and accepts the hard truth this data set illuminates, the use of affirmative action in law school admissions should be maintained, or even increased, for both Black and Latinx students. At first glance, Latinx enrollment appears to be improving, whereas Black enrollment is visibly worsening.¹⁵¹ Upon closer analysis, two very different stories materialize but ultimately lead to the same conclusion. For Black students, matriculation and degrees awarded have remained stable on average but are considerably lower than the Black population nationally.¹⁵² For Latinx students, matriculation and degrees awarded have dramatically increased; the same is true, however, of the national Latinx population.¹⁵³ As a result, the ratio of enrollment and degrees awarded to the respective populations has remained stagnant for both minority groups.

147. In 2018, the poverty rate of Black residents was 24.2% (approximately 9.49 million people), Hispanic residents 21% (approximately 11.85 million people), and white residents 11.6% (approximately 26.73 million people). *Maps & Data, POVERTY USA*, <https://www.povertyusa.org/data/2018> [<https://perma.cc/7ZF8-6WXW>].

148. According to the Law School Admission Council, Caucasian and Asian/Pacific Islander test takers have the highest average LSAT scores, while Black test takers and Puerto Rican test takers have the lowest average LSAT scores. Susan P. Dalessandro, Lisa C. Anthony & Lynda M. Reese, *LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2007–2008 Through 2013–2014 Testing Years (TR 14–02)*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/data-research/research/lSAT-performance-regional-gender-and-racialethnic-breakdowns-2007-2008> [<https://perma.cc/S86G-7X5X>].

149. The wealth gap between Black and white Americans is even more pronounced than the income gap. According to 2016 U.S. Census data on wealth and asset ownership, the average white household has a net worth of \$114,700, while the average Black household's net worth is just \$12,920, and the average Hispanic household's net worth is \$21,420. *Wealth, Asset Ownership, & Debt of Households Detailed Tables: 2016, Wealth and Asset Ownership Table*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2016/demo/wealth/wealth-asset-ownership.html> [<https://perma.cc/C7CJ-WRKT>].

150. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

151. See Figure 1.

152. Compare Figure 1, and Figure 2, with Figure 3.

153. Compare Figure 1, and Figure 2, with Figure 3.

Affirmative action is a necessary equalizer in law school admissions.¹⁵⁴ Considering the lack of progress law schools have made, reversing course on affirmative action would be harmful to both citizens and the legal profession. This research shows that affirmative action, as it stands, is not improving representation of Black or Latinx students in law school classrooms.¹⁵⁵ Without an improvement of representation, it is unlikely that critical mass has been achieved. But this research also shows that repealing affirmative action has detrimental effects.¹⁵⁶ In short: doing *something* is better than doing nothing at all. That being said, other approaches may prove to be more effective, and we should welcome creative solutions as well.

Lawyers hold critical positions of power. State governors are often lawyers; so are a great proportion of the members of both the U.S. Senate and House of Representatives,¹⁵⁷ not to mention judges, prosecutors, and the like. Law schools are a significant pipeline to these positions. As Justice O'Connor emphasized in *Grutter*, "Access to legal education (and thus the legal profession) *must* be inclusive of talented and qualified individuals of *every race and ethnicity*, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."¹⁵⁸ Abandoning race-conscious admissions would surely hinder law schools in their ability to admit a diverse body of students, which means it would also hinder their ability to properly train future lawyers.¹⁵⁹

154. "[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity." *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

155. For a discussion of the harmful effects that lack of representation has on Black students, see Hannah Taylor, *The Empty Promise of the Supreme Court's Landmark Affirmative Action Case*, SLATE (June 12, 2020, 1:50 PM), <https://slate.com/news-and-politics/2020/06/grutter-v-bollinger-michigan-law-diversity-racism.html> [<https://perma.cc/WE6Z-UR8V>].

156. See *supra* Sections III.C.1.a & III.C.2.a.

157. *Grutter*, 539 U.S. at 332.

158. *Id.* at 332–33 (emphasis added).

159. See *supra* note 39 and accompanying text.

APPENDIX A

FIGURE A1. MAP OF THE UNITED STATES DIVIDED BY REGION¹⁶⁰



160. *United States Regions*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/maps/united-states-regions/> [https://perma.cc/35AS-8N87].

