THE STRUGGLE FOR ACCESS FROM *SWEATT* TO *GRUTTER*: A HISTORY OF AFRICAN AMERICAN, LATINO, AND AMERICAN INDIAN LAW SCHOOL ADMISSIONS, 1950–2000

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I. INTRODUCTION

In *Grutter v. Bollinger*, a challenge to race-conscious affirmative action at the University of Michigan Law School, the Sixth Circuit recently ruled that achieving diversity to enhance education is a compelling governmental interest and that the Michigan Law School's program is narrowly tailored to meet that goal.[1] With the Supreme Court granting review of *Grutter* to consider the constitutionality of the Michigan Law School's affirmative action policies, it is a particularly opportune time to look back at law school admissions over the last half-century. Because the Court treats Title VI of the Civil Rights Act of 1964 as coextensive with the Equal Protection Clause of the Fourteenth Amendment,[2] and since every law school accredited by the American Bar Association (ABA) is a recipient of federal funding, the Court's ruling in *Grutter* will have profound implica-

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1. 288 F.3d 732 (6th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 617 (2002).
2. *See* United States v. Fordice, 505 U.S. 717, 732 n.7 (1992) (ruling, in a suit brought under both the Equal Protection Clause and Title VI: "Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment . . . . We thus treat the issues in these cases as they are implicated under the Constitution."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284–87 (1978) (Powell, J.); *id.* at 328–50 (Brennan, White, Marshall, & Blackmun, J.J., concurring in part and dissenting in part) (reviewing the legislative history of Title VI and finding that the Act is in line with the Equal Protection Clause).

tions on the ability of private and public law schools and other institutions of higher learning to maintain diverse student bodies.[3]

In this Article, using a wide array of published and unpublished data, I attempt to document and analyze law school admissions opportunities for African American, Latino, and American Indian students over the past fifty years.[4] In particular, I review the meager representation of students of color in law schools in the pre-affirmative action era. I also analyze the early development of affirmative action in the late 1960s, particularly at so-called "elite" law schools, and I consider the increase in competitiveness of law school admissions during this same period—a phenomenon that led schools to place increasingly greater reliance on the Law School Admission Test (LSAT). In chronicling the national enrollment and admissions decision patterns since the 1970s, the Article also focuses partly on the impact of the Supreme Court's ruling in *Regents of the University of California v. Bakke*.[5]

The historical and contemporary law school admissions and enrollment data, I argue, will support four claims. First, before law schools adopted affirmative action programs in the late 1960s, law schools and the legal profession were overwhelmingly de facto segregated. Second, even with the tool of affirmative action, White students have consistently had higher admissions rates than students of color since the mid-1970s. Third, a comprehensive review of the consequences of ending affirmative action at public law schools in California, Texas, and Washington reveal that there is little evidence that race-neutral alternatives to affirmative action are viable in legal education. When affirmative action was prohibited at law schools that are similar to the University of Michigan, the number of underrepresented minorities sank to levels not seen since the late

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3. *See* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1770 (1996) ("[I]f overruling *Bakke* were also to mean suddenly that all federally funded *private* schools must *never* consider race in their admissions, a sharp resegregation of higher education might occur—the possible social upheaval is rather startling to contemplate.").
4. I do not address Asian Pacific Americans (APAs) in this Article, not for lack of importance, but because the position of APAs in the affirmative action/meritocracy debate is sufficiently important that I have written about it elsewhere. *See* William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 Asian L.J. 29 (2000). For other works in this area, see also Brief of Amici Curiae Nat'l Asian Pacific Am. Legal Consortium et al., Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 617 (2002) (No. 02-241), *available at* http://www.umich.edu/~urel/admissions/legal/amicus.html (last visited Feb. 27, 2003); Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA Asian Pac. Am. L.J. 129 (1996); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. Third World L.J. 225 (1995); Mari Matsuda, *We Will Not Be Used*, 1 UCLA Asian Am. Pac. Islands L.J. 79 (1993); Dana Y. Takagi, The Retreat from Race: Asian-American Admissions and Racial Politics (1992).

   In this Article, I use both the terms "Chicano" (Mexican American) and "Latino" (which includes Chicanos, as well as those with national origins in Central America, Cuba, Puerto Rico, and South America) when appropriate. For clarification, White refers to non-Hispanic White, and Black/African American refers to non-Hispanic Black.
5. 438 U.S. 265, 320 (1978) (Powell, J.).

1960s. Finally, recent national admissions data are consistent with the conclusion that student activism can have a positive influence on admissions rates. Conversely, affirmative action bans and threats of litigation are associated with a widening of the gap in admissions rates in recent years between Whites and students of color nationwide.

II. LEGAL EDUCATION BEFORE AFFIRMATIVE ACTION

Over the past half-century, the struggle for integration and equality in American legal education has been long and arduous.[6] While a history of the carefully orchestrated series of legal challenges to segregation is beyond the scope of this Article,[7] because *Sweatt v. Painter* has both historical and contemporary significance, it is a logical starting point for the discussion of law school admissions.[8] In *Sweatt*, the Supreme Court unanimously held in 1950 that, under the Equal Protection Clause, Heman Marion Sweatt had a right to enroll at the University of Texas Law School (UTLS) rather than a hastily constructed separate and inferior law school designated for African Americans.[9] At the time that Sweatt, a postal worker, filed suit against UTLS, there were only about a dozen African American lawyers in the state of Texas.[10] In the fall of 1950, Sweatt and

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6. In this Article, I do not review law school admissions and entry into the legal profession in the first half of the twentieth century. Authors who have written informative works in this area include: Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944 (1993); RICHARD L. ABEL, AMERICAN LAWYERS (1989); Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past?*, 12 T. MARSHALL L. REV. 415 (1987); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983).
7. Some examples of these earlier cases include *Pearson v. Murray*, 182 A. 590, 594 (Md. 1936) (ordering the admission of an African American to the University of Maryland Law School: "And as in Maryland now the equal treatment can be furnished only in the one existing law school, the petitioner, in our opinion, must be admitted there."); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (holding that Missouri could have satisfied the Equal Protection Clause by providing separate but equal legal education facilities for Blacks: "[P]etitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State."); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631, 632 (1948) (per curiam) ("The petitioner is entitled to secure legal education afforded by a state institution. . . . The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."); *Fisher v. Hurst*, 333 U.S. 147 (1948) (per curiam) (denying writ of mandamus to petitioner who sought to have Oklahoma comply with *Sipuel*). For a history of the NAACP Legal Defense Fund's desegregation litigation strategy, see MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994).
8. 339 U.S. 629 (1950).
9. *Id.* at 636. *See also* Jonathan L. Entin, Sweatt v. Painter, *The End of Segregation, and the Transformation of Education Law*, 5 REV. OF LITIG. 3 (1986). An archive of historical materials on *Sweatt v. Painter* is maintained by Professor Thomas Russell of the University of Denver College of Law, *available at* http://www.law.du.edu/russell/lh/sweatt/ (last visited Aug. 1, 2002).
10. Douglas L. Jones, *The* Sweatt *Case and the Development of Legal Education for Negroes in Texas*, 47 TEX. L. REV. 677, 677–78 (1969).

five other trailblazing African Americans finally became a part of the UTLS entering class of 280 after a four-year legal challenge to a provision of the Texas Constitution that reserved the University of Texas for White students.[11] While UTLS did not explicitly bar Chicanos and Latinos from enrolling,[12] at mid-century, it was more typical for Latinos to be completely excluded from law school simply by virtue of myriad social and economic barriers that forced them into the lowest rungs of the labor market.[13]

In *Sweatt v. Painter*, an important forerunner of the more famous *Brown v. Board of Education* case,[14] the Court also noted the importance of integration to the functioning of legal education and the practice of law:

> Moreover, although 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.[15]

While the Court spoke eloquently about equality under the Constitution, Heman Sweatt and others had a daily confrontation with the real meaning of inequality. After bravely enduring cross-burnings, tire slashings, and racial slurs from students and faculty, Sweatt withdrew from UTLS in 1951 without graduating.[16] Subsequently, during much of the 1950s and

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11. *See Sweatt*, 339 U.S. at 631 n.1; Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of* Sweatt v. Painter *and* Hopwood, 25 Law & Soc. Inquiry 507, 507 (2000).
12. *See* Lisa Lizette Barrera, *Minorities and the University of Texas School of Law (1950–1980)*, 4 Tex. Hisp. J.L. & Pol'y 99, 99 n.3 (1998) (estimating that fewer than twenty Chicanos graduated from UTLS prior to 1950). I should note that Chicanos in the Southwest encountered substantial de jure segregation in education in addition to de facto school segregation because of residential segregation. For a history of Chicano school segregation cases, see Margaret E. Montoya, *A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action*, 12 Berkeley La Raza L.J. 159 (2001).
13. *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 (2000); Jorge H. del Pinal, *Latinos and California's Future: Too Few at the School's Door*, 10 La Raza L.J. 631 (1998); Roithmayr, *supra* note 6, at 1485; Cruz Reynoso et al., *La Raza, the Law, and the Law Schools*, 2 U. Tol. L. Rev. 809 (1970). Likewise, traditionally, financial hardship has severely constrained American Indians' access to legal education. *See, e.g.*, Gloria Valencia-Weber, *Law School Training of American Indians as Legal-Warriors*, 20 Am. Indian L. Rev. 5, 38–39 (1995–1996); Sam Deloria, *Legal Education and Native People*, 38 Sask. L. Rev. 22, 26 (1974).
14. 347 U.S. 483 (1954).
15. 339 U.S. at 634.
16. Hopwood v. Texas, 861 F. Supp. 551, 555 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996). The other forerunner of *Brown v. Board of Education* is *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950). While G. W. McLaurin's suit was pending, the University of Oklahoma Graduate School of Education admitted him but forced him to sit in a roped-off section away from White students and in a separate area of the library and cafeteria. *See* Margaret M. Russell, *McLaurin's Seat: The Need for Racial Inclusion in Legal Education*, 70 Fordham L. Rev. 1825 (2002).

1960s, and as late as 1971, UTLS, like most of the ABA-accredited law schools, had no entering African American students.[17]

Perhaps the most extreme example of entrenched obstructionism in defending Jim Crow racism in law school admissions involves the University of Florida College of Law (UFCL) and Florida public officials.[18] Virgil Hawkins first applied to UFCL at the age of forty-three in April 1949 and was denied admission solely because he was Black.[19] Hawkins's tortuous legal battle spanned nine years, and it became embroiled in the Florida gubernatorial race. The litigation included several petitions to the U.S. Supreme Court and five appeals before the diehard segregationist Florida Supreme Court, which repeatedly and illegally ignored the U.S. Supreme Court's orders that Hawkins be admitted without further delay.[20] By 1958, Hawkins withdrew his application to UFCL in exchange for an agreement that other African Americans would at last be permitted to enroll.[21]

The Association of American Law Schools (AALS) Committee on Racial Discrimination typified the landscape of opportunity in the 1950s . In 1955, the Committee on Racial Discrimination proposed a rule requiring that law schools keep their doors open to African Americans or have their

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17. *See* A. Leon Higginbotham, Jr., *Breaking Thurgood Marshall's Promise*, BLACK ISSUES IN HIGHER EDUC., Feb. 5, 1998, at 20; Hopwood v. Texas, 861 F. Supp. at 558. Regarding resistance to integration at the University of Texas in the late 1960s, Professor Bell noted, "When the minority population in the University of Texas Law School's 1500 student body reached 45 (20 black, 25 Chicano), the Board of Regents in August 1969 passed a rule, aimed primarily at the law school, prohibiting the admission to any college at the university of students not meeting the school's 'normal admission criteria.'" Derrick A. Bell, Jr., *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. PA. L. REV. 364, 365 n.4 (1970). In the 1950s, the University of Texas also formally excluded students of color from university organizations, athletics, and housing; Chicanos were segregated into a separate dormitory known as the "barricks" and African Americans could neither live in nor visit White dormitories. Barrera, *supra* note 12, at 101–02.
18. *See, e.g.*, Lawrence A. Dubin, *Virgil Hawkins: A One-Man Civil Rights Movement*, 51 FLA. L. REV. 913 (1999); Darryl Paulson & Paul Hawkes, *Desegregating the University of Florida Law School:* Virgil Hawkins v. The Florida Board of Control, 12 FLA. ST. U. L. REV. 59 (1984).
19. *See* State *ex rel.* Hawkins v. Board of Control, 47 So. 2d 608, 609 (Fla. 1950).
20. *See* State *ex rel.* Hawkins v. Board of Control, 47 So. 2d 608, (Fla. 1950), *writ denied*, 53 So. 2d 116 (Fla. 1951), *writ denied*, 60 So. 2d 162 (Fla. 1952), *cert. granted*, 347 U.S. 971 (1954), *writ withheld*, 83 So. 2d 20 (Fla. 1955), *cert. denied*, 350 U.S. 413 (1956), *writ denied*, 93 So. 2d 354 (Fla. 1957), *cert. denied*, 355 U.S. 839 (1957), *rev'd*, 253 F.2d 752 (5th Cir. 1958), *and limiting injunctive relief*, 162 F. Supp. 851 (N.D. Fla. 1958).
21. *See* Jon Mills, *Diversity in Law Schools: Where Are We Headed in the Twenty-First Century?*, 33 U. TOL. L. REV. 119, 119 (2001). Hawkins finally earned a law degree at age fifty-eight from New England School of Law, but since that institution was not ABA-accredited at that time, Hawkins was not eligible to sit for the Florida bar examination. *See* Dubin, *supra* note 18, at 944; Paulson & Hawkes, *supra* note 18, at 70. Finally, in 1976, the Florida Supreme Court, noting that Hawkins, now age seventy, had a "claim on this court's conscience," ordered that he be admitted to the Florida Bar without having to take the bar examination. *In re* Florida Bd. of Bar Examiners, 339 So. 2d 637 (Fla. 1976). He would have enjoyed "diploma privilege" had he been allowed to attend UFCL and graduate from the school when diploma privilege was extant. Dubin, *supra* note 18, at 946–47; Paulson & Hawkes, *supra* note 18, at 70.

