Stunted Growth: Assessing the Stagnant Enrollment of African-American Students at the Nation's Law Schools

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STUNTED GROWTH: ASSESSING THE STAGNANT ENROLLMENT OF AFRICAN-AMERICAN STUDENTS AT THE NATION'S LAW SCHOOLS

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In 1844, Macon B. Allen successfully passed the bar examination in the state of Maine. In most historical contexts, this would have been fairly uneventful news. Allen’s successful exam performance, however, enabled him to become the first African-American lawyer in the United States. While there is little documentation of his personal reaction to this landmark achievement, one can be fairly certain that he hoped his accomplishment would open the door for future African-Americans in the field of law.

Mr. Allen was able to attain his legal education through an apprenticeship with practicing attorneys in Maine. Four years after passing the bar in Maine, the Governor of Massachusetts appointed Allen as a justice of the peace, making him the first black to serve in any judicial capacity in the country. At the time, still nearly twenty years before the beginning of the Civil War, the majority of the country’s African-American citizens were still slaves. It was illegal in every state in the South, notwithstanding Tennessee, to formally educate slaves, leaving approximately ninety percent of black adults in the South illiterate.

I would like to thank colleagues Mary Wright and David Green, as well as my excellent research assistants, Stanley Graham and Mercedes Restucha, for their assistance with this project. I also want to thank my wife, Wendy, for taking care of everything else, as she always does.

2. Id. at 94. There may have been other African-Americans loosely engaged in the practice of law at the time, but Allen is widely acknowledged as the first black to do so. Id.
4. Id. at 238.
5. See Kevin D. Brown & Vinay Sitapati, Lessons Learned From Comparing the Application of Constitutional Law and Federal Anti-Discrimination Law to African-Americans in the U.S. and Dalits in India in the Context of Higher Education, 24 HARV. BLACKLETTER L.J. 3, 10 (2008) (noting that the 1860 U.S. Census reported that ninety-two percent of the black population lived in the south and ninety-two percent of that number were enslaved).
abuse in the North, racial inequities made it daunting for African-Americans all over the country to obtain any type of education.\(^7\)

One hundred sixty-three years later, there can be little doubt that blacks who desire to become legal practitioners have a level of access to education that was not conceivable at the time of Allen’s feat. While this certainly represents progress, statistics suggest much more work needs to be done. As of 2000, there were 33,865 African-American (or black) lawyers, representing a total of just 3.9% of all attorneys in the country.\(^8\) The 2000 United States Census listed a total of 36.4 million people who reported themselves as African-American.\(^9\) So, while African-Americans are approximately 12.9\% of the U.S. population,\(^10\) only 0.1\% of the nation’s black citizens are lawyers. Conversely, white\(^11\) Americans comprised approximately 75\% of the nation’s population in the 2000 Census,\(^12\) but compose roughly 90\% of the nation’s attorneys.\(^13\) While there are certainly pockets of sustained optimism that the numbers of black attorneys will increase with the further passage of time, a gathering storm of dynamics hints that such hopefulness may be misplaced and imprudent. Conversely, it may be that today’s legal and socioeconomic landscape instead results in an even more palpable famine of black attorneys in the future.

This Article will address the confluence of issues that may culminate in the constructive cessation of the black attorney. Part I examines the historical struggle of African-Americans to attain access to formal legal education. Part II will focus on the amalgam of modern-day circumstances that seem certain to create even more formidable hurdles to increasing the number of the nation’s black lawyers. Part III urges public and private law schools to work more diligently, both on an individual

\(^7\) See DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 137-38 (2004) (discussing the ineffective instruction received by black children in both segregated and predominantly white schools).
\(^10\) MCKINNON, supra note 9, at 1, 3. This total percentage reflects those who identify as African-American and at least one other race. Id.
\(^11\) See GRIECO & CASSIDY, supra note 9, at 2 (stating that the U.S. Census Bureau defines “white” as those individuals who have origins from the people of Europe, the Middle East, or North Africa).
and collective basis, to ensure that the dreams of future black lawyers will not be deferred—or perhaps even denied almost completely.

I. THE HISTORICAL STRUGGLE FOR ACCESS

What now constitutes legal education in the United States evolved gradually from several modes of early instructional settings. Initially, the customary method of legal education was the apprenticeship, similar to what first-year students experience in their first summer after law school today. Legal apprentices received training through a number of tasks, including research, regular conversations with their mentor, observation of the attorney in court or other legal proceedings, and completion of fundamental administrative office tasks. Almost all thirteen of the original states originally required some type of apprenticeship before one could be considered a lawyer, and only a handful of states required formal education before one was eligible to begin an apprenticeship. The independent law program emerged from the apprenticeship system, with lawyers offering instruction to multiple students simultaneously. Prospective attorneys could also study law at a few colleges or universities, but only as a part of that institution’s general curriculum. Eventually, colleges and universities began to develop law programs that were independent of the university’s general curriculum. In 1817, Harvard became the first university to establish a free-standing law school.

The first viable opportunity for black students to attain a legal education in numbers came at Howard University, a historically black college in Washington, D.C. Howard was chartered by the United States Congress in 1867 and opened its School of Law in 1869. As part of Reconstruction after the Civil War, Congress had enacted the Thirteenth, Fourteenth, and Fifteenth Amendments, creating a...
need for lawyers who could help African-Americans protect the rights promoted by
the newly created amendments.27 Six students comprised Howard's first class of
law students, and they met at night in the homes and offices of faculty members.28
It would be nearly seventy years before more options emerged for prospective
black students interested in law.29 Eventually, however, law schools opened at
other historically black colleges and universities ("HBCU"), including North
Carolina Central University in Durham, North Carolina (1940),30 Texas Southern
University in Houston, Texas (1947),31 Southern University in Baton Rouge,
Louisiana (1947),32 Florida A&M University in Tallahassee, Florida (1951),33 and
the University of the District of Columbia in Washington, D.C. (1986).34

The doors of white institutions remained firmly closed to aspiring black law
students until Sweatt v. Painter35 was decided by the United States Supreme Court
in 1950. Heman Sweatt, the plaintiff, applied for admission to the University of
Texas Law School for its February 1946 term.36 Texas rejected Sweatt's
application because he was black.37 When Sweatt applied, there were only twenty-
three black lawyers in the entire state of Texas, which had an African-American
population of 800,000.38 At the time there were no law schools for black students
in Texas, and Sweatt's suit alleged that the school's rejection of his application on
the basis of his race violated the Equal Protection Clause of the Fourteenth

27. See Howard History, supra note 22.
28. Id.
29. See generally Edward S. Littlejohn & Leonard Rubinowitz, Black Enrollment in Law Schools:
Forward to the Past?, 12 T. MARSHALL L. REV. 415, 436-37 (1987) (noting that by the 1960s, the Civil
Rights Movement, elementary and secondary educational programs, and college assistance programs,
provided increased opportunities for black students interested in pursuing legal careers).
about/history.html (last visited, Nov. 16, 2008).
31. Texas Southern University, About TSU, http://www.tsu.edu/pages/112.asp (last visited Nov. 16,
2008). The law school, later named the Thurgood Marshall School of Law, was acquired by Texas
Southern University in part as a response to the lawsuit filed by Heman Sweatt whose application to the
University of Texas Law School was rejected because he was black. Id.; see also Sweatt v. Painter, 339
U.S. 629, 636 (1950) (holding that the Equal Protection clause of the Fourteenth Amendment required
the University of Texas Law School to admit a black applicant who was rejected solely on the basis of
race).
32. Southern University Law Center, History and Mission of SU Law Center, http://www.sulc.edu/
about/history.htm (last visited Nov. 16, 2008).
33. Florida A&M University College of Law, About Us, http://www.famu.edu/index.cfm?a=law&p=AboutUs
(last visited Nov. 16, 2008). The College of Law was founded in 1949, admitted its first class in 1951, closed its doors in 1968, and re-opened again in
2000. Id. The College of Law is housed in Orlando, Florida, while the undergraduate campus remains
in Tallahassee. Id.
34. University of District of Columbia David A. Clark School of Law, The School of Law,
http://www.law.udc.edu/?page=History (last visited Nov. 16, 2008). Each of the listed law schools on
the campus of historically black colleges and universities ("HBCU") is still in operation today.
35. 339 U.S. at 629.
36. Id. at 631.
37. Id.
38. Katherine L. Chapman, Do You Remember Heman Marion Sweatt?, 67 TEX. B.J. 364, 366
(2004).
Amendment. The state trial court agreed with Sweatt’s theory, but chose not to compel his admission to the law school. The Court instead continued the case, and gave the state six months to provide Sweatt and others similarly situated with substantially equivalent law school facilities. The subsequently created school, which was to be part of the Texas State University for Negroes (now Texas Southern University), was deemed substantially similar by the Texas Supreme Court; Sweatt refused to attend and appealed to the United States Supreme Court.

The U.S. Supreme Court reversed the Texas Supreme Court, finding that the difference between the University of Texas campus and the Texas State campus with regard to faculty size, student body enrollment, accreditation status, curriculum, and facilities, clearly showed there was nothing equivalent about the two schools. The Court’s ruling paved the way for Sweatt and five other black students to enter the University of Texas Law School in the fall of 1950, but did not reach the issue of whether separate but equal educational facilities were constitutionally permissible. Sweatt did, however, lay the foundation for future rulings by the Court that would begin to chip away at the country’s segregationist laws.

In theory, Sweatt opened the doors for more African-American students and other students of color to gain access to the nation’s previously all-white schools of law. The task of actually matriculating to those law schools proved to be much more difficult in practice. Georgia, for example, spent over $400,000 in 1963 to provide scholarships for black students to study law outside of the state—despite a desegregation order from a federal court. Other schools weighted the Law School Admission Test (LSAT) score heavier than an applicant’s undergraduate grade point average, likely as a pretense for keeping their schools segregated. One of

40. Id. at 632.
41. Id.
42. Id.
43. Id. at 633-34.
45. BELL, supra note 7, at 144. The Court would not reach this question until the 1954 decision of Brown v. Board of Education, 347 U.S. 483 (1954).
46. Sweatt was one of several cases where lawyers were able to isolate the duality between the white schools and “substantially equal” schools for blacks to prove that states were not meeting the “equality” portion of the separate but equal doctrine established in Plessy v. Ferguson, 163 U.S. 537 (1896), to show that states were in violation of the Equal Protection Clause. In most circumstances, alternative graduate and professional schools formed for black students were unequal and subsequently struck down by several courts. See, e.g., Sipuel v. Bd. of Regents, 332 U.S. 631, 632-33 (1948) (ordering state of Oklahoma to provide black law school applicant with legal education that conformed with Constitution’s Equal Protection Clause); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 337 (1938) (striking down Missouri law of separate but equal facilities for whites and blacks as unconstitutional); Pearson v. Murray, 182 A. 590, 594 (Md. 1936) (rejecting idea that state provision of scholarships for blacks to attend schools outside of the state was substantially equal).
47. Littlejohn & Rubinowitz, supra note 29, at 432 n.86.
the more noteworthy cases out of the post-Sweatt period came from Florida, where Virgil Hawkins engaged in a lengthy fight during the 1950s with the University of Florida College of Law over his application, which was rejected because he was black.\textsuperscript{49} Despite the holdings of \textit{Sweatt} and \textit{Brown v. Board of Education},\textsuperscript{50} the Florida Supreme Court repeatedly denied Hawkins' requests for relief, initially stating that the recently opened Florida A&M College of Law was a suitable equivalent under the prevailing \textit{Plessy}\textsuperscript{51} standard,\textsuperscript{52} then holding that he could be admitted only if he could prove that his acceptance would not create "public mischief."\textsuperscript{53} On another front, the American Association of Law Schools' (AALS) Committee on Racial Discrimination proposed a regulation that would revoke AALS membership from any school that did not admit black students.\textsuperscript{54} The proposal failed because it could not garner the necessary support from at least two-thirds of its member schools.\textsuperscript{55}

The number of students of color at law schools across the country finally began to rise in the mid-to-late 1960s and 1970s.\textsuperscript{56} The Civil Rights Movement forced the American landscape to change both socially and politically, due in part to the pressure generated by the movement's leaders, the rise of the Black Power Movement, and the desire to reinforce the merits of democracy to the rest of the world during the Cold War Period.\textsuperscript{57} One result of the movement was affirmative action, which began to gain a foothold in many sectors of American society during this period.\textsuperscript{58} Affirmative action, in its myriad forms, was designed to provide more opportunities for African-Americans who had been denied equal protection of the country's laws since the birth of the Constitution.\textsuperscript{59} In 1965, President Lyndon

\begin{footnotes}
\item[50] 347 U.S. 483.
\item[51] \textit{Plessy v. Ferguson}, 163 U.S. 537.
\item[52] \textit{State ex rel. Hawkins v. Bd. of Control}, 47 So. 2d 608, 613 ( Fla. 1950), \textit{vacated}, 347 U.S. 971 (1954).
\item[53] \textit{State ex rel. Hawkins v. Bd. of Control}, 93 So. 2d 354, 360 ( Fla. 1957).
\item[54] Kidder, \textit{supra} note 44, at 5-6.
\item[55] \textit{Id.} at 6.
\item[56] \textit{Id.} at 8.
\item[57] \textit{See generally} Richard Delgado, \textit{Explaining the Rise and Fall of African-American Fortunes-Interest Convergence and Civil Rights Gains}, 37 HARV. C.R.-C.L. L. REV. 369 (2002) (discussing the work of several scholars whose work connects American interest in the Cold War with advances in the Civil Rights Movement).
\item[58] In the case of DeFunis v. Odegaard, 416 U.S. 312 (1974), a white student denied admission to the University of Washington's Law School filed suit challenging the constitutionality of the school's affirmative action program. \textit{Id.} at 312. The Washington Supreme Court found the program to be constitutional, but because DeFunis had been subsequently admitted to the school and was near graduation, the U.S. Supreme Court deemed the matter moot and dismissed the case. \textit{Id.} In a dissenting opinion, Justice Douglas elaborated that affirmative action made sense as a remedy for prior discrimination or to mitigate any racial bias in either standardized testing or other admissions criteria. \textit{Id.} at 335-40 (Douglas, J., dissenting).
\item[59] \textit{See Frank Rene Lopez, Pedagogy on Teaching Race & Law: Beyond "Talk Show" Discussions,} 10 TEX. HISP. J.L. & POL'Y 39, 47-48 (2004) (detailing the long history of oppression of people of color and arguing that affirmative action is an attempt to right the past wrongs in American history).
\end{footnotes}
Johnson buttressed the enactment of the Civil Rights Act of 1964\(^6\) by signing Executive Order 11,246, mandating that federal contractors use affirmative action in the recruitment and promotion of minorities.\(^6\) Six years later, President Richard Nixon changed Johnson's initial order and made contractors institute their own affirmative action plans and programs to bring minorities into the fold, which led more public and private institutions to create their own plans and programs.\(^6\)

Affirmative action led to more race-conscious admissions policies at law schools, which increased the enrollment of black students nationwide.\(^6\) In the academic year (AY) 1964-1965, approximately 700 black students attended the nation's law schools.\(^6\) One-third of those students were enrolled at an HBCU law school,\(^6\) while the other 433 were dispersed among the country's predominantly white schools.\(^6\) A mere ten years later (AY 1974-1975), black student enrollment at 154 of the country's law schools had escalated to 4995 students.\(^6\) In AY 1994-1995, African-American enrollment at the nation's law schools peaked at 9681 students.\(^6\) That, however, represents the high-water mark for the last twenty years.\(^6\)

Since that zenith year, black enrollment at the nation's law schools has stagnated,\(^7\) despite this being a time when the overall minority enrollment at law

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\(^6\) Civil Rights Act, 42 U.S.C. §§ 1981-2000h-6 (2006). It is important to acknowledge that other laws, such as Head Start and the Elementary and Secondary Education Act of 1965, also aided in providing more of a foundation for future black students with a curriculum that targeted disadvantaged youths. \(\text{Littlejohn} \& \text{Rubinowitz, supra note 29, at 436.}\)


\(^6\) Jodi Miller, *Democracy in Free Fall: The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 13 (1999). Other scholars have argued convincingly that affirmative action did not really begin to take root until the riots in American cities in the late 1960s, and it was the accompanying fear of the threat to the existing social order that hastened universities and employers to move more aggressively in adopting corrective policies, not any moral obligations stemming from the Civil Rights Movement. See, e.g., Richard Delgado & Jean Stefancic, *California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1583 (2000) (discussing the possibility that affirmative action was not driven by an altruistic moral obligation, but was instead a somewhat fearful response to societal pressures).

\(^6\) Kidder, *supra* note 44, at 11-12. Professor Kidder also points to several other key factors that may have had a positive impact on minority enrollment. From 1960-1975, there was a significant jump in the number of individuals who took the LSAT, increasing from 23,800 in 1960 to 133,316 in 1975. \(\text{Id. at 14.}\) The increase in American births following World War II, that is, the “baby boom,” also contributed to the increase in applications during the 1960s and 1970s because those children had reached adulthood. \(\text{Id.}\) The G.I. Bill and economic demand for educated employees helped create a demand for legal education, which was now more accessible than ever before. \(\text{Id. at 15.}\)


\(^6\) \(\text{Id. at 20.}\)

\(^6\) \(\text{Id. This was an average of three-and-a-half black students at each predominantly white school.}\)

\(^6\) \(\text{Id. at 435 tbl.2 (citing ABA, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL, 1985 LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS 66-67 (1986 & Supp. 1987)).}\)


\(^6\) \(\text{Id.}\)

\(^7\) In AY 2006-2007, a total of 9529 black students were enrolled in 191 law schools nationwide.
schools nationwide is steadily increasing. In the fall of 2006, a total of 141,031 students were enrolled in J.D. programs, 9529 of whom were black, or 6.8% of the country’s law school students. This statistic represents only slight improvement from thirty years earlier, when 4.7% of the nation’s law students in AY 1976-1977 were African-American. While the current numbers are clearly a far cry from the initial attempts of Heman Sweatt and Virgil Hawkins, the static numbers are cause for concern. The central inquiry, therefore, is, why is this happening? At a time when there are more doors open to students of all ethnicities, why have black students been unable to access law school in greater numbers?

Id. This number represented a sizable jump from the previous year’s number of 9195 students, but still falls 152 students short of AY 1994-1995. Id.

71. In AY 2006-2007, a total of 30,557 students who identified as minorities were enrolled in law schools across the country. LSAC, Total Minority Enrollment, http://www.lsac.org/pdfs/2007-2008/TotalMinorityEnrollment.pdf (last visited Nov. 16, 2008). This is the highest figure in the last twenty years and in some ways is an encouraging figure because it shows law schools across the country are becoming slightly less homogeneous. Id. Still, it does show a paradigm shift in that approximately one-third of those minority students are African-American, whereas twenty-one years earlier, in AY 1986-1987, almost half of all minority law students were African-American. Id.

72. LSAC, African-American Enrollment, supra note 68.

## African-American Law School Enrollment

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II. THE CHALLENGES AT BAR

In the 2003 case of Grutter v. Bollinger, the United States Supreme Court rejected a challenge to the admissions program at the University of Michigan's School of Law. The plaintiffs in Grutter alleged that the school's use of race as a "predominant factor" in the admissions process was tantamount to the establishment of a racial quota, and therefore violated the Equal Protection Clause of the Constitution. The Court rejected this contention, holding that the law school's use of race in its admissions policy was constitutionally permissible because it was tailored appropriately to meet the compelling interest of widening the educational benefits that come from a diverse student body. Writing for the majority, Justice Sandra Day O'Connor said that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." O'Connor noted in dicta, however, that the Court's opinion in Grutter would eventually self-destruct:

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

Five years have passed since the Grutter holding, leaving approximately a twenty-year statute of limitations on the use of diversity in higher education as a compelling governmental interest in the eyes of the Court. Justice O'Connor's hypothesis infers that there will be a continued trek of societal advancement that will eventually make the subject of race in this context completely extraneous. Given the country's history, time will tell as to whether such optimism bears fruit or proves to be somewhat naïve. What is abundantly evident, however, is that the pool of black students who are qualifying for law school does not appear to be getting deeper, even at a time when the overall non-white law school enrollment is growing steadily. Several problematic issues make addressing this matter a daunting challenge.