AALS membership revoked.[22] The AALS Committee's proposal was not approved because it failed to gain the endorsement of two-thirds of member law schools.[23] After the proposal was rejected, AALS president Maurice Van Hecke gave an annual address in which he stated:

> [T]he adoption by the Association of any coercive measures would delay further racial integration in the schools by aggravating present resentment and resistance.
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> The wisest course, I believe, is for the Association to continue to serve in the role of mediator, keeping the situation fluid and in the realm of discussion and making suggestions, from time to time, that will encourage the several schools to work out their own problems as conditions change.[24]

National data, discussed shortly, indicate that the legal education establishment's "wisest course" in fact meant that conditions did not change and that students of color made no significant inroads until the late 1960s.

In the 1950s and early 1960s, aspiring minority attorneys outside the South did not confront Jim Crow segregation, yet the barriers of racial and ethnic exclusion in legal education were nonetheless quite formidable. While 1950s national law school enrollment figures broken down by race and ethnicity are unavailable due to poor data collection, it is safe to conclude that American law schools were approximately 99% White during this period. For example, there were an estimated 1450 African American attorneys in 1950[25] out of a total of 221,605 lawyers,[26] meaning that African Americans were 0.65% of the legal profession. In 1960, there were 2180 African American attorneys[27] out of a total of 285,933 lawyers,[28] or 0.76% of the profession. Erwin Smigel, author of a major 1964 study of Wall Street lawyers, reported, "In the year and a half that was spent interviewing, I heard of only three Negroes who had been hired by large law firms. Two of these were women who did not meet the client."[29] Likewise,

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22. *See* Maurice T. Van Hecke, *Racial Desegregation in the Law Schools*, 9 J. Legal Educ. 283 (1956).
23. *Id*. at 283.
24. *Id*. at 288. Similarly, in a report summarizing the ABA's organizational goals and accomplishments for the 1950s, achieving racial/ethnic integration in the legal profession was not mentioned. *See* Gene Brandzel, Am. Bar Found., Research Mem. No. 26, The Long-Range Objectives of the American Bar Association: The Achievements of a Decade, 1951–1961 (1961).
25. Ralph R. Smith, *Great Expectations and Dubious Results: A Pessimistic Prognosis for the Black Lawyer*, 7 Black L.J. 82, 85 n.8 (1981) (reporting U.S. Census data).
26. Clara N. Carson, The Lawyer Statistical Report: The U.S. Legal Profession in 1995, at 1 tbl.1 (1999) (listing American Bar Foundation estimates of the total number of American lawyers in 1951).
27. Harry T. Edwards, *A New Role for the Black Law Graduate—A Reality or an Illusion?*, 69 Mich. L. Rev. 1407, 1410 (1971) (reporting U.S. Census data).
28. Carson, *supra* note 26, at 1 tbl.1 (listing ABF estimates of the total number of American lawyers in 1960).
29. Erwin O. Smigel, The Wall Street Lawyer: Professional Organization Man? 45 (1964). There is a substantial body of scholarship indicating that minorities, and African Americans in particular, continue to encounter substantial barriers at elite private law firms, especially with respect to achieving partnership status. *See, e.g.*, Am. Bar Ass'n, Miles to Go 2000: Progress of Minorities in the Legal Profession 9

a 1963 study of firm lawyers and solo practitioners in Detroit found that all 206 of the attorneys surveyed were White.[30] Law firm practitioners in this Detroit study consisted primarily of Northern European Protestants who had attended elite schools like Yale, Harvard, and Michigan.[31]

Comprehensive data on African American law school enrollment are also difficult to come by for much of the 1960s. The ABA and other national organizations did not collect data on Latino, American Indian, and Asian Pacific American students until 1969.[32] In 1965, the AALS Committee on Minority Groups, in the most comprehensive effort up to that point, surveyed ABA-accredited law schools about minority enrollment figures. The AALS Committee found that most law schools could not provide information on either Latin American or Puerto Rican students for two reasons: (1) there was confusion among deans over what these terms meant; and (2) most schools simply had no idea of the past or present enrollment levels of these groups.[33] Even after reluctantly restricting the focus of their study to African Americans, the AALS Committee had to rely on help from faculty members, students, and personal visits to law schools, because some uncooperative deans would not provide the requisite data.[34] The Committee eventually estimated that there were a total of 701 African American law students in the 1964–1965 academic year (combining first, second, and third year students), with 267 at six predominantly Black law schools, including 165 at Howard.[35] Thus, African Americans were about 1.3% of national law school enrollments and less than 1.0% of enrollments excluding these six schools.[36] Prior to 1968, there were about 200 African Americans graduating from law school annually.[37]

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tbl.19 (2000); David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY OF LEGAL ETHICS 15 (1999); Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669 (1997); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996).

30. *See* Jack Ladinsky, *The Impact of Social Backgrounds of Lawyers on Law Practice and the Law*, 16 J. LEGAL EDUC. 127, 131 tbl.1 (1963) (all respondents characterized their ethnicity as either Northwest European, Central European, or Eastern and Southern European).
31. *See id*. at 131–32.
32. The American Bar Foundation's reports in the 1950s and 1960s do not include data on race and ethnicity. *See, e.g.*, JOHN C. LEARY & MICHAEL B. DOUTY, AM. BAR FOUND., Research Mem. No. 15, COMPILATION OF PUBLISHED STATISTICS ON LAW SCHOOL ENROLLMENTS AND ADMISSIONS TO THE BAR, 1889–1957 (1958); AM. BAR FOUND., THE 1961 LAWYER STATISTICAL REPORT (1961); FAYE A. HANKIN & DUANE W. KROHNKE, AM. BAR FOUND., THE AMERICAN LAWYER: 1964 STATISTICAL REPORT (1965). The 1969 survey to which I refer was jointly sponsored by the Law School Admission Council, the Association of American Law Schools, and the Council on Legal Education Opportunity, and is reprinted in *1971 Survey of Minority Group Students in Legal Education*, 24 J. LEGAL EDUC. 487 (1972).
33. Harry Groves, *Report on the Minority Groups Project*, *in* ASS'N OF AM. LAW SCHOOLS, 1965 ANNUAL MEETING PROCEEDINGS PART I 171 (1965).
34. *Id*. at 172.
35. *Id*.
36. *Id*.
37. Ernest Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069, 1077.

U.S. Census data indicate that between 1960 and 1970, the number of African American attorneys grew by 76% (from 2180 to 3845),[38] while the total number of American lawyers grew by 24% during that span.[39] Not surprisingly, the shortage of Black attorneys was most severe in the South. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia had a combined total of 393 African American lawyers in 1970, even though the total Black population of these states was over 8.8 million at that time.[40] In 1970, the number of African American lawyers in states outside the South with Black populations over one million were as follows: 373 in California, 667 in Illinois, 650 in New York, and 141 in Pennsylvania.[41] A committee of the Philadelphia Bar Association reported in 1970:

> The scarcity of Black lawyers in Pennsylvania—just 130 for a Black population of nearly 1,000,000 persons—is scandalous to a Commonwealth professing to serve all its people. This shortage of Black lawyers has undeniably decreased the effectiveness of the Black community in seeking to achieve equality of opportunity through traditional legal channels. And while the Black community is principally harmed by what has amounted to the total exclusion of Blacks from the Pennsylvania Bar, the entire Commonwealth and nation suffer irreparable harm.[42]

In the 1960s, the scarcity of American Indian and Latino attorneys and law students was startling. In 1968, there were fewer than twenty-five American Indian attorneys nationwide, even though the American Indian population at that time was well over a half-million.[43] Moreover, through the late 1960s, no American Indians had ever graduated from law school in Arizona, New Mexico, or Utah—nor had any American Indians ever practiced law in Arizona or New Mexico—though these three states had an American Indian population of over 135,000 at that time and had substantial legal needs associated with the management of tribal holdings.[44] Similarly, only three Chicanos graduated from "major" California law

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38. Edwards, *supra* note 27, at 1410.
39. Carson, *supra* note 26, at 1 tbl.1 (reporting ABF estimates of the total number of lawyers in 1960 and 1971).
40. Edwards, *supra* note 27, at 1409.
41. Edwards, *supra* note 27, at 1432–33.
42. Peter J. Liacouras, *A Call to Action on our Disaster Area, Law School Admissions*, 4 Black L.J. 480, 482 (1975) (quoting the 1970 report of a Philadelphia Bar Association committee chaired by Liacouras, who was then dean of Temple University Law School).
43. Telephone Interview with Rennard Strickland, Professor of Law and Former Dean, University of Oregon School of Law (Aug. 12, 2002); Brief for American Indian Law Students Association, Inc. and American Indian Lawyers Association, Inc., Amici Curiae, DeFunis v. Odegaard , 416 U.S. 312 (1974) (No. 73-235), *reprinted in* DeFunis versus Odegaard and the University of Washington Volume III 1307, 1316 (Ann Fagan Ginger ed., 1974) [hereinafter DeFunis Amici Curiae Brief]; Thomas W. Christopher & Frederick M. Hart, *Indian Law Scholarship Program at the University of New Mexico*, 2 U. Tol. L. Rev. 691, 693 (1970); Rennard Strickland, *Redeeming Centuries of Dishonor: Legal Education and the American Indian*, 2 U. Tol. L. Rev. 847, 862 (1970); Gellhorn, *supra* note 37, at 1087 n.71.
44. Gellhorn, *supra* note 37, at 1087 n.71.

schools in 1969,[45] and it was estimated that less than .006% of all American law students enrolled in 1969 belonged to the "amorphous category entitled Spanish American, which include[d] all Spanish surnames and Spanish speaking groups."[46]

A decade after *Brown v. Board of Education*, the Civil Rights Movement was at its height, and the Civil Rights Act of 1964 was just approved by Congress and signed into law by President Johnson.[47] Yet at this time, American law schools, especially elite schools, were still almost completely segregated. In fact, when Erwin Griswold, the dean at Harvard Law School and later the U.S. Solicitor General, testified before a Senate Committee that national registration and voting statistics proved discrimination and the need for the voting rights bill, he was embarrassed by a Southern segregationist senator who wanted Griswold to concede that application of the same logic compelled the conclusion that Harvard must be discriminating against African Americans since the Law School's African American enrollment numbers were substantially below the national average.[48] As indicated in Table 1 and Chart 1, in the early 1960s at schools like Boalt Hall, Michigan, and University of California, Los Angeles (UCLA), the "inexorable zero"[49] routinely characterized African American enrollment patterns.[50] In the fall of 1965, Boalt, Michigan, New York University (NYU), and UCLA had a combined total of four African Americans out of 4843 students, which, shockingly, is one fewer than the University of Mississippi (Ole Miss), where the law school begrudgingly enrolled five Blacks in 1965 to avoid jeopardizing a substantial grant from the Ford Foundation.[51] Similarly, between 1948 and 1968, the University of Texas enrolled a total of 8018 White first-year law students and only 37 Afri-

45. Reynoso et al., *supra* note 13, at 816.
46. Reynoso et al., *supra* note 13, at 839.
47. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in various sections of 28 U.S.C. and 42 U.S.C.). For a history of the events leading to the Civil Rights Act of 1964, see David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645 (1995).
48. Gellhorn, *supra* note 37, at 1082–83 n.61. Incidentally, Griswold earlier co-authored an amicus brief for the Committee of Law Teachers Against Segregation in Legal Education in *Sweatt v. Painter.* 339 U.S. at 630.
49. This phrase comes from *Johnson v. Transp. Agency*, 480 U.S. 616, 657 (1987) (O'Connor, J., concurring) (quoting *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).
50. Table 1 lists three African Americans in 1963. Most of the sources obtained do not report data prior to that year. However, one short piece, put together by an African American Harvard alumnus from the 1950s, indicates that between 1958 and 1962, Harvard graduated virtually zero African Americans. *Harvard Law School Celebrates Its Black Alumni*, 31 J. BLACKS IN HIGHER EDUC. 85, 85 (2001); *see also* DAVID B. WILKINS ET AL., HARVARD LAW SCHOOL REPORT ON THE STATE OF BLACK ALUMNI 1869–2000, at 8, 14 (2002) (reporting that while Harvard's first African American graduated in 1869, a century later the 1965 graduating class also included only one African American).
51. *See* Gellhorn, *supra* note 37, at 1080 n.52, 1082; Jerome Karabel, The Rise and Fall of Affirmative Action at the University of California tbl.1, 5 (Sept. 1999) (unpublished manuscript, on file with the UC Berkeley Institute for the Study of Social Change). The 1965 total enrollment figures for Boalt, NYU, Michigan, and UCLA are from John G. Hervey, *Law School Registration, 1965*, 18 J. LEGAL EDUC. 197, 197, 204, 207 (1965).

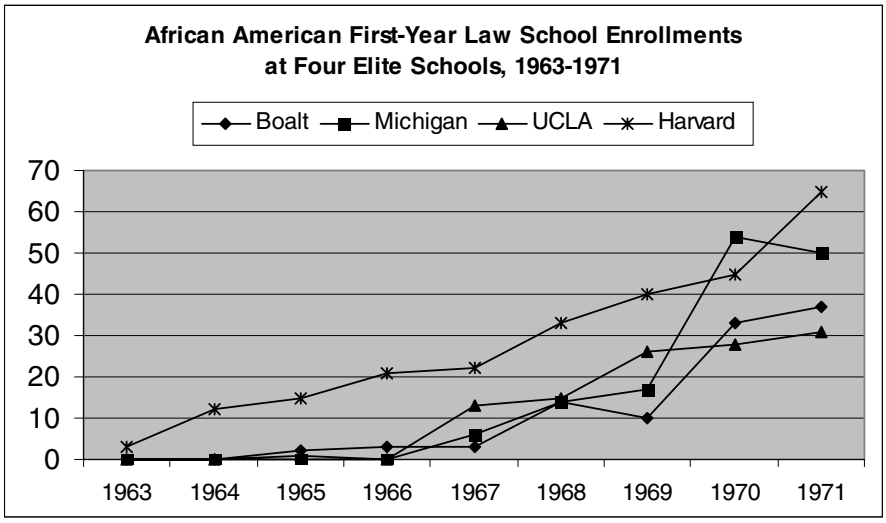
can Americans.[52] Between 1956 and 1967, there were between zero and two African American enrollments at UTLS annually.[53]

Table 1: African American First-Year Enrollments at Four Elite Law Schools, 1963–1971

	Boalt[54]	Harvard[55]	Michigan[56]	UCLA[57]
1963	0	3	0	0
1964	0	12	0	0
1965	2	15	0	1
1966	3	21	0	0
1967	3	22	6	13
1968	14	33	14	15
1969	10	40	17	26
1970	33	45	54	28
1971	37	65	50	31
Class Size (avg. of 1960 & 1970)[58]	241	565	354	230

52. Jones, *supra* note 10, at 690 tbl.
53. Jones, *supra* note 10, at 689.
54. Karabel, *supra* note 51, tbl.1; *Report on Special Admissions at Boalt Hall After Bakke*, 28 J. Legal Educ. 363, 382–83 (1977). For clarification, the 1970 and 1971 figures include all first-year African American students at Boalt. However, for 1963–1969, such data was not available. For 1963–1969, data on entering African Americans who subsequently graduated were obtained by matching archived student files from the Boalt Hall Registrar's Office with Boalt yearbook photos.
55. Wilkins et al., *supra* note 50, at 22 tbl.A; Memorandum from the UCLA School of Law Admissions and Standards Committee to the Faculty app. A (Oct. 18, 1966) (on file with author) (reviewing 1963–66 admissions of African Americans to Harvard Law School based on data provided by Harvard Admissions Director Russell Simpson); Albert Muratsuchi, *Race, Class, and UCLA School of Law Admissions, 1967–1994*, 16 Chicano-Latino L. Rev. 90, 92 (1995); Edwards, *supra* note 27, at 1441; Gellhorn, *supra* note 37, at 1080, 1080–81 n.53.
56. Edwards, *supra* note 27, at 1429, 1441; Gellhorn, *supra* note 37, at 1080 n.52; Terrance Sandalow, *Minority Preferences Reconsidered*, 97 Mich. L. Rev. 1874, 1874 (1999) (book review).
57. Karabel, *supra* note 51, tbl.4; Muratsuchi, *supra* note 55, at 95–97; Gellhorn, *supra* note 37, at 1080 n.52.
58. Robert L. Nelson, *The Future of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 Case W. Res. L. Rev. 345, 397 tbl.8 (1994).

CHART 1



III. THE RISE OF AFFIRMATIVE ACTION: LAW SCHOOLS RESPOND WHEN AMERICA'S SOCIAL ORDER IS THREATENED

The minuscule number of students of color in law schools began to improve in the late 1960s as a result of early affirmative action programs. Table 1 and Chart 1 display the dramatic rise in African American enrollments in the late 1960s. At least partly because of the aforementioned controversy involving Griswold's testimony for the Civil Rights Act, Harvard Law School's affirmative action program, started in 1964, predates those of other law schools by three or four years. In 1965, Harvard also began a "special summer program" funded by the Rockefeller Foundation that introduced about forty African American college students from the South to the possibilities of a legal career by bringing them to Cambridge for eight weeks.[59] Between 1964 and 1966, about half of the African Americans enrolled at Harvard Law School came from the same schools that traditionally sent a large number of White students (Harvard, Yale, Columbia, Brown, etc.), and half came from historically Black colleges in the South.[60] A couple years later, other schools like Columbia, Boalt, and

59. Louis A. Toepfer, *Harvard's Special Summer School Program*, 18 J. LEGAL EDUC. 443–45 (1966). The students took four law school courses and one regular Harvard summer school class and had various luncheons with scholars and lawyers. *Id.* Among those attending this summer program was Reginald F. Lewis, who graduated from Harvard Law School in 1968 and went on to found the first minority-run Wall Street law firm and became a major benefactor. WILKINS ET AL., *supra* note 50, at 15–16. I thank President Derek Bok, a member of the Harvard Law School faculty in the 1960s, for his comments about the inception of affirmative action at Harvard and the special summer program.

60. *See* Memorandum from the UCLA School of Law Admissions and Standards Committee Memo, *supra* note 55, app. A. The Southern colleges included Morehouse, Tuskegee, Spelman, Fisk, Morris Brown, Howard, Morgan State, Virginia State,

UCLA started "weak" forms of affirmative action such as increased outreach, recruiting, financial aid, and summer preparation programs.[61] However, it was the 1967 revolts in Detroit and Newark—and especially the urban uprisings that swept across America after the assassination of Martin Luther King, Jr. on April 4, 1968—which ruptured long-established practices of exclusion in legal education and other institutions, and, at a national level, quickly prompted "strong" affirmative action in the form of race-conscious admissions.[62] By the late 1960s, UCLA and Boalt Hall had become the leading producers of Chicano law students in California.[63]

Charts 2 and 3 document the rise in underrepresented minority entrants at ABA law schools from the late 1960s to the early 1970s and the leveling off that occurred thereafter. Thirty-seven American Indians graduated from ABA law schools and passed the bar exam in the first four years of the Special Scholarship Program in Law for American Indians (begun in 1967),[64] meaning that the total number of American Indians practicing law increased about 150% in only the first few years that affirmative action was in place. At a national level, affirmative action was present in varying degrees at most law schools by about 1970. However, throughout the 1970s, law schools in the South tended to lag far behind the rest of the country with respect to affirmative action programs.[65]

Florida A & M, North Carolina College (now named North Carolina Central), Johnson C. Smith, and Tennessee State. *See id.*

61. *See* Gellhorn, *supra* note 37, at 1080–81; Muratsuchi, *supra* note 55, at 92–95; William G. Bowen & Derek Bok, The Shape of the River: Long-term Consequences of Considering Race in College and University Admissions 5 (1998).
62. Andrea Guerrero, Silence at Boalt Hall: the Dismantling of Affirmative Action 2, 10 (2002) (quoting 1968 statements by the UC president, UC Berkeley chancellor, and dean at Boalt Hall); Karabel, *supra* note 51, at 3; Derrick Bell, *"Here Come de Judge": The Role of Faith in Progressive Decision-making*, 51 Hastings L.J. 1, 2 (1999); Herma Hill Kay, *The Challenge to Diversity in Legal Education*, 34 Ind. L. Rev. 55, 59 (2000).
63. *See* Reynoso et al., *supra* note 13, at 816–17 (displaying Chicano enrollments at California law schools).
64. DeFunis Amici Curiae Brief, *supra* note 43, at 1324 app. A.
65. *See* Henry Ramsey, Jr., *Affirmative Action at American Bar Association Approved Law Schools: 1979–1980*, 30 J. Legal Educ. 377, 412 (1980).

CHART 2[66]

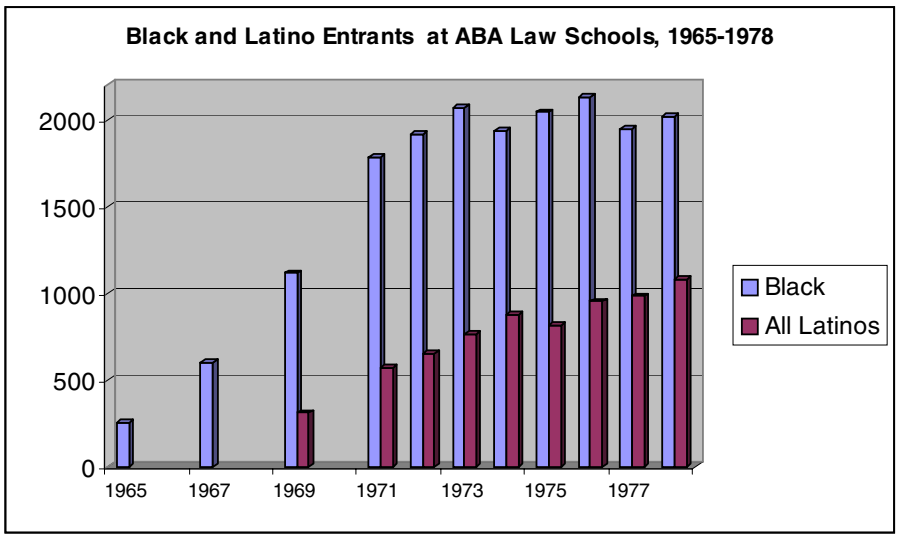
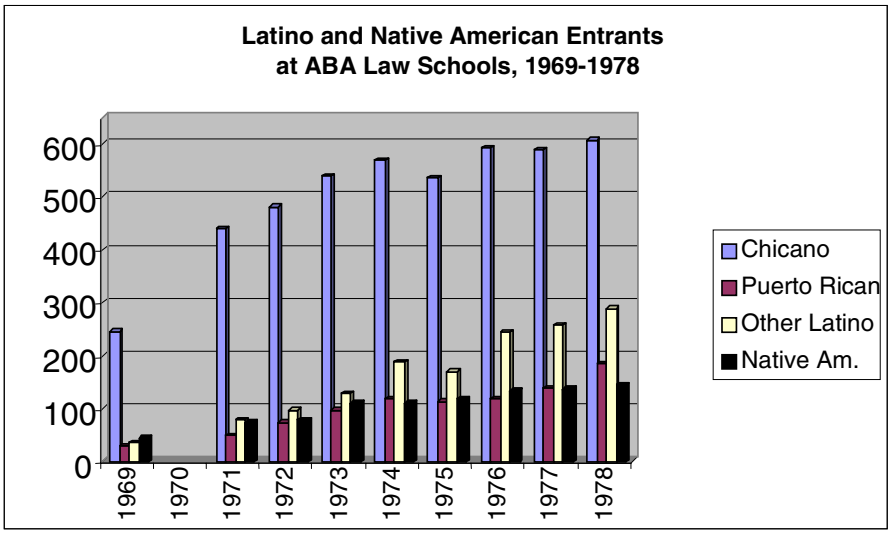


CHART 3[67]