76. Id. at 343-44.
77. Id. at 317.
78. Id. at 343.
79. Id. at 332.
80. Id. at 343.
A. Housing Patterns and Public Education

Generally, parents understand that the future upward mobility of their children will be shaped in large part by the quality of the elementary and secondary schools they attend, making schools a top priority when families are deciding where to live. At these introductory levels, students can develop the study habits and skill sets that will empower them to climb the education ladder successfully. Other key initiatives, such as enrolling children in preschool child development programs, keeping smaller class sizes, and retaining experienced, certified teachers, all play significant roles in securing positive learning outcomes for students. Achieving the above-referenced initiatives requires financial resources, and in much of the country, the ability to generate monies for schools is tied largely to property wealth. The residential isolation that currently exists between ethnicities has contributed mightily to the discrepancy between the returns on education received by many white students and those received by black students. Naturally, this affects the numbers of African-American students who develop the ability needed to navigate college, and ultimately impacts the quantity of black students who are deemed admissible by law schools.

1. The Ongoing Dilemma of Residential Segregation

In 1910, approximately ninety percent of African-Americans living in the United States resided in the Southern part of the country. Following World War I, however, the tide of foreign immigrants that had previously traveled to America seeking work began to recede, creating a shortage of unskilled labor in the North. Because northern manufacturers needed laborers to keep their companies operable, they began hiring more African-Americans and women. At the end of World War II, roughly six of every ten people living in metropolitan areas resided in the major cities themselves, making the city the principal location for opportunity and advancement. The demographics of major cities began to change during the 1950s. The large losses suffered by the housing industry during the Depression

81. See generally Anthony Downs, Opening Up the Suburbs 76 (1973) (discussing the reasons why many families move to suburban areas in an attempt to provide better educational opportunities for their children, stating that “parents believe formal education is vital to their children’s eventual economic and personal success”).
82. Id.; see also William L. Taylor, The Continuing Struggle for Equal Educational Opportunity, in Race, Poverty, and American Cities 467 (John C. Boger & Judith W. Wegner eds., 1996) (stating that “where investments are made in preschool programs for economically disadvantaged children, many more children are likely to succeed in school”).
83. Taylor, supra note 82, at 470-71.
84. Id. at 471.
85. Id. at 467-72.
86. Id. at 466.
89. Id. at 227.
91. Id. at 134.
were exacerbated by World War II, as most available materials were funneled toward the combat effort.\textsuperscript{92} When veterans began returning home after the war, there simply were not enough places to live, leaving too many to reside in cramped, tenement-like conditions.\textsuperscript{93} The problems were worse in metropolitan areas where many veterans were forced into homelessness.\textsuperscript{94}

To address the dilemma, the federal government, spurred by the Veterans Administration and the Federal Housing Administration (FHA), engaged in an aggressive agenda to resolve the difficulties.\textsuperscript{95} From 1944-1950, the G.I. Bill allowed veterans to purchase homes with little or no money down,\textsuperscript{96} leading to significant stimulations in the home construction market.\textsuperscript{97} Contractors and developers, however, focused post-war construction not in the cities but on less expensive undeveloped land outside of the cities.\textsuperscript{98} This led to the formation of areas we now know as the suburbs, and created another "great migration" of sorts, as whites of varying socioeconomic levels began flocking to the suburbs in large numbers.\textsuperscript{99} From 1950-1980, suburbs gained approximately sixty million people, while the population dropped in eighteen of the nation's twenty-five largest cities.\textsuperscript{100}

The growth of suburbia meant that entities that were traditionally city-based hallmarks, like banks and hospitals, began relocating to suburban enclaves.\textsuperscript{101} The increase in population led to increased demand for shopping centers and office space and pushed more job opportunities to the suburbs,\textsuperscript{102} while central cities lost manufacturing and clerical positions in large numbers.\textsuperscript{103} Most importantly, the post-war mass relocations created shortfalls in the tax base of the central cities, handicapping their provision of services and allocation of resources to remaining residents.\textsuperscript{104}

The African-American family's path to the suburbs was initially quite cumbersome. When suburbs began gaining in popularity, many builders and developers simply would not sell property to blacks.\textsuperscript{105} Bill Levitt, one of the

\textsuperscript{93} See id. (noting that after World War II many veterans along with their families lived in places like attics, box cars, and chicken coops).
\textsuperscript{94} See id. (noting that Washington, D.C., reported about 25,000 homeless veterans and in Chicago the number was as high as 100,000).
\textsuperscript{95} Id. at 49-52.
\textsuperscript{96} Id. at 50.
\textsuperscript{97} See Milton Greenberg, The GI Bill of Rights, in HISTORIANS ON AMERICA 46, 51-52 (2007), available at http://usinfo.state.gov/products/pubs/historians/chapter07.htm (noting that the G.I. Bill's VA Loan program encouraged developers to build more homes and that while housing starts were at 114,000 in 1944, by 1950 they were up to 1.7 million).
\textsuperscript{98} W. DENNIS KEATING, THE SUBURBAN RACIAL DILEMMA 8 (1994).
\textsuperscript{99} Id. at 8-11.
\textsuperscript{100} HALBERSTAM, supra note 90, at 142.
\textsuperscript{101} CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 5 (1996).
\textsuperscript{102} See id. at 5-7.
\textsuperscript{103} Id. at 7.
\textsuperscript{104} JOHN GUINThER, DIRECTION OF CITIES 169-170 (1996).
\textsuperscript{105} KEATING, supra note 98, at 8.
nation's first builders to apply principles of mass production to housing, was one of
many builders to refuse to open his suburbs to black consumers:

As a Jew I have no room in my mind or heart for racial prejudice. But . . . I have come to know that if we sell one house to a Negro family, then 90 or 95 percent of our white customers will not buy into the community. That is their attitude, not ours. . . . As a company our position is simply this: We can solve a housing problem, or we can try to solve a racial problem but we cannot combine the two.\textsuperscript{106}

Blacks who were shut out of suburbs by builders could not seek viable recourse through the federal government because those entities played key roles in carrying out the exclusion.\textsuperscript{107} The FHA considered housing for African-Americans to be an investment risk and regularly refused to underwrite mortgages in areas threatened by potential integration.\textsuperscript{108} The FHA and Home Owners Loan Corporation, which made loans to homeowners,\textsuperscript{109} also formulated a system ranking the eligibility of communities to receive loans that were either funded or insured by the federal government.\textsuperscript{110} Federal agencies “red-lined” areas deemed susceptible to integration or areas with high concentrations of black residents and did not fund or underwrite loans in those neighborhoods.\textsuperscript{111} Even blacks who could afford to follow the resources from the cities to the suburbs were regularly “steered” away from non-black communities by real-estate agents,\textsuperscript{112} keeping blacks isolated in densely populated areas peppered with low to moderate income households.\textsuperscript{113}

This combination of factors meant that for nearly two decades African-Americans were systematically excluded from suburban housing. While access marginally improved after the signing of the Fair Housing Act of 1968, removing racial language from federal housing policies,\textsuperscript{114} African-Americans seeking to move to the suburbs continued to face significant barriers.\textsuperscript{115} Though roughly 7.1

\begin{footnotes}
\item[106] HALBERSTAM, supra note 90, at 141.
\item[107] KING, supra note 92, at 55.
\item[108] Id. (quoting RICHARD O. DAVIES, HOUSING REFORM DURING THE TRUMAN ADMINISTRATION 124 (1966)).
\item[110] Id. at 1669-70.
\item[111] Id. at 1670.
\item[112] Robin D. G. Kelley, Into the Fire: 1970 to the Present, in TO MAKE OUR WORLD ANEW: A HISTORY OF AFRICAN-AMERICANS 570 (Robin D. G. Kelley & Earl Lewis eds., 2000). The practice of “steering” involved realtors directing consumers toward neighborhoods that were comprised largely of individuals and families of the same ethnicity or race. Note, Racial Steering: The Real Estate Broker and Title VIII, 85 YALE L.J. 808, 809 (1976).
\item[113] DOWNS, supra note 81, at 14.
\item[115] See Kelley, supra note 112, at 570 (noting that black buyers in the housing market routinely did not receive accurate information about the status of the property, were rejected for mortgages at higher
\end{footnotes}
millions of African-Americans reached the suburbs by the mid-1980s, today's residential neighborhoods remain largely segregated communities. Whites, on average, are more likely to live in neighborhoods that are approximately eighty percent white, while African-Americans reside in areas that are predominantly non-white.

2. The Impact of "Local Control"

In the 1954 landmark Brown v. Board of Education decision, the United States Supreme Court held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." But due to the segregated housing patterns taking shape around many of the country's major cities, the ideals of Brown were undercut before the decision could even be penned. Once Brown became law, its core principles eventually ran chin-first into the notion of "local control," which has been endorsed forcefully by the Supreme Court on numerous occasions.

Pursuant to the Tenth Amendment, schools are generally developed and controlled locally. The U.S. Department of Education has stated that only about nine percent of money spent on public education comes from the federal government, with the bulk of such dollars coming from the state and local level. A healthy percentage of those funds stem from local property taxes, so typically, the wealthier the neighborhood, the more money there is for the infrastructure of the local school, creating educational settings, resources and facilities that will attract experienced teachers and help put its students ahead of the curve. However, the influence of local taxes clearly plays a pivotal role in rates than whites, and were steered toward non-white neighborhoods).