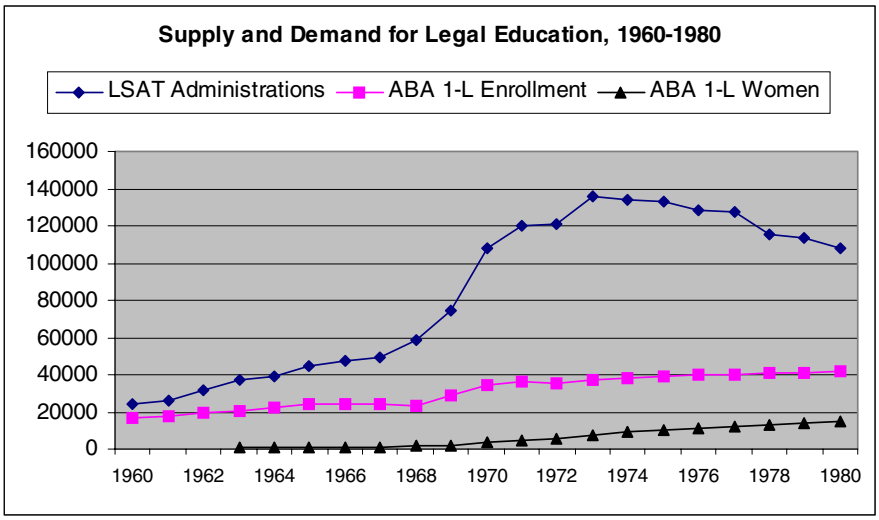


66. AM. BAR ASS'N, LAW SCHOOLS & BAR ADMISSION REQUIREMENTS 44 (1973); AM. BAR ASS'N, OFFICIAL ABA GUIDE TO APPROVED LAW SCHOOLS 457–58 (Rick L. Morgan & Kurt Snyder eds., 2000) [hereinafter 2001 OFFICIAL ABA GUIDE]; Gellhorn, *supra* note 37, at 1077. Comprehensive data on Latino entrants for 1965–1968 and 1970 were not collected.
67. AM. BAR ASS'N, LAW SCHOOLS & BAR ADMISSION REQUIREMENTS 44 (1973); 2001 OFFICIAL ABA GUIDE, *supra* note 66, at 456–58. Comprehensive data on Latino and American Indian entrants for 1970 were not collected.

IV. The Rise of the LSAT and the Law School Application Boom: 1960–1980

At the same time that affirmative action programs were taking root at American law schools, other demographic trends were transforming the structure of opportunity to attend law schools. Applications to ABA law schools increased sharply between 1960 and 1975, particularly between 1968 and 1973. Chart 4 indicates that LSAT administrations, a close proxy for application trends,[68] jumped from 23,800 in 1960 to 133,316 in 1975, a stunning increase of 460%. Total ABA first-year enrollments increased from 17,031 to 39,038 between 1960 and 1975, a more modest increase of 129%. In other words, the demand for legal education skyrocketed, even relative to increased supply. This jolt was most pronounced between the late 1960s and the early 1970s. For reasons that will be discussed shortly, these trends would soon have a substantial impact on opportunities for students of color.

Chart 4[69]



The baby boom—the dramatic increase in American birth rates following World War II—contributed significantly to the sharp increase in law school applications during the 1960s and 1970s.[70] In addition to the simple effect of increased numbers, baby boomers approached adulthood

68. *See* Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 Law & Soc. Inquiry 431, 453 n.48 (1989) (noting that while LSAT administrations always outnumber law school applications, trends in LSAT administrations closely track trends in law school applications).
69. Richard L. Abel, American Lawyers 253 tbl.4 (1989); Am. Bar Ass'n, 2001 Official ABA Guide, *supra* note 66, at 454; Robert J. Solomon, Information Concerning Mean Test Scores 6 (1983) (ETS Memorandum reproduced as ERIC document # 237030). Chart 4 does not show women's first-year enrollment data prior to 1963 because the sources do not contain information for those years.
70. *See* Sander & Williams, *supra* note 68, at 453–55 (reviewing the impact of the baby boom on the supply of lawyers and law students).

in an era when higher education was available to a much larger segment of society. A legal education was more attainable because of the G.I. Bill, Cold War educational competition, a strong economy for educated workers, and increased funding for state universities and student grant and loan programs.[71] Further, in the late 1960s and early 1970s, many young men were motivated to apply to law school because they opposed the war in Vietnam and were seeking draft deferments.[72]

A second factor driving the increased competition to law schools in the 1970s was the steady rise in applications from women.[73] In the 1950s and 1960s, law schools adopted policies and practices that excluded women.[74] In those days, it was not seen as contradictory for the legal education establishment to advocate racial desegregation, yet support discrimination against women. For example, in 1951, the AALS Special Committee on Racial Discrimination was able to get 85 of 102 member law schools to vote in favor of a resolution, without enforcement provisions, opposing racial discrimination in law school admissions.[75] Yet the AALS Special Committee was careful to note:

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71. *See, e.g.*, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 80, 200 tbl.37-1 (1999) (reporting that funding for higher education jumped from 0.5% of GDP in 1960 to 1.0% in 1970, whereas it has remained at about 1.0% since 1970. Also reporting that higher education enrollments went from 3.6 million in 1960 to 10.2 million in 1975, whereas the growth rate has been slower since that time, reaching 14.3 million by 1996), *available at* http://nces.ed.gov/pubs99/condition99/pdf/1999022.pdf; ELIZABETH A. DUFFY & IDANA GOLDBERG, CRAFTING A CLASS: COLLEGE ADMISSIONS AND FINANCIAL AID, 1955–1994, at 169, 173, 186 (1998) (discussing the growth in federal financial aid programs, including the National Defense Education Act of 1958, the 1965 Higher Education Act, and the 1972 Higher Education Act); Sander & Williams, *supra* note 68, at 453 (reviewing sources of changes in the opportunity structure of attending college).
72. This point is difficult to document, but it is consistent with my conversations with a number of professors and practitioners who were students at that time. A parallel phenomenon is that significant grade inflation occurred at colleges and universities (more so at elite schools) in the late 1960s and early 1970s as professors were reluctant to flunk out students knowing that this could lead to them being drafted. *See, e.g.*, HENRY ROSOVSKY & MATTHEW HARTLEY, EVALUATION AND THE ACADEMY: ARE WE DOING THE RIGHT THING? GRADE INFLATION AND LETTERS OF RECOMMENDATION 7–8 (2002), *available at* http://www.amacad.org (last visited July 17, 2002); CLIFFORD ADELMAN, U.S. DEP'T OF EDUC., THE NEW COLLEGE COURSE MAP AND TRANSCRIPT FILES 198 (2d ed. 1999); Theodore L. Cross, *On Scapegoating Blacks for Grade Inflation*, 1 J. BLACKS IN HIGHER EDUC. 47, 51 (1993).
73. *See* Kay, *supra* note 62, at 81 ("[T]he rising application rate of women to law school has been the major success story of the decades after 1960: between 1965 and 1985, the proportion of women J.D. students in ABA-approved schools went from four percent to forty percent of the total."); Sander & Williams, *supra* note 68, at 461 ("Law also seemed to be disproportionately attractive to women during their early years of expanded choice. Between 1965 and 1975, women entered the law in larger numbers than they entered medicine or other professions.").
74. For example, a 1971 survey of lawyers found that over half of women and over a third of men believed that women were discriminated against in law school admissions. Barry B. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 238, 239 n.52 (1974).
75. Michael H. Cardozo, *Racial Discrimination in Legal Education, 1950 to 1963*, 43 J. LEGAL EDUC. 79, 79–83 (1993).

> The suggestion has been urged upon the committee that if the Association condemns discrimination in admission on ground of race, then it should go further and condemn discrimination on grounds of sex or religion. The committee does not believe this is so.
>
> Discrimination against women is now not a serious enough problem in fact to be worth Association action. Where it exists, it carries no invidious implications.[76]

Likewise, in 1964, Erwin Griswold of Harvard Law School assured students and alumni, "[T]here could never be a great influx of women into the school . . . because the policy was never to give any man's place to a woman."[77] This institutionalized policy of male privilege was also reflected in the Harvard Special Summer Program, the first significant affirmative action outreach program in legal education designed to encourage African Americans in the South to apply to law school. In 1966, Harvard's assistant dean coolly remarked that "women suffered heavily when selections were made" regarding admission into the program because admitting a substantial proportion of women made no sense in light of the "relatively low proportion of women" at Harvard and other law schools.[78] In 1968, ten ABA-accredited law schools, including Notre Dame, still had zero female students.[79] Other schools in the mid-1960s, like Columbia, placed ceilings on the number of women who could enroll.[80]

In the 1960s and 1970s, feminism, the Civil Rights Movement, and other social forces put pressure on law schools to open their doors to women[81]—that is at least White women from middle- to upper-class backgrounds.[82] At the same time, these same forces contributed to the sub-

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76. *Id*. at 84.
77. David M. White & Terry Ellen Roth, *The Law School Admission Test and the Continuing Minority Status of Women in Law Schools*, 2 Harv. Women's L.J. 103, 105 n.10 (1979). *See also* John Anderson, *Admission Denied*, Am. Law., Mar. 1999, at 118, 119 (noting that 1950 was the first time a woman was admitted to Harvard and quoting an early alumna who recalls Griswold's greeting to incoming students: "Enjoy your stay at Harvard Law School, and as for the women in the class, personally, I didn't favor your admission, but since you are here, welcome.").
78. Toepfer, *supra* note 59, at 445–46. The author states that 31 of 40 spots in 1966 went to men, but he does not specify the ratio of men to women within the pool of 108 completed applications, stating only that the proportion of women was large. *Id*. at 445–46.
79. White & Roth, *supra* note 77, at 104.
80. *See* Deborah L. Rhode, *Perspectives on Professional Women*, 40 Stan. L. Rev. 1163, 1173–74 (1988) ("Many professional schools retained rigid quotas on female applicants and some institutions . . . remained totally inviolate as late as 1950. Not until 1972 did all accredited law schools admit women."); Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 Temp. L. Rev. 799, 807 (1988).
81. One indicator of changing attitudes is that in 1967, 44% of women college freshmen agreed that "the activities of married women are best confined to the home and family," but by 1975, only 19% agreed with this statement. Sander & Williams, *supra* note 68, at 459–60.
82. *See* Nelson, *supra* note 58, at 378 (noting that it was White upper-middle-class women who were best positioned educationally and economically to take advantage of greater opportunities to go to law school); Sander & Williams, *supra* note 68, at 461 (noting that the early growth in female law school applicants in the 1960s were disproportionately from White upper-middle- to upper-class backgrounds).

stantial expansion of the pool of female applicants. Chart 4 reflects this transformation, with 1064 women first-year students at ABA law schools in 1965 (4% of total enrollments), compared to 3542 in 1970 (10%), 10,472 in 1975 (27%), and 15,272 in 1980 (36%). This trend has continued, with 18,592 women in 1990 (42%) and 21,499 in 2000 (49%).[83]

Prior to the application explosion resulting in part from the aforementioned factors, only a few law schools, including Ole Miss and Tulane, relied extensively on the LSAT in law school admissions decisions.[84] These schools likely adopted such policies as a pretense for maintaining segregation, which is consistent with other pro-segregation maneuvers by Southern universities during that period.[85] The more common practice at that time, however, was for schools to weigh undergraduate grade point average (UGPA) more heavily than the LSAT.[86] This fact was reflected in a 1965 survey of eighty-eight law schools, which reported that a majority of law schools, including Boalt, Harvard, Pennsylvania, and Yale, relied on UGPA more than the LSAT.[87] For example, prior to 1961, Boalt Hall admitted virtually all applicants with at least a B average in college; the LSAT was only used as a factor for applicants with less than a B average.[88] Likewise, in the early 1960s, the University of Texas Law School admitted all applicants who had a 2.2 UGPA and took the LSAT, regardless of their test scores.[89]

The increased demand for legal education in the 1970s, illustrated in Chart 4, brought the competitiveness of law school admissions to dizzying heights, particularly at elite schools. This trend led to the LSAT becoming the centerpiece of the admissions process because schools were looking for an efficient method for sorting thousands of applications. Ap-

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83. AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 808 (Wendy Margolis et al. eds., 2001) [hereinafter 2002 OFFICIAL GUIDE].
84. *See* Patricia W. Lunneborg & Donna Radford, *The LSAT: A Survey of Actual Practice*, 18 J. LEGAL EDUC. 313, 318–19, 321 (1966). The third school to place more weight was South Carolina State, a law school established for Blacks, but it closed in 1966. *See* Littlejohn & Rubinowitz, *supra* note 6, at 419 n.14 (indicating that there were thirteen law students registered at South Carolina State in 1964, four in 1965, and none from 1966 to 1968).
85. One example is that a mere seven days after the Fifth Circuit ordered the admission of James Meredith to the University of Mississippi in 1962, *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962), all White public colleges and universities in Mississippi implemented an ACT cut-off score (conveniently set below the White mean but above the Black mean) even though the ACT had never previously been part of the admissions process in Mississippi. *See* Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay on Parallel Universes*, 42 J. LEGAL EDUC. 103, 112–13 (1992). A second example is the University of Florida College of Law, which first adopted a LSAT cutoff requirement in 1958 when it needed to manufacture newly minted proof that Virgil Hawkins was academically unqualified to study law at UFCL. *See* Paulson & Hawkes, *supra* note 18, at 68.
86. *See* Lunneborg & Radford, *supra* note 84, at 314.
87. *See* Lunneborg & Radford, *supra* note 84, at 313, 314, 317, 319, 321, 324 (1966). Note that Yale gave more weight to UGPA only for applicants from schools with high application volume. *See id*. at 324.
88. Rachel F. Moran et al., Statement of Faculty Policy Governing Admission to Boalt Hall and Report of the Admissions Policy Task Force 10 (1993); *Report of Special Admissions at Boalt Hall After Bakke*, *supra* note 54, at 364, 379.
89. Hopwood v. Texas, 861 F. Supp. 551, 557 (W.D. Tex. 1994).

plications to Boalt Hall rose from 706 in 1960, to 1490 in 1964, to 2340 in 1969, and to 4958 in 1972—a sixfold increase over that span.[90] Whereas 68% of Boalt applicants were admitted in 1960, only 12% of a much stronger pool were admitted in 1972.[91] By 1972, those admitted to Boalt under the "regular" (i.e., non-affirmative action) program had a median LSAT in the 97th percentile.[92] The 5000-plus applicants to the fall 1970 incoming class at Harvard had a median LSAT of 640 on a 200–800 scale, and those accepted had a median score of 695.[93] At another unidentified law school, the entering class in 1969 had a median UGPA of 2.3 and a median LSAT of 503, but only three years later these figures rose to 3.0 and 600.[94]

By the late 1960s and early 1970s, the LSAT was firmly established as the most influential factor in law school admissions decisions. While in 1961 only eight ABA schools had entering classes with a median LSAT of 600 or above, by 1972, it was estimated that more than 100 ABA schools had entering classes with median LSAT scores of 600 or higher.[95] Moreover, in 1961, the median LSAT score at 81% of law schools was below 485, whereas by 1975, 510 was the lowest mean LSAT score of any ABA school.[96] By 1980, the LSAT mean for students entering the University of Illinois College of Law (679) had caught up to the LSAT median for Harvard's class in 1969.[97]

The increased competition during the 1970s was most severe at elite law schools, partly because these schools grew much less than other law schools. Total J.D. enrollments at ABA law schools increased 53% between 1970 and 1980, due both to the expansion of existing law schools and twenty-five additional schools obtaining ABA accreditation.[98] By contrast, total enrollments at a dozen elite law schools—Boalt Hall, Chicago, Columbia, Cornell, Duke, Harvard, Michigan, NYU, Pennsylvania, Stanford, Virginia, and Yale—grew by only four percent between 1970 and 1980.[99]

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90. The Univ. of Cal. at Berkeley Sch. of Law (Boalt Hall), 1994 Annual Admissions Report 6 (1994).
91. *Id*.
92. *Report of Special Admissions at Boalt Hall After Bakke*, *supra* note 54, at 364; Moran et al., *supra* note 88, at 10.
93. Bell, *In Defense of Minority Admissions Programs*, *supra* note 17, at 368 n.10. By comparison, admitted students to Harvard in 1964 averaged 651 on the LSAT. *See* Memorandum from the UCLA School of Law Admissions and Standards Committee Memo, *supra* note 55, app. A.
94. Albert R. Turnbull et al., *Law School Admissions: A Descriptive Study*, *in* Reports of LSAC Sponsored Research: Volume II, 1970–1974, at 265, 268 (1976). The names of the five law schools in this study were not disclosed as part of a confidentiality agreement between LSAC and the law schools.
95. David M. White, *The Definition of Legal Competence: Will the Circle be Unbroken?*, 18 Santa Clara L. Rev. 641, 664 n.109 (1978).
96. Allan Nairn, *Standardized Selection Criteria and a Diverse Legal Profession*, *in* Towards a Diversified Legal Profession: An Inquiry into the Law School Admission Test, Grade Inflation, and Current Admissions Policies 366, 375 (David M. White ed., 1981).
97. Sander & Williams, *supra* note 68, at 477.
98. *See* Nelson, *supra* note 58, at 397 tbl.8.
99. *See id.* Georgetown, which usually garners the most applications in the country, was the only "top twenty" law school to significantly boost enrollment during this period.

An overlooked irony amidst all these trends is that while critics argued that affirmative action meant admitting "unqualified" and "unprepared" students and led to the "general debasement of academic standards,"[100] admission standards were relatively more relaxed during the 1950s and early 1960s, when White men maintained virtually total control over access to legal education. For instance, at the University of Michigan Law School, the students of color in the entering class of 1971 had equivalent index scores to Michigan's White male-dominated class of 1957.[101] Yet nationally, these White males of the 1950s and early 1960s, the majority of whom would have been denied access to an ABA education under the more extreme competition that was the norm by the early 1970s, apparently performed well enough as the judges, professors, government officials, and law firm partners of their generation. Likewise, a recent study of minority (mostly African American) alumni of the University of Michigan Law School found that they were equally successful as Whites in terms of income and career satisfaction and that they also had significantly higher civic service contributions than their White classmates.[102]

V. THE SUPREME COURT AND STALLED PROGRESS FOR STUDENTS OF COLOR: 1975–1985

In an admissions environment of heightened competition and a political environment of backlash against Great Society programs,[103] the constitutionality of higher education affirmative action was challenged in the courts only a few years after these programs began. The first major case was *Defunis v. Odegaard*, a suit by a White applicant denied admission to the University of Washington Law School.[104] In 1973, the Washington Supreme Court overturned a state trial court decision and upheld the affirmative action program that benefited African Americans, Chicanos, American Indians, and Filipinos.[105] This decision was stayed pending a ruling by the U.S. Supreme Court.[106] The *DeFunis* case garnered significant national attention, which was reflected in twenty-six amici curiae briefs

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100. Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 353, 360–61 (1970). Graglia's statements over three decades ago mirror those of affirmative action critics today. *See, e.g.*, Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1903 (1999) (book review) (arguing that affirmative action has led to grade inflation and "a lowering of academic standards" at elite universities); Martin Trow, *California After Racial Preferences*, 135 PUB. INT. 64, 79 (1999) (arguing that after Proposition 209 "Boalt could no longer admit large numbers of poorly qualified minority students . . . .").
101. Harry T. Edwards, *"Headwinds" Minority Placement in the Legal Profession*, 16 L. QUADRANGLE NOTES, Spring 1972, at 14, 18.
102. Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 395 (2000). For similar findings, see also DAVID B. WILKINS ET AL., *supra* note 50; BOWEN & BOK, *supra* note 61, at 162–68.
103. *See, e.g.*, JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES 1945–1974, at 676–77 (1996) (describing backlash among large segments of America to the Great Society programs of the Lyndon Johnson administration).
104. 416 U.S. 312 (1974).
105. Defunis v. Odegaard, 507 P.2d 1169 (Wash. 1973).
106. 416 U.S. at 315.

filed, a Supreme Court record at the time.[107] However, by the time the case was argued before the Court in February 1974, Marco DeFunis was finishing up his last semester of law school and was set to graduate regardless of how the case was decided.[108] The furor the case had created in academic and policy circles quickly dissipated when the Court dismissed the lawsuit as moot in a per curiam opinion.[109]

Justices Brennan, Douglas, White, and Marshall dissented, arguing that the case deserved a ruling on its merits and that the issue would inevitably return to the Supreme Court.[110] Justice Douglas authored a separate dissent that gave all sides reason for concern.[111] On one hand, progressives were troubled that Douglas, a stalwart member of the liberal Warren Court, applied a strict scrutiny standard of review and seemed to go out of his way to condemn affirmative action:

> The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone . . . . A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions . . . .
>
> If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality.[112]

On the other hand, Justice Douglas also wrote that racial bias in standardized testing may be an adequate justification for affirmative action: "My reaction is that the presence of an LSAT is sufficient warrant for a school to put racial minorities into a separate class in order better to probe their capacities and potentials."[113] Testing officials, law school deans invested in an LSAT-dominated definition of "merit," and affirmative action critics were all troubled when Douglas opined, "The key to the problem is consideration of such applications in a racially neutral way. Abolition of the LSAT would be a good start."[114]

When Allan Bakke's challenge to the affirmative action program at the University of California (UC) Davis Medical School reached the U.S. Supreme Court in the 1977–1978 term, public attention reached new levels. *Regents of the University of California v. Bakke* spurred nearly twice as many

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107. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 831 (2000).
108. *DeFunis*, 416 U.S. at 315–16.
109. *Id.* at 319–20.
110. *Id*. at 348–49.
111. *Id*. at 320.
112. *Id*. at 342–43.
113. *Id*. at 335.
114. *Id*. at 340.

amici curiae briefs as *DeFunis*.[115] In *Bakke*, Justice Powell provided the crucial swing vote for two divergent majority rulings. The conservative wing of the Court and Powell struck down the affirmative action program at the UC Davis Medical School, ruling that having a dual track admissions plan with a predetermined number of places reserved for minorities violated the Equal Protection Clause.[116] The liberal wing of the Court and Powell held that race could be used as a plus factor in higher education admissions decisions.[117] Federal courts today are quite divided on the question of whether a key portion of Justice Powell's opinion—in which he wrote that racially diverse learning environments can enhance all students' educational experiences and therefore provide universities with a compelling interest in adopting race-conscious admissions—should be interpreted as part of the holding of the case.[118]

A coalition of civil rights organizations and bar groups urged UC not to appeal *Bakke* because of the poor, compromised record in the case. These same groups later filed briefs asking the Supreme Court to deny UC's petition for certiorari.[119] Progressive scholars were troubled by the posture of *Bakke* because it was not necessarily in UC's institutional best interest to make a full-throated defense of affirmative action. For example, UC had no stake in arguing that Bakke may have actually been denied admission because the dean could reserve seats for the relatives of wealthy donors or because age discrimination was pervasive at American medical schools at that time.[120] (Bakke was thirty-two years old when he first applied and was rejected by all fourteen medical schools to which he applied, despite having significantly higher grades and MCAT scores than other Whites admitted to Davis and presumably many other medical schools.)[121] UC also declined to present evidence that affirmative action

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115. Kearney & Merrill, *supra* note 107, at 831.
116. 438 U.S. 265, 315–20 (1978) (Powell, J.); *id.* at 408–21 (Stevens, J. concurring in part and dissenting in part).
117. *Id*. at 320 (In a portion of Powell's opinion in which he was joined by Brennan, White, Marshall, and Blackmun, he found that "the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.").
118. Conflicting recent rulings include: *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 617 (2002); *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich., 2000), *cert. granted*, 123 S. Ct. 602 (2002); *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 263 F.3d 1234 (11th Cir. 2001); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).
119. JOEL DREYFUSS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 90–94 (1979); Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 5 n.8 (1979).
120. Regarding whether Alan Bakke would not have been admitted to UC Davis Medical School even in the absence of affirmative action, one scholar recently conducted an extensive review of background material on the case and concluded that the University of California conceeded a strong argument that Bakke lacked standing in order to confer jurisdiction on the Supreme Court. Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1056–60 (2002).
121. DREYFUSS & LAWRENCE, *supra* note 119, at 32, 39–53 (also criticizing the UC's restricted defense of affirmative action, including how UC had a greater institutional

was necessary to remedy its prior discrimination or to neutralize racial bias in admissions criteria like standardized tests, since such evidence might open the door to litigation from rejected minority applicants.[122] Regarding standardized testing, Justice Powell noted that neither party had developed a record, but he opined that compensating for bias in testing and grades could conceivably justify race-sensitive admissions:

> Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all.[123]

As for the effect of *Bakke* on law school admissions, Charts 2 and 3 indicate that Black, Chicano, and American Indian first-year enrollments at ABA law schools were flat in the mid- to late-1970s. In a major recent study of *Bakke*'s impact on affirmative action in law and medical schools, Susan Welch and John Gruhl conclude that *Bakke* had the net effect of institutionalizing already established affirmative-action admission practices, rather than leading to a significant rise or drop in opportunities for African Americans and Latinos between the early 1970s and the late 1980s.[124] Welch and Gruhl's study was based upon national medical applications and enrollments, law school enrollments, cross-sectional information on individual schools, and a 1989 survey of admissions officers.[125] However, this important study included no information on law school applications or admissions decisions,[126] and Welch and Gruhl's data on law school enrollments combined Blacks and Latinos.[127] Their study was consistent with the results of Henry Ramsey's 1979 survey of 100 law

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interest in quickly establishing a clear precedent rather than in mounting a defense under optimal conditions, and how UC contributed to the notion that Bakke was better qualified based on test scores and undergraduate grades). *See also* Emma Coleman Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 Harv. C.R.-C.L. L. Rev. 31 (1979).