116. Id.
118. Id. at 495.
119. See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40-44 (1973) (holding that local control over the educational process, the system of taxation, and the distribution of expenditures affords the citizenry the right to tailor the school toward the desires and needs of the community).
120. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.
122. See generally U.S. Dep't of the Treasury, Fact Sheets: Taxes: State and Local Taxes, http://www.treas.gov/education/fact-sheets/taxes/state-local.shtml (last visited Nov. 16, 2008) ("The revenue from property taxes usually goes towards financing public services, such as public schools.").
124. See generally Dep't of Educ., Federal Role, supra note 121 (stating that individual states, the federal government, and private sources all contribute to fund local schools).
125. See, e.g., Greatschools, Chapel Hill-Carrboro Schools, http://www.greatschools.net/cgi-
increasing the likelihood that the student will have an opportunity to receive a quality education.\footnote{126}

Hence, the move of whites to the suburbs beginning in the late 1940s and 1950s created a seismic shift in the available tax-base and led to de facto segregated schools. This segregation still peppers large parts of the educational landscape today. White students are incredibly isolated by ethnicity, with the average white student attending school where nearly eighty percent of his or her peers are white.\footnote{127} The average black student is likely to go to a school that is approximately seventy percent non-white,\footnote{128} often in schools that are located in areas of concentrated poverty.\footnote{129} This duality would not necessarily be so unpalatable if schools were equally positioned with regard to resources, quality teachers, and other amenities. But African-Americans often reside in property-poor districts that frequently cannot attract high-quality instructors or offer advanced-level courses that broaden the school curriculum.\footnote{130} Moreover, the per-pupil spending, potential for supplemental funds through private subsidies and fundraising, and access to vital early-education programs all heavily tilt against students who come from poorer neighborhoods and who reside in the center of urban areas or areas where there are few large property owners at all.\footnote{131} The country’s residential segregation has produced educational segregation that not only routinely produces inferior schooling but also excludes blacks from important social networking structures that can lead to future employment opportunities.\footnote{132}

\footnote{bin/nc/district_profile/87/ (last visited Nov. 16, 2008). The Chapel Hill-Carrboro School District is among the best funded in the state, spending $9258 per pupil in 2005-2006, while the state average of spending expenditures per student was approximately $7951. \textit{Id.} Yet in the district's End-of-Grade testing in 2006-2007, black students lagged far behind their white peers at the elementary and junior high level in subjects such as mathematics and reading. \textit{Id.} Even if the black students in the Chapel Hill-Carrboro District may be outdistancing black students in poorer school districts, the startling achievement gap within the district raises questions about why such gaps still exist, even when the financial stability of the schools is not a substantive concern.}

\footnote{126. See also Deborah Kenn, \textit{Institutionalized, Legal Racism: Housing Segregation and Beyond}, 11 B.U. PUB. INT. L.J. 35, 48-49 (2001) (discussing the connection between “[f]unding public education with income from local property taxes” and the “inequitable distribution of resources in public education”). Professor Kenn also opines that housing segregation and school segregation regularly fuel each other because:  

\begin{quote}

The manner in which public education is funded, coupled with the structural nature of public school districts dividing suburban and city districts, maintains and perpetuates school segregation. The way public education is funded also serves to further the entrenchment of housing segregation in our society. To break this vicious cycle, the public school system needs to be radically revamped and structurally changed.
\end{quote}

\textit{Id.}


\footnote{128. \textit{Id.}}

\footnote{129. \textit{Id.} at 29.}

\footnote{130. Taylor, \textit{supra} note 82, at 471-72.}

\footnote{131. \textit{Id.}}

While the Supreme Court rightfully receives credit for identifying the inequities that necessitated its decision in Brown, the Court's subsequent decisions concerning the interrelation between residential segregation and educational inequity have left much to be desired. For example, by 1970, schools in the greater Detroit area were segregated in large part because of residential housing patterns that left the majority of the city's black residents within the city, while whites lived in the surrounding suburbs. A lengthy fight in the state legislature over community control of the Detroit public schools and the schools within the surrounding suburban districts culminated in a suit by the Detroit branch of the National Association for the Advancement of Colored People (NAACP). In Milliken v. Bradley, the plaintiffs sued the Governor, Attorney General, and State Superintendent of Public Instruction, among others, alleging inter alia that the Detroit Public School System was racially segregated because of the policies, customs, and practices of the defendants. While the complaint did not seek a city-suburban integration plan initially, District Court Judge Stephen Roth concluded that since the Detroit School District was largely seventy to ninety percent black, the only way to truly desegregate the city's school system was to include the fifty-plus predominantly white suburban school districts in any future integration plan, thereby creating one unitary system for Detroit.

On appeal, the U.S. Supreme Court rejected this remedy. The Court stated that in order for the inter-district proposal to be deemed constitutionally permissible, "it must be shown that racially discriminatory acts of the state or local school districts . . . have been a substantial cause of interdistrict segregation." Because the record presented no substantial evidence showing that any of the suburban school districts actively engaged in policies that encouraged segregation, the Court found it "wholly impermissible" to incorporate the suburban districts in any remedy aimed toward desegregating Detroit's schools. In essence, the Court said Brown applied chiefly to de jure segregation within individual school districts, but by so holding, the Court largely green-lighted de facto segregation resulting from district lines created by voluntary, residential segregation. By releasing suburban schools from any legal obligation to support integration efforts in city school systems, Milliken limited the practical impact of Brown considerably.

Despite Milliken, a number of school districts across the country implemented court-supervised desegregation plans throughout the late 1970s and 1980s to

133. See Paul R. Dimond, Beyond Busing: Reflections on Urban Segregation, the Courts, & Equal Opportunity 26, 28 (2005) (noting that 133 of Detroit's public schools were virtually all-black while sixty-nine others were virtually all-white and that Detroit as a city was "heavily black in racial composition" while the surrounding suburbs were virtually all-white).
134. Id. at 26-31.
136. Id. at 722-23.
137. Bradley v. Milliken, 345 F. Supp. 914, 918 (1971); see also Dimond, supra note 133, at 31, 81-85 (discussing the NAACP's initial reluctance to request a city-suburban integration plan and Judge Roth's decision to require a city-suburban integration plan).
139. Id. at 745.
140. Id. at 745-47.
varying degrees of success, but even those efforts are likely to be stifled if they are based chiefly upon race in the future. In June 2007, the U.S. Supreme Court held school districts in Louisville and Seattle to be in violation of the Constitution for their use of race in voluntary student assignment plans.\textsuperscript{141} Both school districts, in their desire to keep certain schools from falling outside a predetermined ethnic balance, used race as a means of determining assignments and placements.\textsuperscript{142} In Louisville, the race of the student was a factor used to resolve whether requested student assignments and transfers would be approved or denied.\textsuperscript{143} Similarly, the Seattle system used race as a means of apportioning enrollment the city’s high schools.\textsuperscript{144} Both school districts contended that their plans provided educational and social benefits because students were learning in racially diverse settings.\textsuperscript{145} In his majority opinion, Chief Justice John Roberts said any potential impact of such plans was a non-issue as neither program’s racial classifications were sufficiently narrowly tailored to withstand a strict scrutiny analysis.\textsuperscript{146} The Chief Justice also claimed that the plurality\textsuperscript{147} decision was truer to the tenets of the Brown decision than the contradictory position of Justice John Paul Stevens’ dissent:

Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. . . . The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.\textsuperscript{148}

The Chief Justice’s opinion reiterated the Court’s position that the U.S. Constitution does not substantively discern between benign discrimination and invidious discrimination.\textsuperscript{149} Perhaps worse, the Court found that avoiding resegregation was not a compelling governmental interest.\textsuperscript{150} The fractured decision produced waves of hand-wringing from both legal observers and civil rights commentators, who claimed that Roberts’ opinion marked the affirmative

\begin{itemize}
  \item \textsuperscript{141} Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2755-59 (2007).
  \item \textsuperscript{142} Id. at 2748-50.
  \item \textsuperscript{143} Id. at 2749-50.
  \item \textsuperscript{144} Id. at 2747-48.
  \item \textsuperscript{145} Id. at 2755.
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} Parents Involved, 127 S. Ct. at 2743-44 (Justice Kennedy did not join in this part of the opinion.).
  \item \textsuperscript{148} Id. at 2768.
  \item \textsuperscript{149} Id. at 2774 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (Thomas, J., concurring in part and concurring in the judgment)).
  \item \textsuperscript{150} Id. at 2757. Chief Justice Roberts wrote: Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”
  \item \textsuperscript{141} Id. (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).
\end{itemize}
abandonment of the principles espoused in *Brown*, and the end of substantive school desegregation.\(^1\)

Our public school system has been, and is likely to remain, a starkly segregated landscape, still separate and still unequal, due in no small part to our thoroughly entrenched geographic and housing isolation. For at least five decades, individual housing choices, the fiscal and zoning policies of local government, and numerous school board adoptions of "school choice" plans cementing suburban access to neighborhood schools have all played pivotal roles in helping produce the above-referenced segregation. This, at minimum, allows one to infer that significant, influential segments of our society never really bought into *Brown* in the first place. Without a solid educational foundation upon which to build at the elementary and secondary level, black students are less likely to have the skill sets essential to gain entry to, and successfully navigate and complete, a college education.

B. The Challenge of Accessing Law School

To be considered for admission to most of the nation's law schools, students must have graduated with a bachelor's degree from an accredited college or university and must have completed the LSAT. African-American students face considerable challenges in meeting both prongs of what seem to be completely objective standards.

1. Navigating College

Over the past thirty years, there has clearly been statistical improvement in reducing high school dropout rates for African-Americans. In 1972, for example, the dropout rate for black students aged sixteen to twenty-four was 21.3%.\(^2\) By 2004, that number dipped to 11.8%, a figure that was still nearly double the dropout rate for white students during the same year.\(^3\) The increased total of African-American high school graduates certainly helps explain why black enrollment at institutions of higher learning has reached its highest numbers yet.\(^4\) Such statistics, while obviously salient, still only tell a portion of the story. Despite the obvious gains, the percentage of African-Americans who finish college remains sluggish. The United States General Accounting Office found that while more than

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151. See, e.g., Erwin Chemerinsky & Charles Clotfelter, Op-Ed., *The Death of Desegregation*, RALEIGH NEWS & OBSERVER, July 3, 2007, at A11 (noting that the decision by the Supreme Court in *Parents Involved* will only hasten the process of American public schools becoming more racially separate and unequal).