122. Dreyfuss & Lawrence, *supra* note 119, at 39–53; David M. White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 Harv. C.R.-C.L. L. Rev. 89, 124–25 (1979).
123. *Bakke*, 438 U.S. at 306 n.43.
124. Susan Welch & John Gruhl, Affirmative Action and Minority Enrollments in Medical and Law Schools 131–32 (1998). For a summary of these findings, see Susan Welch & John Gruhl, *Does* Bakke *Matter? Affirmative Action and Minority Enrollments in Medical and Law Schools*, 59 Ohio St. L.J. 697 (1998).
125. Welch & Gruhl, *Does* Bakke *Matter?*, *supra* note 124, at 705.
126. Welch & Gruhl, *supra* note 124, at 113 ("Unfortunately, longitudinal data on acceptances are available only for medical schools."); Welch & Gruhl, *Does Bakke Matter?*, *supra* note 124, at 705 n.66 ("It is important to note that our data sources are more complete for medical schools than law schools. Accurate time series data on minority applications and acceptances to law schools in pre-*Bakke* years are unavailable.").
127. Welch & Gruhl, *supra* note 124, at 120 ("Data from law schools have another limitation. We cannot obtain separate enrollment figures for blacks and Hispanics. . . . While we would like to examine these groups separately, that is not possible from existing data.").

schools,[128] in which he found that 72% of law schools reportedly had affirmative action programs.[129]

Whereas Welch and Gruhl's study was limited by the fact that it relied on survey data and limited admissions data, one goal of this Article is to analyze legal education opportunities for underrepresented minorities in the last quarter-century based upon comprehensive national admissions data. Analysis of relevant national admissions data supports Welch and Gruhl's central conclusion that *Bakke* did not change admissions practices. At the same time, however, it is also true that White applicants have been more likely to be admitted to law schools nationally than minority applicants.

Table 2 and Chart 5 display the available data collected by Law School Admission Council (LSAC) for virtually all African American, Chicano, and White applicants to ABA-approved law schools for the fall term from 1976 to 1979 and 1985.[130] A crucial point is that while the unavailability of data makes it impossible to know whether Black and Chicano applicants had higher admissions rates than Whites at ABA law schools in the late 1960s or early 1970s, such was certainly not true by the 1975-1976 admissions cycle or thereafter. During the period shortly before and after *Bakke*, White applicants were substantially more likely to be admitted to ABA law schools than Blacks, Chicanos, or other minority applicants. Indeed, the highest acceptance rate[131] for African Americans (55% in 1985) is still lower than the lowest acceptance rate for Whites (59% in 1976), and in each of the five years reported, the cumulative acceptance rate for African Americans is only about two-thirds of the White acceptance rate.

These findings contrast somewhat with Welch and Gruhl's medical school admissions data. At medical schools in 1976, the ratio of the Black acceptance rate to the White acceptance rate was about 1.05, meaning that African Americans were equally likely to be offered admission.[132] Gradually, the Black-White acceptance ratio declined and then hovered between

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128. This survey had a ninety-five percent response rate.
129. Ramsey, *supra* note 65, at 384 tbl.1.
130. Such national data was first made available after LSAC researchers needed to analyze the national applicant pool in preparation for the pending *Bakke* case. Franklin R. Evans, *Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall of 1976*, *in* LAW SCH. ADMISSION COUNCIL, REPORTS OF LSAC SPONSORED RESEARCH: VOLUME III, 1975–1977, at 551, 599–602 (1978).

    Unfortunately, I could not obtain national applicant data before the 1975–1976 admission cycle. Nor was I able to obtain serviceable admission data for 1980–1984 from either published or unpublished sources. Other underrepresented minority groups were excluded from Table 2 and Chart 5 because the data sources combined American Indian, Puerto Rican, Asian American, and other candidates into a single "unspecified minority" category. In 1976, the "unspecified minority" category consisted of 290 American Indians, 829 Asian Americans, 412 Puerto Ricans, and 2152 candidates who checked "other," a portion of which may have been Whites who did not want to state their race/ethnicity. *Id.* at 598.
131. Regarding the national admission data in this Article, acceptance rate is the proportion of applicants who receive one or more admission offers from the law schools to which they applied.
132. WELCH & GRUHL, *supra* note 124, at 117 fig.5.4.

.80 and .85 during the 1978–1985 period.[133] By contrast, the law school data in Table 2 indicates that the Black-White acceptance ratio stayed in the .66–.67 range from 1976 to 1979 and became only slightly more equitable (.70) in 1985 when the national applicant pool decreased.[134]

While the Chicano category in Table 2 and Chart 5 is not entirely comparable to Welch and Gruhl's data on Hispanics, a review of these data sources still suggests that Chicanos applying to law school fared relatively worse off vis-à-vis Whites than those applying to medical school.[135] At American medical schools, the Hispanic-White acceptance ratios ranged from 1.2 to 1.05 for the 1975–1985 span.[136] By contrast, the Chicano-White acceptance ratios for ABA law schools climbed from .80 in 1976 to .89 in 1979, and were at .85 in 1985.

Another noteworthy fact is that nearly two-thirds of Chicano law students in the late 1970s were enrolled in California, Texas, and New Mexico.[137] Public law schools in these states were a particularly important gateway of opportunity. In 1978, the top five feeder law schools for Chicanos were the University of Texas (164 enrolled students), UCLA (96), University of New Mexico (83), UC Hastings (78), and Boalt Hall (73).[138] For reasons that will become apparent in Part VI, the fact that so many Chicano law students came from California and Texas had troubling consequences when affirmative action was banned in those states.

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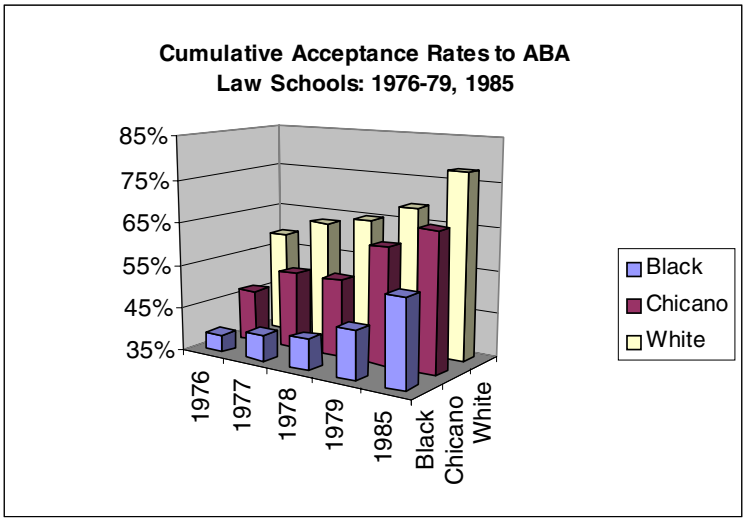
133. Welch & Gruhl, *supra* note 124, at 117 fig.5.4.
134. In 1985, the total number of applicants to ABA law schools was 60,338, compared to a range of 68,773 to 77,532 for 1976–1979. David H. Vernon & Bruce I. Zimmer, *The Size and Quality of the Law School Applicant Pool: 1982–1986 and Beyond*, 1987 Duke L.J. 204, 205; Law Sch. Admission Council, The Challenge of Minority Enrollment, app. D, (Rennard Strickland et al. eds., 1981).
135. For example, separate data for Hispanics (excluding Chicanos) is reported by 1985, and the cumulative acceptance rates for Chicanos (67%) and other Hispanics (69%) were similar at this time. Law Sch. Admission Council, Analyses of Minority Law School Applicants 1980–1981 to 1985–1986, at 27–28 (1987).
136. Welch & Gruhl, *supra* note 124, at 117 fig.5.4.
137. Smith, *supra* note 25, at 102–03 tbl.4.
138. Smith, *supra* note 25, at 102–03 tbl.4.

TABLE 2: CUMULATIVE ACCEPTANCE RATES (AND APPLICANT VOLUME) TO ABA LAW SCHOOLS: 1975–79, 1985[139]

Year	BLACK	CHICANO	WHITE
1976	39% (4299)	47% (1085)	59% (66994)
1977	41% (3914)	53% (1091)	63% (66030)
1978	42% (4230)	53% (1187)	65% (68184)
1979	46% (3721)	62% (1053)	69% (60280)
1985	55% (3776)	67% (693)	78% (48166)
5-Year Total	44.6% (19,940)	55.4% (5,109)	65.9% (309,654)

CHART 5



In its influential *Bakke* amicus brief, LSAC acknowledged the admissions disparities favoring White applicants and cited these statistics as evidence that law schools were not admitting unqualified students of color:

> Because minorities generally rank lower on these measures [LSAT and UGPA], for reasons evident from their previous educational experience, a somewhat disproportionate number of minority ap-

139. Evans, *supra* note 130, at 599–602; LAW SCH. ADMISSION COUNCIL, THE CHALLENGE OF MINORITY ENROLLMENT, *supra* note 134, tbl.16a–16d; LAW SCH. ADMISSION COUNCIL, ANALYSES OF MINORITY LAW SCHOOL APPLICANTS 1980–1981 TO 1985–1986, *supra* note 135 at 25–27. Please note there is a minor discrepancy (probably a typo) in LSAC's 1979 data for White applicants. THE CHALLENGE OF MINORITY ENROLLMENT, *supra*, states that there were 42,709 admits out of 60,280 applicants and that 69% of White applicants were admitted. However, 42,709/60,280 = 70.9%. In my analysis I am assuming that the real number of White admits is 41,709 because 41,709/60,280 = 69.2%, and this is a less favorable assumption vis-à-vis my conclusions compared to the assumption that the 69% figure was a typo.

> plicants must be rejected as having no reasonable chance of completing law school, so that to admit them would be a misallocation of resources, wasting a year of their lives and occupying a valuable law school seat. Accordingly, only 39% of black applicants to the nation's law schools were admitted to the class entering in 1976, in contrast with 59% of the white applicants.[140]

LSAC's justification of the ABA admissions practices during the 1970s raises an important question: is the disparate impact of law school admissions standards in the *Bakke* era primarily attributable to the screening out of students of color whose inadequate educational achievement indicated they had little realistic hope of completing their legal studies?

Contrary to LSAC's assurances, Table 3 and Chart 6—which display national admissions rates for all ABA applicants with UGPAs of 3.25 or higher—suggest that by the mid-1970s, law schools were disproportionately turning away high-achieving African Americans.[141] Combined data from 1976 to 1979 and 1985 reveal that 26% of African Americans with 3.25+ UGPAs were denied admission from every ABA law school to which they applied, compared to 14% of Chicanos and 15% of Whites.[142]

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140. Brief for Amicus Curiae, Law School Admission Council, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-118), *reprinted in* Allan Bakke versus Regents of the University of California: The Supreme Court of the United States 143, 175 (Alfred A. Slocum ed., 1978) [hereinafter LSAC *Bakke* Brief].

141. There is voluminous literature debating the predictive validity of the LSAT and UGPA as well as other test fairness considerations. However, such a discussion is beyond the scope of this Article and is something I have written about elsewhere. *See* 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 (2001); William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 Tex. J. Women & L. 167 (2000); 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 (2000). For other recent works from a variety of perspectives, see generally Rebecca Zwick, Fair Game? The Use of Standardized Admissions Tests in Higher Education (2002); Lisa A. Anthony et al., Law Sch. Admission Council, Technical Report, Predictive Validity of the LSAT: A National Summary of the 1995–1996 Correlation Studies 6 tbl.2 97–01 (1999); Richard Delgado, *Official Elitism or Institutional Self-Interest? 10 Reasons Why UC Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. Davis L. Rev. 593 (2001); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 31–34 (1997); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953 (1996).

142. Some readers may suspect that I am making an apples to oranges comparison because they believe that African Americans and Latinos may have disproportionately earned degrees at less competitive institutions with lax grading standards. Such an assumption, however, is contradicted by available evidence. In a major study of 821 colleges and universities using data from the Law School Admission Council (including both data supplied by colleges to LSAC and applicant data), Sandra Weckesser found that at traditionally black colleges 41% of 1979 graduates had a 3.0+ GPA, compared to 45% at public colleges, 52% at private colleges, and 64% at highly selective colleges. Sandra W. Weckesser, The Double Jeopardy of the GPA: A Comparative Study of Grade Distribution Patterns and Grade Inflation by Types of Colleges and Universities, *in* Towards a Diversified Legal Profession: An Inquiry into the Law School Admission Test, Grade Inflation, and Current Admis-

Moreover, these results are not an artifact of group differences in the distribution of applicants with 3.25–4.0 UGPAs. More detailed data from 1976 and 1985 indicate that White Applicants consistently had higher admissions rates than African Americans among those with 3.75+ UGPAs, 3.5–3.74 UGPAs, 3.25–3.49 UGPAs, and so forth.[143] Since this pattern occurred at a time when nearly all American law schools practiced affirmative action to some extent, the depressed admissions rates for African American "high achievers" is most likely attributable to law schools giving the greatest weight to precisely the criterion that disadvantages students of color most: the LSAT.