153. Id. (noting that 6.8% of white students between the ages of sixteen and twenty-four dropped out of high school in 2004).

154. See JENNIFER CHEESEMAN DAY & AMIE JAMIESON, *School Enrollment 2000, CENSUS 2000 BRIEF 9 tbl.3* (2003), http://www.census.gov/prod/2003pubs/c2kbr-26.pdf (noting that the 2000 Census states that approximately twenty-seven percent of the black population aged eighteen to twenty-four were enrolled in college at the time of the Census, and approximately six percent of the African-American population aged twenty-five-and-over were college students).
half of all students who enrolled in a four-year university in 1995 completed degree requirements within six years, black students graduated at only a thirty-eight percent rate. This figure trails that of white and Asian students, both of whom completed degree requirements at a fifty-five percent clip. This disparity can likely be attributed to some basic rationales.

The skyrocketing cost of higher education impacts students of all backgrounds, but has had an especially harmful affect on too many black college students. According to Census 2000, Asians registered a median income of $51,908. Whites averaged $44,687, Hispanics earned $33,676, and Native-Americans earned $30,599. African-Americans had the lowest median income, $29,423, of each of those other major population groups. That number stems at least in part from a major demographic shift within the black community—African-Americans are not marrying at the same rate they once did. In 1998, the percentage of married blacks in their thirties dropped to forty-two percent, down from sixty-eight percent in 1969. Where marriage frequently yields a two-income household and is a key element in improving the financial status of a family, this


156. GAO REPORT, supra note 155, at 11.

157. See Carlene Young, Issues of Access and Retention for Afro-Americans In Higher Education, 24 PHYLON 55, 57 (1992) (discussing the barriers to gaining a college education for low-income students and stating that almost half of college-bound black students come from families that are defined as poor, whereas only approximately ten percent of white college-bound students are from poor families).


159. Id.

160. Id.

161. Id.

162. Id.


164. See Urban Institute, Wedding Bells Ring in Stability and Economic Gains for Mothers and Children (Sept. 5, 2002), http://www.urban.org/url.cfm?ID=900554 (noting that 1998 data from the U.S. Census Bureau's Survey of Income and Program Participation showed that "poverty rates for cohabiting,
alarming statistical trend suggests that the income gap between black families and families of other ethnicities will get wider before it closes.  

As stated, this is significant because of the increasing costs associated with obtaining a college education. Students who entered a four-year public university in 2007-2008 could expect to spend an average of $13,589 per year in tuition, fees, room and board—an increase of forty-one percent in the last twenty-one years.  

Students who started at four-year private institutions paid an average of $32,307 annually for tuition, fees, room, and board, a twenty-nine percent increase.  

To help meet the financial demand, students are now borrowing more money than ever. In 2005-2006, college students across the nation received nearly $135 billion in student aid. Roughly forty-two percent of this aid came in the form of grants, which is especially desirable for students because it is money that does not have to be repaid. A number of students pay for college with the benefit of grants such as the Federal Pell Grant or the Federal Supplemental Education Opportunity Grant, both of which are based on need. The Pell Grant is heavily utilized, constituting sixty-eight percent of federal grants to students in AY 2005-2006. But the percentage of undergraduate funding that is covered by grant aid has dropped every year since 2001-2002, and the percentage of room, board, tuition, and fees covered by the maximum Pell Grant dropped from forty-two percent in AY 2001-2002 to thirty-three percent in AY 2005-2006. Thus, at a time when the cost of college has steadily increased, the amount of total federal grant aid has not kept pace.

unmarried parents were double those for married parents”).

165. For African-American women who desire to marry men who have attained similar educational credentials, there are fewer numbers from which to choose. From 1974-2004, income levels of black women rose seventy-five percent, while that of black men dropped twelve percent. Downward Mobility, supra note 163. Some women are not inclined to marry a man who earns significantly less or in some cases, nothing at all. Id. One of the ongoing internal discussions within the black community concerns the issue of relationships between African-American men and women. “The fact that young black women are now completing high school and enrolling in college at substantially higher rates than black men also raises concerns about future trends in the growth of the black middle class.” Testimony of Harry J. Holzer to the U.S. Comm’n on Civil Rights, Expanding the African-American Middle Class: Improving Labor Market Outcomes (July 15, 2005), http://www.welfareacademy.org/pubs/poverty/Holzer.pdf.


167. Id. When adjusted for inflation, the private university charges for AY 1977-1978 were $14,404. Id.


169. Id. at 14.

170. Id. at 3.

171. Id. at 5.

172. Id.

173. These figures do not include the state grant money and institutional grant money that is also distributed to need-based students. Institutional grant money increased by $11 billion between AY 1995-1996 and AY 2005-2006. College Board 2006 Trends, supra note 168, at 7.
Private lending companies have stepped in to fill some of the cost gap, which is especially important for students who attend private schools. But it is the nation’s wealthier students who have benefited from the increased availability more than poorer students. The lack of family wealth and ability to attain assistance from private lending entities leaves too many black students in the position of having to work while attending school to help offset some of the costs of attending college. This means students must take reduced course loads in order to fulfill their work responsibilities, making it even more expensive to attend school because it will take longer to graduate—if they manage to graduate at all.

Moreover, because of the lack of quality in many public primary and secondary schools in urban areas, many African-American college students are plagued by deficient preparation for post-secondary education. Much of this is traceable to the fact that so many black students in college have attended schools where resources are scarcer, there is more turnover among teachers, and there is less parental involvement. Since they have not been adequately trained at the elementary and secondary level, black students regularly enter college without the study habits and basic skill sets needed to effectively handle the increased rigor and complexity of college level course work. The combination of insufficient preparation and the lack of financial resources play a sizeable role in reducing an already too shallow pool of potential black law students.

2. Law School Matriculation

A total of 84,000 individuals applied to the nation’s American Bar Association-approved law schools with the hope of starting law school in the fall of 2007. Of that number, 9090 of those applicants were African-American, the
lowest number since the fall of 2001. A total of 3300 African-American students matriculated at law schools for AY 2007-2008, an increase of over ten percent from the fall of 2005. While that number represents improvement in an isolated context, statistical patterns, when viewed over the last ten years, tell a different story. From 1994-2004, the enrollment of African-American students at law schools actually fell by two percent, despite this being a time period when both the total law school enrollment and total non-white law school enrollment showed significant increases. These numbers suggest it is getting harder to maintain—let alone increase—the number of black law students across the country.

Some scholars have suggested this is because schools are relying too heavily on LSAT scores when assessing candidates. The Law School Admissions Council’s (LSAC) regular proclamation that the LSAT is a reliable predictor of law school performance goes unchallenged at many institutions. This, depending on one’s perspective, does make some sense. Applicants come from a number of undergraduate majors and institutions, are of varying age groups, and come from wide-ranging social backgrounds and upbringings. None of those factors are simple to quantify. With so many files to process in a finite amount of time, it is simply easier to look at the test score, in some combination with the undergraduate

Summary Applicants by Ethnic and Gender Group) (last visited Nov. 16, 2008) [hereinafter LSAC, Volume Summary Applicants by Ethnic & Gender Group].

According to the LSAC, a total of 9700 blacks applied to law school in 2002, 10,600 applied in 2003, 10,670 applied in 2004, 10,010 applied in 2005, and 9340 applied in 2006. Id.

LSAC, Volume Summary Matriculants by Ethnic & Gender Group, http://www.lsacnet.org (follow the LSAC Ethnic/Gender Volume Summary link under the Data button, then click Volume Summary Matriculants by Ethnic and Gender Group) (last visited Nov. 16, 2008).


ABA, J.D. Degrees 1984-2004 (Total/Women/Minorities), http://www.abanet.org/legaled/statistics/jd.html (last visited Nov. 16, 2008). In the referenced time period, the total law school enrollment numbered 140,376 students overall. Id. The minority enrollment totaled 29,489 students.


Nussbaumer, supra note 185, at 169.

See id. at 170 (discussing a conference focused on the problematic relationship between over-reliance on the LSAT and its negative impact on students of color); see also Phoebe A. Haddon & Deborah W. Post, Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit, 80 ST. JOHN'S L. REV. 41, 49-77 (2006) (chronicling the undue reliance placed on the LSAT in law school admissions); William C. Kidder, Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education, 12 YALE J.L. & FEMINISM 1, 11-13 (2000) (noting that women are disadvantaged in the law school admissions process because of the LSAT, despite having higher undergraduate grade point averages).

William C. Kidder, Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving “Elite” College Students, 89 CAL. L. REV. 1055, 1065 (2001) (noting that both the LSAC and the ABA believe that too great a reliance is being placed on the LSAT).

LSAC, Volume Summary Applicants by Ethnic & Gender Group, supra note 181.
grade point average, when deciding among candidates. While every school takes other factors for admission into consideration, no amount of community service, work experience, or scaling of obstacles will offset a lower-end LSAT score at many institutions.

This practice is particularly harmful for African-American students who desire to attend law school because they traditionally score lower than white students on the LSAT. In the testing year 2005-2006, white students scored a mean of 152.71 on the LSAT. African-Americans scored a mean of 142.31 during the same period. Therefore, if a law school decides to adopt a “floor” score where it presumptively denies admission to anyone who scores lower than 143, this could conceivably omit large numbers of black students, regardless of how strong other aspects of their file may be. Not only is this LSAT reliance damaging to black students, it is contradictory to the LSAC’s own policies, which encourage admissions officials to refrain from being too dependent upon LSAT scores in making final decisions:

The LSAT should be used as only one of several criteria for evaluation and should not be given undue weight solely because its use is convenient. Those who set admission policies and criteria should always keep in mind the fact that the LSAT does not measure every discipline-related skill necessary for academic work, nor does it measure other factors important to academic success.