This conclusion is consistent with the finding that in the 1970s, African American law students were disproportionately clustered in a few dozen ABA law schools[144] and that Chicanos were disproportionately clustered in public law schools in the Southwest.[145] While these few schools practiced energetic affirmative action in the 1970s, a much larger number of law schools had more modest affirmative action programs that were overshadowed by the disparate impact of an LSAT-driven definition of merit. Therefore, while affirmative action critics charged that law schools had become havens of widespread "reverse discrimination,"[146] the actual national admissions practices that were locked in by the mid-1970s and which were further institutionalized by *Bakke* significantly favored Whites.[147]

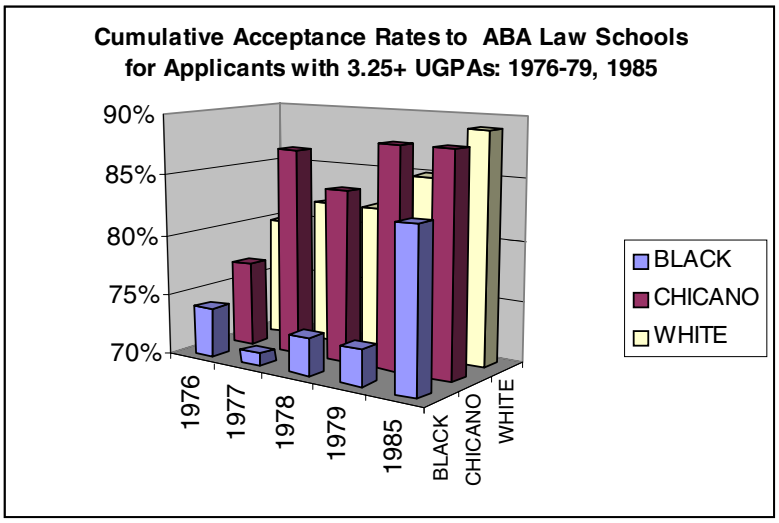
SIONS POLICIES 284, 296–303 (David M. White ed., 1981). Thus, during this period an African American graduate from Howard University or a Chicana graduate of San Diego State University would both have attended institutions with less forgiving grade distributions.

143. Evans, *supra* note 130, at 599–602; LAW SCH. ADMISSION COUNCIL, ANALYSES OF MINORITY LAW SCHOOL APPLICANTS 1980–1981 TO 1985–1986, *supra* note 135, at 25–27.
144. A 1970 AALS study of 140 ABA law schools found that fifty schools enrolled ninety percent of all students of color. Bell, *In Defense of Minority Admissions Program*, *supra* note 17, at 365 n.2. Stated differently, in 1971, 101 of 142 ABA law schools were ninety-five percent or more White. *1971 Survey of Minority Group Students in Legal Education*, 24 J. LEGAL EDUC. 487, 490 tbl.4 (1972).
145. Smith, *supra* note 25, at 102–03 tbl.4.
146. *See, e.g.*, Clyde W. Summers, *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. TOL. L. REV. 377, 384–86; Lino A. Graglia, *Racially Discriminatory Admission to Public Institutions of Higher Education*, 9 SW. U. L. REV. 583 (1977); Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education,"* 15 CONST. COMMENT 11 (1998).
147. *Cf.* Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000) (arguing that admission standards favoring Whites in law school admissions become more embedded over time).

Table 3: Cumulative Acceptance Rates (and Applicant Volume) to ABA Law Schools for Applicants with 3.25+ UGPAs: 1976–79, 1985[148]

Year	Black	Chicano	White
1976	74% (556)	77% (243)	80% (26753)
1977	71% (557)	87% (234)	82% (27876)
1978	73% (592)	84% (274)	82% (29802)
1979	73% (557)	88% (291)	85% (27189)
1985	83% (488)	88% (139)	89% (19698)
5-Year Total	74.2% (2,753)	85.9% (1,181)	85.0% (131,318)

Chart 6



VI. The Fall of Affirmative Action: Resegregation at Public Law Schools

National data regarding law school admissions trends must be placed in the proper context by analyzing a salient feature of the current landscape: the impact that affirmative action bans have had on public law schools. Commentators addressing affirmative action can be deservedly criticized for relying on selective data rather than larger samples including several schools and several years.[149] Similarly, in "reverse discrimina-

148. *See supra* note 139.
149. *See, e.g.*, Grutter v. Bollinger, 137 F. Supp. 2d 821, 858 (E.D. Mich. 2001), *rev'd en banc* 288 F.3d 732 (6th Cir. 2002) (making comparisons only between 1996 and 1997 for the

tion" suits challenging race-conscious admissions programs, courts have made problematic factual findings about the consequences of ending affirmative action. For example, in *Grutter v. Bollinger*, the district court rejected the defendant intervenors' argument that ending affirmative action would result in resegregation at the University of Michigan Law School. The court noted its "sincere hope that such consequences can be avoided," and the court based its speculation on an apples-to-oranges comparison with the UC Berkeley Graduate School of Education and the undergraduate campuses in the UC system, which vary considerably in their selectivity.[150]

Compounding the problem in *Grutter*, in January 2003, the Bush Administration filed an amicus brief with the Supreme Court in support of the White plaintiffs in which it argued that the University of Michigan Law School's affirmative action policy was unconstitutional because there are ample race-neutral alternatives that will yield comparable levels of racial and ethnic diversity.[151] Shockingly, the Bush administration assured the Court there were "ample" alternatives, while at the same time, it failed to discuss what happened when affirmative action was ended at law schools in California and Texas that are comparable to the University of Michigan Law School.[152] Clearly, a more systematic analysis of the impact of affirmative action bans on legal education is needed.

As mentioned above, the Supreme Court will issue a ruling in *Grutter v. Bollinger* in the early summer of 2003, which will affect affirmative action plans at public and private universities and colleges across the nation.[153] As it stands, affirmative action in higher education is under greater threat today than at any time since *Bakke*. In the wake of the Fifth Circuit's decision in *Hopwood v. Texas*, California's Proposition 209, the University of California Regents' SP-1 Resolution, Washington's 1-200 Initiative, and the "One Florida" plan, a substantial number of America's leading public law schools terminated race-sensitive affirmative action in recent years.

Ending race-sensitive admissions at public law schools in California, Texas, and Washington has had significant negative consequences for African Americans, Latinos, and American Indians. The first prohibition on affirmative action occurred when the UC Regents approved SP-1 in July 1995, which ended race-conscious admissions at the graduate and professional levels beginning on January 1, 1997, and the undergraduate level

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University of Texas Law School and for Boalt Hall); Stephan Thernstrom & Abigail Thernstrom, *Reflections on* The Shape of the River, 46 UCLA L. REV. 1583, 1689 (1999) (book review) (incorrectly concluding that Asian Pacific Americans were the greatest beneficiaries of Proposition 209 based on a flawed interpretation of 1997 UCLA Law School data); Stephan Thernstrom, *Farewell to Preferences?*, 130 PUB. INTEREST 34, 39–45, 49 (1998).

150. *Grutter*, 137 F. Supp. 2d at 869–70.

151. Brief for the United States as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (en banc), *cert. granted*, 123 S. Ct. 617 (2002) (No. 02-241), *available at* http://www.umich.edu/~urel/admissions/legal/amicus.html (last visited Feb. 27, 2003).

152. *Id*.

153. *See supra* note 3.

one year later.[154] This was followed up with Proposition 209, a November 1996 voter-backed amendment to the California Constitution that took effect in January of 1998.[155] In the 1996 case of *Hopwood v. Texas*, a challenge to the affirmative action program at the University of Texas Law School, the Fifth Circuit ruled that diversity (i.e., the educational benefits that flow from having racially diverse learning environments) was not a compelling governmental interest. This ruling had the effect of prohibiting race-conscious admissions at public and private higher educational institutions in Texas, Louisiana, and Mississippi.[156]

Washington voters passed Initiative 200, a ballot initiative with wording identical to Proposition 209, in November 1998.[157] Finally, the "One Florida" plan, adopted in November 1999 by Governor Jeb Bush's executive order, discontinued race-conscious affirmative action in the Florida public university system beginning in 2000 at the undergraduate level and in 2001 at the graduate and professional levels. Although the "One Florida" plan grants students who graduate in the top twenty percent of their high school class a spot in at least one public university, there is no analogous admissions plan for law, medical, business, and graduate schools.[158]

UC Berkeley (Boalt Hall), UCLA, UC Davis, the University of Texas (UT), and the University of Washington (UW) have been greatly impacted by the end of affirmative action. The law schools at the University of Florida and Florida State University are not discussed here because the One Florida Plan only took effect for the entering class of 2001 and because Florida still has race-conscious financial aid.[159] For Boalt Hall, UCLA,

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154. Kit Lively, *Preference Abolished: U. Of California Regents Vote to End Affirmative Action in Hiring and Admissions*, Chron. Higher Educ., July 28, 1995, at A26–A29. The UC Regents rescinded SP-1 in May 2001, but Proposition 209 remains in effect. Rebecca Trounson & Jill Leovy, *UC Regents Vote to Rescind Ban on Affirmative Action,* L.A. Times, May 17, 2001, at A11.

155. Cal. Const. art. I, § 31, (a) states: "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

156. *Hopwood*, 78 F.3d 932 (5th Cir. 1996), *reh'g denied*, 84 F.3d 720 (5th Cir. 1996) (en banc), *cert. denied*, 518 U.S. 1033 (1996). Four years later there was another Fifth Circuit ruling on an appeal and cross-appeal of the district court's ruling on remand. Hopwood v. State of Texas, 236 F.3d 256 (5th Cir. 2000). However, this had no effect on the prohibition on higher education affirmative action within the Fifth Circuit.

157. *See, e.g.*, D. Frank Vinik et al., *Affirmative Action in College Admissions: Practical Advice to Public and Private Institutions for Dealing with the Changing Landscape*, 26 J.C. & U.L. 395, 413–15 (2000).

158. Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution,'* Chron. Higher Educ., June 2, 2000, at 31; *Why the "One Florida" Plan Would Remove Blacks from the Best Campuses of the University of Florida*, 27 J. Blacks Higher Educ. 29, 29–30 (2000).

159. William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 Berkeley La Raza L.J. 173, 221 (2001). For recent critiques of the One Florida Plan, see, for example, Patricia Marin & Edgar K. Lee, Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida, (2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.php (last visited Feb. 24, 2003); Catherine Horn & Stella M. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences, (2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php; U.S. Comm'n on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity

UC Davis, and UT, the admissions data include the five years after Prop. 209/SP-1 and *Hopwood* (1997–2001), which are compared to the four years before the ban on affirmative action from 1993 to 1996. For UW, the three post-Initiative 200 admissions cycles (1999–2001) are compared to the admissions cycles for the last three years with affirmative action (1996–1998).

Tables 4 and 5 and Chart 7 compare the number of enrolled first-year African Americans in the years before and after affirmative action was prohibited. Total enrollments for each class are included in parentheses to account for fluctuations in enrollment totals over time. The data reveal a precipitous drop in African American enrollments after affirmative action was banned. Across the five schools, African Americans were 6.65% of enrollments with affirmative action, but 2.25% of enrollments without affirmative action. In effect, the clock was turned back on three decades of affirmative action in California. At Boalt Hall, African Americans were 2.7% of enrollments from 1997 to 2001. By comparison, Blacks were 9.0% of enrollments in the first five years in which affirmative action took full effect (1968–1972).[160] Likewise, African Americans were 7.5% of enrollments at UCLA in the first five years of affirmative action (1967–1971) but only 2.3% of enrollments thirty years later (1997–2001). The University of Texas came full circle as well, as a half-century of hard-fought yet halting progress was erased. In 1951, Heman Sweatt and the five other African American entrants to the first post-de jure segregation class at UT constituted 2.1% of enrollments.[161] African Americans were a nearly identical proportion of enrollments (2.2%) at UT in 1997–2001. The extent to which Boalt, UCLA, and UT became resegregated is particularly disheartening in light of the recent history of those institutions. Boalt Hall and UCLA combined to award nearly 600 law degrees to African Americans between 1987 and 1997, and UT produced some 650 Black attorneys prior to *Hopwood*.[162] It should also be noted that African Americans were 11.1% of the national applicant pool from 1993 to 1996 and a slightly higher 11.4% from 1997 to 2000.[163]

IN HIGHER EDUCATION (Staff Report November 2002), *available at* http://www.usccr.gov/ (go to recent briefings and papers).