The dilemma of increasing the number of black students has been on the radar of many in the legal academy for some time, so it may be too callous to suggest that the academy does not care whether law schools are enrolling African-American students. The American Bar Association has recognized the lack of minority presence as a problem and created the ABA Presidential Advisory Council.

194. Id.
195. See, e.g., Haddon & Post, supra note 187, at 65 (noting that while the ABA does not propose a minimum LSAT score for admission, it is a practice at many schools to deny students who score between 141-143).
197. See George B. Shepherd, No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools, 53 J. LEGAL EDUC. 103, 108-13 (2003) (discussing the history of the legal profession’s awareness of the number of black lawyers and its attempts to both increase and decrease that number).
on Diversity in the Profession, a body that is geared toward improving the “pipeline” of students of color into the legal profession.\textsuperscript{198} The ABA Section of Legal Education and Admissions to the Bar recently proposed to modify its diversity standards.\textsuperscript{199} Standard 211 requires schools to show “concrete action” in their commitment to diversity, but to date, it does not require specific outcomes or actions.\textsuperscript{200} The LSAC regularly holds academic assistance programs and also conducts national and regional workshops in an attempt to increase the ethnic diversity at the nation’s law schools.\textsuperscript{201}

Despite these efforts, it is clear that law schools perceive\textsuperscript{202} themselves to be under considerable market pressure to engage in actions that will make them more competitive in the eyes of the consumer and legal employers, a good bit of which is driven by the annual *U.S. News & World Report* rankings.\textsuperscript{203} While presidents of colleges and universities are often publicly dismissive of the organization’s rankings of schools,\textsuperscript{204} administrators will flaunt any aspect of the rankings that are flattering to their individual school in an effort to woo attractive students.\textsuperscript{205} While the recruitment pitches that drive this academic double-talk are not terribly harmful standing alone, schools may inadvertently penalize black applicants by adjusting some of their policies in an attempt to move from one of the ranking system’s four tiers to the next.

For example, Professor John Nussbaumer of the Thomas Cooley School of Law recently did a limited statistical analysis among ABA-accredited schools in

\begin{itemize}
\item \textsuperscript{198} ABA, Presidential Advisory Council on Diversity in the Profession, http://www.abanet.org/op/councilondiversity/ (last visited Nov. 16, 2008).
\item \textsuperscript{199} ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT TO THE HOUSE OF DELEGATES 1 (2006), available at http://www.abanet.org/media/legaled/hod210_212.pdf.
\item \textsuperscript{200} Id. at 8-9. See also William R. Rakes, Law Schools Must Act on Commitment to Diversity, SYLLABUS (ABA Section of Legal Educ. and Admissions to the Bar, Chicago, Ill.), Spring 2007, at 2-3 (stating that the Standard requires concrete action but not any specific action and alleging that the diversity standard promotes quotas and may force some schools in states where affirmative action has been banned to circumvent the law); Katherine Mangan & Paul Basken, Law-School Accreditor Faces Federal Scrutiny, CHRON. OF HIGHER EDUC., July 13, 2007, at A19 (discussing the concrete action requirement and reporting a request by the Education Department that the ABA provide extensive documentation to prove that such a standard would be applied fairly).
\item \textsuperscript{201} LSAC, Office of Diversity Initiatives, http://www.lsac.org/SpecialInterests/minorities-in-legal-education.asp (last visited Nov. 16, 2008).
\item \textsuperscript{202} I use the language “perceive” in this instance because I am not certain that there is a close, uniform nexus between law school ranking and student choice. It has been my experience that location and cost are the overriding considerations when one chooses a law school. This is not to say that some potential students are not influenced by the *U.S. News & World Report* rankings. I am simply saying that I have not yet encountered concrete data that clearly shows that future law students are heavily influenced by these rankings.
\item \textsuperscript{204} See, e.g., Julie Rawe, The College Rankings Revolt, TIME, Mar. 21, 2007, available at http://www.time.com/time/nation/article/0,8599,1601485,00.html (discussing the negative reactions of several college presidents to ranking systems).
\end{itemize}
eight highly competitive areas—California, New York, Florida, Washington, D.C., Illinois, Ohio, Texas, and Massachusetts. Each study addressed the issue of whether law schools in those eight markets increased their twenty-fifth percentile scores on the LSAT between the years 2002-2004, and whether said adjustments affected African-American enrollment. His study concluded that of the eighty-four schools in the eight areas, sixty-nine raised their twenty-fifth percentile LSAT scores during the time period. Of the sixty-nine schools that increased the lower-end number, forty-three of them saw their enrollment of black students dip by an average of nineteen percent. While enrollment at all schools in the eight areas increased nearly six percent, the total enrollment of African-American students dropped.

Professor Nussbaumer concluded that because there appeared to be a statistically significant correlation between increasing the twenty-fifth percentile LSAT scores and the reduction in black student enrollment, giving undue weight to the LSAT may have a disparate impact on black and other minority students who seek admission to law school. It is highly unlikely that raising the twenty-fifth percentile score by some schools is mere coincidence, especially since the U.S. News & World Report places a high level of importance on the seventy-fifth to twenty-fifth percentile LSAT scores for entering classes when assessing which law schools will fall in what tier. There is little quarrel that the LSAT does have some predictive value, but it should not be used as a marketing device to trumpet the perceived talent of a school’s student body. The pressure to “keep up with the Joneses” and admit students with higher LSAT scores has created an arms race among institutions that can leave black applicants outside of a law school’s doors.

C. The Potential “Fool’s Gold” of Achieving Diversity

Over the last twenty years, few words in legal parlance have generated as much discussion, debate, and emotion as the word “diversity.” Admissions officials at colleges and universities across the country have justified challenges to the use of race in their decisions by citing the need for diverse student populations. The ensuing discourse has centered on the extent to which race should be considered in determining who will receive access to education at the undergraduate, graduate, and professional school levels. In Grutter, the U.S. Supreme Court, at least temporarily, settled part of the legal debate by giving

206. Nussbaumer, supra note 185, at 170.
207. Id.
208. Id. at 174.
209. Id.
210. Id.
211. Id. at 174-75.
conditional approval to the concept of diversity as a compelling governmental interest in law school settings.215 The application of “diversity” principles, however, may not be an elixir for African-American student enrollment.

Justice O’Connor’s majority opinion mentioned the word “diversity” in some context approximately fifty-three times.216 While Justices Clarence Thomas and Antonin Scalia suggested that even the term “diversity” should not be fully trusted, calling it “more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue.”217 Justice O’Connor’s opinion uses the phrase largely in association with the concept of inclusion.218 Still, the opinion never really expressly elevated the meaning of diversity beyond a somewhat theoretical concept, the definition of which can be left open to interpretation.

Nevertheless, for a federal bench and general public that have grown increasingly hostile to the concept of affirmative action, the term “diversity” seems to go down a little bit easier. Professor Trina Jones suggests this is because diversity-centered programs typically do not employ the same language of corrective and distributive justice that has regularly earmarked affirmative action plans.219 The term “diversity” tends to propose inclusiveness, while corrective justice principles are more likely to be seen as exclusionary and dredge up the very racial history that many in the country continually seek to minimize.220 Because more individuals can envision themselves as beneficiaries of diversity-related plans, either due to age, gender, or sexual orientation, such plans are considered more acceptable.221 For historically disadvantaged students though, blind acceptance of diversity as an insurer of access is potentially harmful. While Justice O’Connor’s opinion tied principles of inclusion to the term diversity, many diversity discussions—including *Grutter*—do not distinguish between or among racial ethnicities or groups.222 The history of Asian-Americans and Latinos in the country is markedly different, and the background of African-Americans in America is vastly different from both of those populations. Massing all non-white groups under one diversity umbrella may produce results that have nothing to do with improving the access of those who have been traditionally excluded from legal education.223

One does not have to look far to find a similar example already in existence in much of today’s race jurisprudence. Dr. Stanley Fish noted some time ago that the “colorblind” doctrine that now dots state and federal opinions has evolved from ensuring all of America’s citizens equal protection of the laws, to the increasingly

215. 539 U.S. at 343.
216. Id. at 311-44.
217. Id. at 354 n.3 (Thomas, J., concurring in part and dissenting in part).
218. Id. at 332 (majority opinion).
220. Id.
221. Id.
223. Id. at 552.
popular version today, where the end result is that society is “blind to the effects of what has been done in the past to people because of their color.” There is arguably no similarity whatsoever between the “colorblind” society espoused by Martin Luther King during his 1963 speech at the March on Washington, and the “colorblind” system championed by Chief Justice Roberts in Parents Involved in Community Schools. Similarly, “diversity,” without distinction or nuance, is vulnerable to the same wordplay. Schools may in the future be able to boast of being more diverse because of an increase in retired students or practicing Communists, neither of which would necessarily increase the number of black students.

Thinking of diversity in such an open-ended manner ignores the obvious historical context that created the need for diverse student populations in the first place. As a result, attaining diversity in the abstract is susceptible to making only a minimalist impact that does alarmingly little to promote harmony between the races or address contemporary racism. One of legal education’s primary goals should be educating students beyond the coursework that comprises the bulk of their studies. Ensuring that people of color populate the nation’s law schools—in the student body, faculty, and administration—increases the odds that there will be a deepening of our understanding of race and how it still impacts lives. The diversity goals of law schools should not focus on presenting a more harmonious ethnic pie chart to offer the public, but should instead aim to help reduce racism within the legal field. If diversity goals do not target black students, law schools will obstruct what should remain a desired goal—making certain that students who have been historically excluded receive more opportunities in the future. It is difficult to tell whether the broad understanding of diversity in its currently accepted form actually gets us closer to this goal.

III. THINKING ABOUT THE FUTURE

Few citizens would claim that no progress has been made from the Civil Rights Movement to the present. Advancement has come in cycles for black students who seek legal education, but at a time where there needs to be more progress, significant obstacles still remain. Unfortunately, due to very firmly entrenched societal practices, many of these hurdles appear fairly intractable. If progress is to continue in this area, the onus of increasing enrollment of black students likely rests with law schools themselves.

225. 127 S. Ct. at 2767-68.
226. See Wu, supra note 222, at 554 (discussing the importance of open educational paths to individuals of all racial and ethnic groups).
227. See Jones, supra note 214, at 179 (identifying the lack of diversity as a consequence of historical racism).
Some might contend that special attention to the impasse concerning African-American student enrollment in law school is unnecessary. Although whites and blacks often tend to see the state of today’s race relations in very different lights, there are several core reasons why increasing the number of lawyers of color is vital to the future growth of the profession. Many of these reasons have already been well-documented. The Census Bureau has reported that in roughly one of every ten counties in the United States, people of color now make up the majority of the population. This trend, because of immigration and higher birth rates among African-Americans and Hispanics, is likely to continue for the foreseeable future. A bar that is more representative of its population is apt to increase the odds that practitioners will possess more cultural awareness and sensitivity to issues that are unique to distinct ethnicities, which should translate to enhanced legal services. Additionally, seeing people of color in positions of authority within the judicial system is also more likely to generate trust in the system and its processes, while simultaneously chipping away at the stereotype that it is an elitist framework that is too quick to close its doors in the face of those who lack financial and political resources.

The corporate sector, given the shift of economic power to other parts of the world, has also come to understand the importance of this issue. In Grutter, the U.S. Supreme Court received two amicus briefs signed by a number of top American corporations. The briefs urged the Court to support the University of Michigan’s policies because it makes good business sense for foreign countries that

229. See PollingReport.com, Race and Ethnicity, CNN/Opinion Research Corp. Poll (Jan. 14-17, 2008), http://www.pollingreport.com/race.htm. Fifty-seven percent of white respondents characterized racial discrimination in the United States against African-Americans as either very serious or somewhat serious. Id. Twelve percent of white respondents characterized the discrimination as very serious. Id. Conversely, ninety percent of African-Americans characterized racial discrimination in the United States against blacks as either very serious or somewhat serious. Id. Of that number, fifty-six percent of blacks characterized the discrimination as very serious. Id.  
231. See id. (explaining that an increasing number of counties are likely to be comprised of individuals who identify as “minority”).  
232. See Paul Andrew Burnett, Fairness, Ethical, and Historical Reasons for Diversifying the Legal Profession with Longhairs, the Creatively Facial-Haired, the Tattooed, the Well-Pierced, and Other Rock and Roll Refugees, 71 UMKC L. REV. 127, 131 (2002) (noting that diverse clients are not only better served by practitioners who share their similar needs and concerns, but also by “conservatively styled attorneys” who are more likely to respect clients visibly different from themselves because of exposure to diverse colleagues).  
233. See id. at 132 (emphasizing that increasing visible representation of distinct physical appearances will lead to more positive perceptions amongst minorities regarding the legal profession’s ability to handle their needs).  
234. See generally Steven Mufson, Oil Price Rise Causes Global Shift in Wealth, WASH. POST, Nov. 10, 2007, at A1 (explaining that the sale and purchase of crude oil, in particular, is causing a massive transfer of wealth from the West).  
are playing increasingly larger roles in the global economy to see American interests represented by those who are reflective of the different cultures that make this country the melting pot it purports to be.²³⁶

Today's social dynamics, however, do not suggest that many of the entities that have helped create the existing opportunity gap are going to change. Several creative theories have been advocated to address the issue of residential segregation.²³⁷ At bottom, however, any real impact in that arena would require whites to do something that statistics suggest they have been unwilling to do for the past sixty years—live amongst and around significant quantities of folk who do not look like them.²³⁸ Without this elementary change, our country's residential segregation is likely to persist, which will continue to make the task of putting elementary and secondary schools on equal footing problematic. Moreover, no presidential administration has adopted suburban integration as an affirmative policy,²³⁹ and the U.S. Supreme Court has been very reluctant to require school boards to take proactive measures to remedy school segregation created by residential segregation.²⁴⁰

Congress did pass the 2001 Elementary and Secondary Education Act, more popularly known as No Child Left Behind ("NCLB").²⁴¹ President Bush and supporters of NCLB argued that one of the law's central tasks was to create a system of accountability that would help alleviate the achievement gap between children of different ethnicities.²⁴² It has, however, been a qualified success at best, whose true impact in raising student achievement may not be seen for quite some time.²⁴³ More federal dollars aimed at improving the resources and amenities in poorly funded schools could help, but NCLB has created a cruel irony for some of

²³⁶. See id. at 1576–77, 1582 n.142 (arguing that America's business success in the future will hinge upon it's ability to benefit from an increasingly interconnected global marketplace and its simultaneous ability to cope with an increasingly diverse population at home).
²³⁷. See John C. Boger, Toward Ending Residential Segregation, in RACE, POVERTY, AND AMERICAN CITIES, at 399-408. Dean John Charles Boger of the University of North Carolina-Chapel Hill School of Law has in his scholarship proposed a "National Fair Share Act," a market-based policy tool that would stimulate integrated housing by supporting business incentives, while inducing compliance with market deterrents (such as loss of mortgage interest and property tax deductions) for choices that foster more segregation within communities. Id.
²³⁹. KEATING, supra note 98, at 34. However, President Barack Obama has proposed a specific office in his administration that would be devoted to the issue of urban policy. See Office of the President-Elect, Urban Policy: The Obama-Biden Plan, available at http://change.gov/agenda/urbanpolicy_agenda (last visited Dec. 12, 2008).
²⁴⁰. See, e.g., Austin Indep. Sch. Dist. v. United States, 429 U.S. 990, 994 (1976) (Powell, J., concurring) (finding evidence of housing discrimination to be irrelevant because any such discrimination could not be attributed to the school system).
those schools. Although they lack the resources to compete with schools that produce better standardized test results, attempts by poor performing schools to obtain more government funding are constrained because they cannot achieve the NCLB test results needed to access the financial capital. Even if the federal government were to decide to offer more substantial financial support, such a move would still certainly engender considerable debate over what role the federal government should play in what has repeatedly been described as a local issue.  

The rigidity of the above-referenced issues strongly suggests that law schools themselves must do the heavy lifting in composing a bar that is more representative of the population. If historically exclusionary fields of business and military endorse the concept of building employee bases that are less homogeneous, law schools should be among the entities that follow suit.

The process can at least begin with addressing how law school admissions offices evaluate candidates. Every law school receives a wealth of data about each individual applicant, ranging from college transcripts to personal statements to letters of recommendation. Many decisions, however, simply come down to the applicant's score on the LSAT. On some levels this makes sense. The LSAT score provides a quantitative instrument that admissions offices can use as a measure of determining which student may have a better chance of navigating the rigor and pace of law school. It is also assumed that the test can help guarantee fair treatment of students, while sparing other students who may be less equipped for law school from incurring large amounts of debt only to be unsuccessful in attempting to obtain a law license.

While the test does assess valuable capacities like reading comprehension, analytical ability and writing aptitude, the LSAT cannot measure a student's work ethic, desire, responsiveness to constructive critique or other intangible tools that can determine how well students do upon enrolling in law school. Often, it is the latter set of attributes that can distinguish not just between a good law student and an underachieving one, but also provide evidence of who is likely to be more adept in practice after graduation. Dozens of scholars have already addressed the topic of whether the LSAT has predictive validity in evaluating the potential of applicants, with some scholars even advocating for the elimination of LSAT scores from consideration as an evaluation tool. While this is creative—and maybe even

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244. See id. at 36-37 (claiming that the federal government contributes only nine cents of every dollar spent on schools in the United States).
245. Wilkins, supra note 235, at 1583.
246. See Haddon & Post, supra note 187, at 55 (asserting that admissions officers "often treat the test score as a definitive measure of aptitude and merit").
247. See id. at 50 (explaining that the LSAT is intended to predict potential to succeed in law school).
248. See id. (arguing that it is assumed the LSAT will "prevent the unfair exploitation of students").
249. Id.
250. Id. at 53-54. The statistically significant correlation between LSAT scores and first-year grades in law school is qualified by its variation among law schools and questionable application to predicting potential law school achievement of minorities. Id.
251. See, e.g., Richard Delgado, Official Elitism or Institutional Self-Interest? 10 Reasons Why the UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit), 34 U.C. DAVIS L. REV. 593, 600-02 (2001) (showing that standardized tests do not always predict effectiveness...
desirable—it is simply not going to occur. The LSAT is likely here to stay, which means the test score gap between racial groups will continue to influence the applicant pool.

Still, there are mechanisms by which law schools can work to address the shortage of black students and other students from historically excluded backgrounds. One such instrument is allowing a limited number of students to earn admission through a performance-based format. Many applicants may have test scores or other academic indicators that fall below the median performance of the school's regularly admitted students. Those applicants still may have individual attributes, be they related to successful work experience or strong graduate school performance, which suggest the potential to successfully matriculate. A performance-based admissions format would allow the school to further evaluate those students in a two-week or three-week program, during which the candidates can be tested in a limited curriculum of one or two first-year courses. Those who show potential and work ethic can then be extended an admission offer by the law school.

Such a program has at least two discernible benefits. First, by specifically targeting individuals who have not obtained the desired academic indicators, it is only natural that the program would draw African-American and Hispanic students because of the existing LSAT score gap. Second, such programs enable admissions officials an additional opportunity to appraise some of the above-referenced intangibles that are otherwise difficult to quantify, and offer a better gauge as to whether the applicant is capable of completing the course work. Such concerted evaluation of these candidates allows the school to lessen any possible risk of admitting ill-equipped students, but more importantly, broadens the potential for increasing the school's enrollment of historically excluded students. A number of schools already operate such programs.252

Law schools can also diversify recruitment efforts of black students through early-entry programs that permit highly qualified undergraduate students to obtain admission to law school before completing their course work. These programs, referred to as "early assurance programs" by other professional schools,253 allow

and emphasizing that children of affluent parents are statistically shown to score higher on exams, which supports a co-relation between test scores and economic status).

252. See, e.g., North Carolina Central University School of Law, Performance Based Admission Program (PBAP), http://web.nccu.edu/law/admissions/requirements_pbap.html (last visited Nov. 16, 2008) (discussing the University's "conditional admissions" program for applicants who show a promise of success). North Carolina Central University has run such a Performance Based Admissions Program for several years, which I have coordinated for the past three years. Our tracking information indicates that the PBAP students who have enrolled at NCCU after gaining admission have performed at substantially the same level as students who have gained entry through our regular admissions process. In each of the past two years, students who have been admitted through PBAP have finished their first year ranked in the top ten percent of the entire class.

253. See, e.g., Wright State University Boonshoft School of Medicine, Early Assurance Program, http://www.med.wright.edu/eap/ [hereinafter Wright State University] (last visited Nov. 16, 2008) (describing enrichment opportunities provided to sophomore students conditionally accepted into the medical school upon graduation); see also Wake Forest University School of Medicine, The Early Assurance Program (EAP), http://www1.wfubmc.edu/MADProgram/Admissions/Early+Assurance.htm (last visited Nov. 16, 2008) (explaining the application process for sophomore college students to the
successful applicants to bypass the stressors that accompany the law school application process because of guaranteed acceptance, while concurrently developing the skill level of these prospective students. In theory, students would apply to law school after their sophomore year at the undergraduate level. If accepted, students would then use the remaining two academic calendar years to complete the requisite courses necessary to obtain their bachelor’s degree while using the summer months to participate in LSAT preparation courses and other pre-matriculation and orientation activities at the law school.\textsuperscript{254} By giving students early exposure to activities that build the foundation skills and confidence needed to successfully complete law school, admissions officers can minimize the risk that such students will not flourish in law school. Once students begin law school, institutions should add and develop academic support divisions that would increase the odds that all of their students who might need assistance in digesting the course material will eventually be able to do so. The law school should set a lofty bar for potential students for such programs by requiring a high undergraduate grade point average, interviewing each potential applicant, and assessing whether admitting the student comports with the mission of the law school. Creating such programs would show that the school is interested in minority applicants, and will eventually place more students in the legal education pipeline.

The biggest challenge to the success of any such program, however, may be the change in mindset that will be necessary for such programs to be seen as viable commodities by law schools across the country. From the mid-1960s to 1970s, the enrollment of black students at law schools grew at an extraordinary rate due to the gains made by African-Americans in the Civil Rights Movement.\textsuperscript{255} At that time, many of the nation’s law schools took the opportunity to address the inequity unveiled by the Movement by engaging in increased recruiting and applying policies like affirmative action to enroll more black students.\textsuperscript{256} These schools did so even though a 1973 study by the Educational Testing Service (ETS) showed that students who came from wealthier families and a higher socioeconomic background averaged forty points higher on the LSAT than students from even average socioeconomic backgrounds.\textsuperscript{257} Because of the wealth disparities between black families and white families, it is reasonable to infer that the test gap between black and white students was even greater than that which currently exists. Yet that did not keep many schools from admitting black students, nor was it an obstacle to African-Americans successfully completing degree requirements once admitted.\textsuperscript{258}

\textsuperscript{254} See Wright State University, supra note 253 (applying these factors to the medical school’s Early Assurance Program).

\textsuperscript{255} See Littlejohn & Rubinowitz, supra note 29, at 436 (noting that the Civil Rights Movement spurred changes to laws and institutional policies, an increase in black political power and self-confidence, and more black role models; all of which influences black student enrollment in law schools).

\textsuperscript{256} See id. (claiming that the Civil Rights Movement’s anti-discrimination message was one of the reasons for the increase in black enrollment in law schools during and after the Civil Rights Movement).

\textsuperscript{257} Eulius Simien, The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action, 12 T. MARSHALL L. REV. 359, 375 (1987).

\textsuperscript{258} For example, in 1970, there were 3700 black lawyers and judges, according to the U.S. Census.
Now, however, at a time when educational opportunities available to black students dwarf those opportunities of the 1960s and 1970s, the present black enrollment at the nation's law schools has only ticked upward slightly since 1975.259 Given the seeming lack of both political and social will to maintain a society that is desegregated in the substantive ways that make a difference in quality of life, admitting black students may simply no longer be enough of a priority for too many of the nation's law schools.

If, however, law schools do take affirmative steps to reduce the homogeneity of the nation's bar, they must receive institutional support from the ABA, the governing body for the nation's law schools. The ABA could stand to improve in this arena. For example, ABA accreditation is obviously vital to the standing of a law school, but Professor George Shepherd has exhaustingly detailed how the ABA accreditation process may actually harm the cause of African-American student enrollment.260 Professor Shepherd argues that the ABA is more prone to withhold accreditation for schools that seek to enroll students with average LSAT scores of 142-143, which severely curtails the potential matriculation of black students.261 Shepherd contends that other desired accreditation standards, such as higher-end undergraduate grade point averages and high bar pass rates, also place tacit institutional pressure upon schools to take actions that will ultimately result in the rejection of applicants from historically excluded or underserved populations.262 Such practices only lend credence to the fallacy that the LSAT overwhelmingly and accurately predicts success in law school as well as serves as an indicator of the quality of a student body.

Moreover, in February 2008, the ABA adopted Interpretation 301-6, a rule that requires the nation's law schools to meet and maintain a minimum bar pass rate in order to keep their accreditation.263 Under the newly passed provision, schools can show compliance by showing that at least seventy-five percent of its graduates passed the bar exam over the five most recent calendar years.264 Schools

Dannye Holley & Thomas Kleven, Minors and the Legal Profession: Current Platitudes, Current Barriers, 12 T. MARSHALL L. REV. 299, 301-02 (1987). By 1980, that number had grown to 15,300 lawyers and judges. Id. This means that during the enrollment boom of black students at white schools in the 1970s, large percentages of those students matriculated successfully and passed the bar exam, despite the existing achievement gap on the LSAT.


260. Shepherd, supra note 197, at 104-05.

261. See id. at 114-15 (citing several examples of law schools whose students' LSAT scores averaged around 142, and whose accreditation was subsequently threatened).

262. Id. at 120.


264. ABA, COMMENTARY, supra note 263, at 3.
may also comply by showing a seventy-five percent passage rate in three of the most recent five calendar years or by showing that the school's yearly first-time bar pass rate is not more than fifteen points below the average rate for graduates at other ABA-approved schools in the same jurisdiction during the same time period. These requirements are facially neutral. But when one considers that African-American and Hispanic bar takers are more frequently unsuccessful on the bar exam than whites, especially on the first attempt, it may cause admissions offices to think twice about admitting an African-American student who may not have attractive LSAT scores.

There appears to be a lack of symmetry in some of the ABA's actions regarding minority enrollment. It is inherently contradictory to create a Council on Diversity in the Profession, as the ABA has, then turn around and adopt Interpretation 301-6, a regulation that may actually dissuade law schools from admitting applicants of color because of the initial struggles some of those students have had with the bar exam. It is also incongruous to create an ABA Standard requiring schools to take concrete action to attract minority students, then force them to justify admitting some of these students in the subsequent accreditation process. If the ABA does not seem willing to put its proverbial money where its mouth is when it comes to creating change in the profession, it will only hinder the potential for future progress in this area.

CONCLUSION

There is little doubt that challenges galore loom over the horizon for the nation's law schools. Legal education seems to grow more expensive by the year, which may lead to more consumer-driven demands for schools to meet. The advent of technology may eventually force more schools to alter instruction in such a way that it can be better received by students who, due to the vast role the digital world plays in their daily lives, now process and absorb information differently than students have in the past. More work must also be done to close the growing gap between academics and practitioners.

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265. Id. at 5.
266. Cross, supra note 259, at 69.
267. See id. at 69 (noting that the first-time pass-rate for white law students is approximately ninety-one percent, thirty percent higher than that of black students, and that almost ninety-seven percent of white law students eventually pass a bar exam, while approximately seventy-eight percent of black students eventually pass a bar exam). Cross also stated that the first-time bar pass rate is crucial in evaluating whether the bar exam is a barrier to the profession because blacks who do not succeed on their first attempts are more likely than whites not to take the test a second time. Id. at 70.
268. See Shepherd, supra note 197, at 130 (arguing that it is inconsistent for the ABA to simultaneously impose accreditation standards that require use of LSAT scores and encourage law schools to deemphasize use of the LSAT to remedy racial imbalance).
269. See generally Rogelio Lasso, From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students, 43 SANTA CLARA L. REV. 1, 21-23 (2002) (presenting the argument that, because of the use of modern technology, contemporary law students learn differently than their peers from the past, and that this shift presents a challenge to legal instruction that may require fundamental changes).
Still, when viewed in the overall context of our nation’s evolving demographics, these challenges are not as imperative as addressing the homogeneity that appears certain to dominate both the bar and the bench without more aggressive efforts. In *Sweatt v. Painter*, Chief Justice Vinson eloquently summed up the necessities surrounding the Court’s holding, which ordered that Sweatt be admitted to the University of Texas Law School:

> [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.  

The heavily-used existing criteria for assessing candidates tends to do more to reward past performance than to critically assess which applicants create the best blend of students, and subsequently, the best set of attorneys to navigate the demands of an increasingly globally connected world. Given that reality, it simply makes more sense to create an educational environment where students (and subsequently, employers) would not be allowed to retreat to comfortable enclaves simply because they are more familiar to them.

These issues are clearly larger than the enrollment of black students. But the unique history of African-Americans in this country does seem to warrant particular consideration. While it is fairly certain that the country will always have some African-American lawyers, the lingering question is whether the academy is satisfied with the current enrollment trends concerning black students. To properly honor the efforts of men like Macon Allen, Heman Sweatt, and Virgil Hawkins, the answer to that question should be no.

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271. See Lee C. Bollinger, *Why Diversity Matters*, CHRON. OF HIGHER EDUC., June 1, 2007, at B20 (arguing that an educational environment reflective of society’s diversity fills in gaps of knowledge, uncovers new subject areas worth exploring, and shapes students capable of connecting to diverse groups of people).
272. *Id.*