160. Karabel, *supra* note 51, tbl.1, tbl.5.
161. Russell, *supra* note 11, at 507.
162. Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 930 n.9 (2001).
163. Law Sch. Admission Council, National Decision Profiles, 1993–2000.

Table 4: African American Enrollments at Selective Public Law Schools Before Affirmative Action Was Prohibited[164]

Year	Boalt	UCLA	Davis	U. Texas	U. Wash.
1993	21 (269)	20 (340)	5 (160)	31 (556)	—
1994	31 (269)	46 (335)	10 (153)	37 (568)	—
1995	21 (266)	20 (272)	3 (136)	36 (509)	—
1996	20 (263)	19 (307)	4 (152)	29 (500)	6 (172)
1997	—	—	—	—	3 (166)
1998	—	—	—	—	8 (173)
Avg.	23.3 (266.8)	26.3 (313.5)	5.5 (150.3)	33.3 (533.3)	5.7 (170.3)

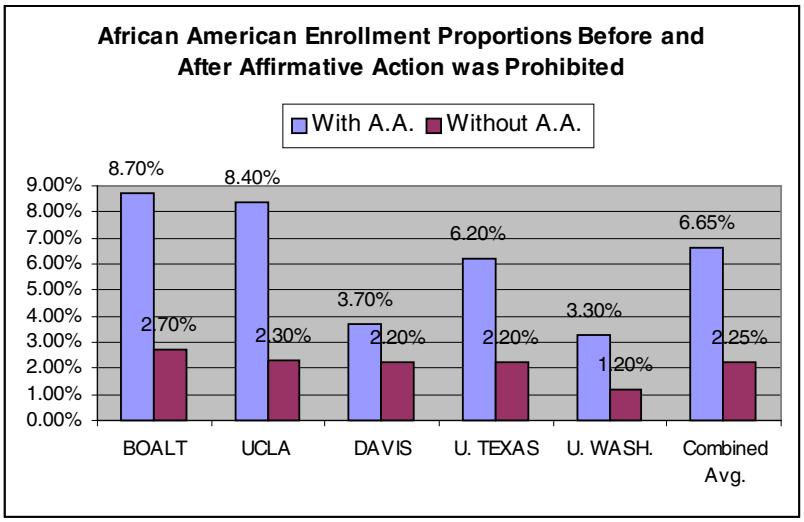
Table 5: African American Enrollments at Selective Public Law Schools After Affirmative Action Was Prohibited[165]

Year	Boalt	UCLA	Davis	U. Texas	U. Wash.
1997	1 (268)	10 (381)	5 (172)	4 (464)	—
1998	8 (269)	8 (277)	3 (183)	9 (489)	—
1999	7 (269)	3 (289)	6 (161)	9 (519)	2 (158)
2000	7 (270)	5 (305)	2 (168)	17 (518)	1 (163)
2001	14 (299)	10 (304)	4 (214)	16 (527)	3 (177)
Avg.	7.4 (275)	7.2 (311)	4.0 (179.6)	11.0 (503.4)	2.0 (166)

164. University of California Office of the President, UC Law School Statistics, *available at* http://www.ucop.edu/acadadv/datamgmt/lawmed/law-enrolls-eth.html; University of Texas at Austin Office of Institutional Studies, New Fall Law School Enrollments 1993–2001 (2002) (letter on file with author); University of Washington Law School Admissions Office, New Law School Enrollments 1996–2001 (2002) (letter on file with author); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. Rev. 1215, 1236 (2002) (providing admission data for UCLA).

165. University of California Office of the President, *supra* note 164; University of Texas at Austin Office of Institutional Studies, *supra* note 164; University of Washington Law School Admissions Office, *supra* note 164; Harris, *supra* note 164, at 1236.

CHART 7



Tables 6 and 7 and Chart 8 compare the number of enrolled first-year Latinos in the years before and after affirmative action was prohibited. Based on the combined data from the five schools, Latinos were 11.8% of enrollments with affirmative action, but 7.4% of enrollments without affirmative action. There was a substantial 47% drop in the proportion of enrollments at Boalt and UCLA combined. The impact at the University of Texas was more modest, which is partly a reflection of the fact that Texas's pre-*Hopwood* affirmative action program included Chicanos but not other Latinos. The real drop in Latino enrollments is actually understated by Chart 8 insofar as Latinos were 7.1% of the national applicant pool from 1993 to 1996, compared to 8.3% from 1997 to 2000, an increase of 15%.[166]

As with African Americans, for Latinos, the clock was also turned back on three decades of affirmative action. At Boalt Hall, Latinos were 6.4% of enrollments from 1997 to 2001, a smaller figure than the 7.3% of enrollments in the first five years in which affirmative action took full effect (1968–1972).[167] To give these figures added context, Boalt Hall and UCLA together awarded over 800 law degrees to Latinos between 1987 and 1997, and UT was the top Chicano feeder law school in the nation, producing over 1300 Chicano attorneys prior to *Hopwood*.[168]

166. Law Sch. Admission Council, National Decision Profiles, 1993–2000.
167. Karabel, *supra* note 51, at tbl.4. This finding is even more remarkable considering how small the Chicano/Latino applicant pool was in the early 1970s. Although comprehensive applicant data on this point is scarce, one LSAC study reported, for example, that out of the 34,394 students who took the December 1971 LSAT, only 1.4% of test-takers were Chicano. Frances Swineford, *Comparisons of Black Candidates and Chicano Candidates with White Candidates*, *in* Law Sch. Admission Council, REPORTS OF LSAC SPONSORED RESEARCH: VOLUME II, 1970–1974, at 261, 262 (1974).
168. Lawrence, *supra* note 162, at 930 n.9.

Table 6: Latino Enrollments at Elite Public Law Schools Before Affirmative Action Was Prohibited[169]

Year	Boalt	UCLA	Davis	U. Texas	U. Wash.
1993	42 (269)	50 (340)	14 (160)	59 (556)	—
1994	35 (269)	57 (335)	18 (153)	63 (568)	—
1995	36 (266)	29 (272)	21 (136)	68 (509)	—
1996	28 (263)	45 (307)	16 (152)	46 (500)	10 (172)
1997	—	—	—	—	15 (166)
1998	—	—	—	—	7 (173)
Avg.	35.3 (266.8)	45.3 (313.5)	17.3 (150.3)	59.0 (533.3)	10.7 (170.3)

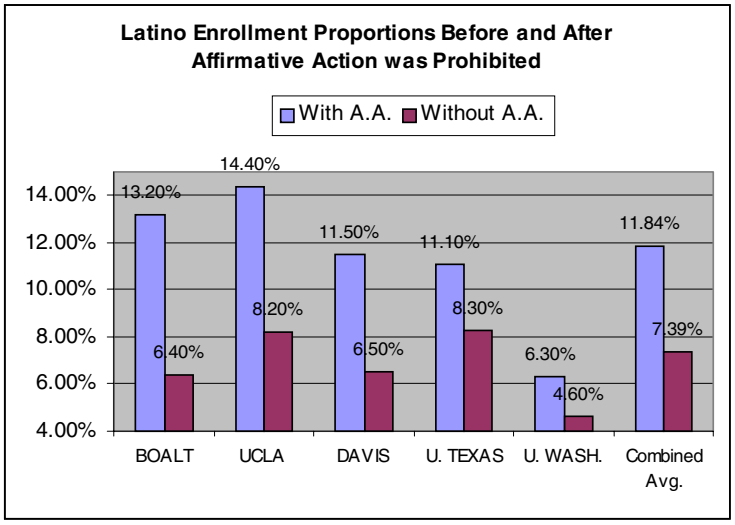
Table 7: Latino Enrollments at Elite Public Law Schools After Affirmative Action Was Prohibited[170]

Year	Boalt	UCLA	Davis	U. Texas	U. Wash.
1997	14 (268)	39 (381)	6 (172)	31 (464)	—
1998	23 (269)	16 (277)	26 (183)	37 (489)	—
1999	16 (269)	18 (289)	14 (161)	41 (519)	4 (158)
2000	18 (270)	28 (305)	12 (168)	51 (518)	6 (163)
2001	17 (299)	26 (304)	14 (214)	50 (527)	13 (177)
Avg.	17.6 (275)	25.4 (311)	11.6 (179.6)	42.0 (503.4)	7.7 (166)

169. University of California Office of the President, *supra* note 164; University of Texas at Austin Office of Institutional Studies, *supra* note 164; University of Washington Law School Admissions Office, *supra* note 164; Harris, *supra* note 164, at 1236.

170. University of California Office of the President, *supra* note 164; University of Texas at Austin Office of Institutional Studies, *supra* note 164; University of Washington Law School Admissions Office, *supra* note 164; Harris, *supra* note 164, at 1236.

CHART 8



The analysis of American Indian enrollment patterns is less detailed because the samples are so small, and therefore, trends at a single law school are potentially misleading. In addition, the University of Texas is excluded because it did not include American Indians in its pre-*Hopwood* affirmative action policy. Combining Boalt, UCLA, and UC Davis statistics from 1993 to 1996 with Washington statistics from 1996 to 1998, American Indians were 1.4% of enrollments with affirmative action in place.[171] At Boalt, UCLA, and UC Davis from 1997 to 2001 and Washington from 1999 to 2001, American Indians were 0.81% of enrollments, a drop of 42% in the wake of Prop. 209/SP-1 and I-200.[172] An average of ten American Indians enrolled annually at Boalt, UCLA, and UC Davis combined from 1993 to 1996, compared to five per year from 1997 to 2001.[173] For historical context, Boalt, UCLA, and UC Davis combined to enroll twelve American Indians in 1972 and ten in 1973.[174] Boalt alone had eight American Indian first-year students in 1972 after they were added to its affirmative action plan.[175]

Recent data in Table 5 indicate that African American enrollments were somewhat better in 2000 and 2001 than they were from 1997 to 1999. On the other hand, the consequences of banning affirmative action at the undergraduate level are only now beginning to unfold. This is particularly troublesome since nationwide, the top five producers of applicants to law school over the five most recent admissions cycles (1996–1997 to 2000–2001) are UCLA (4468 applicants), UC Berkeley (4314), University of

171. University of California Office of the President, *supra* note 164; University of Washington Law School Admissions Office, *supra* note 164; Harris, *supra* note 164, at 1236.
172. University of California Office of the President, *supra* note 164; University of Washington Law School Admissions Office, *supra* note 164; Harris, *supra* note 164, at 1236.
173. University of California Office of the President, *supra* note 164.
174. University of California, Report of the Task Force on Graduate and Professional Admissions tbl. F-14 (1977).
175. *Report of Special Admissions at Boalt Hall After Bakke*, *supra* note 54, at 382 tbl.1.

Michigan-Ann Arbor (4094), University of Texas-Austin (4083), and the University of Florida (3916).[176]

VII. The Contemporary Admissions Environment: 1987–2000[177]

This fifty-year history concludes with an analysis of the current national landscape of law school admissions. As in the late 1970s and mid-1980s, White applicants to ABA law schools continue to have higher cumulative admissions rates to ABA-accredited law schools compared to African American, Latino, and American Indian candidates. The 1987–2000 data in Chart 9 present an interesting paradox because during the early 1990s, when application volume hit record levels, acceptance rates were actually more equitable than in the late 1990s, when application volume was about 30% lower than in 1991. All other factors being equal, a time of heightened competition would be more likely to exacerbate than ease racial and ethnic disparities in admissions rates; therefore, it is important to examine what other social forces might have influenced the law school admissions process in the last decade.

The resolution of this paradox of greater equity amidst heightened competition actually highlights a point that has been true all along about affirmative action, but one that is often difficult to quantify: student activism had an important impact on the law school admissions process in the last decade. It is easy to forget, in part because this analysis of admissions statistics is necessarily so reliant on official sources, that higher education affirmative action programs were never designed by university chancellors, deans, and faculty committees in a vacuum. Rather, affirmative action programs were closely linked to student efforts to strive for access and integration through political actions and protests. For instance, in 1972, the Boalt faculty felt traumatized by the rapid transformation in student demographics brought about by affirmative action and the atmospheric shift that ensued.[178] The Boalt faculty proposed ending the "special" admissions program altogether. This proposal was only defeated after students of color organized a two-week strike in April 1972 and were able to attract considerable media attention.[179] Throughout the last three decades, students at many law schools have engaged in numerous sit-ins, hunger strikes, rallies, and other actions organized around student and faculty diversity issues.[180]

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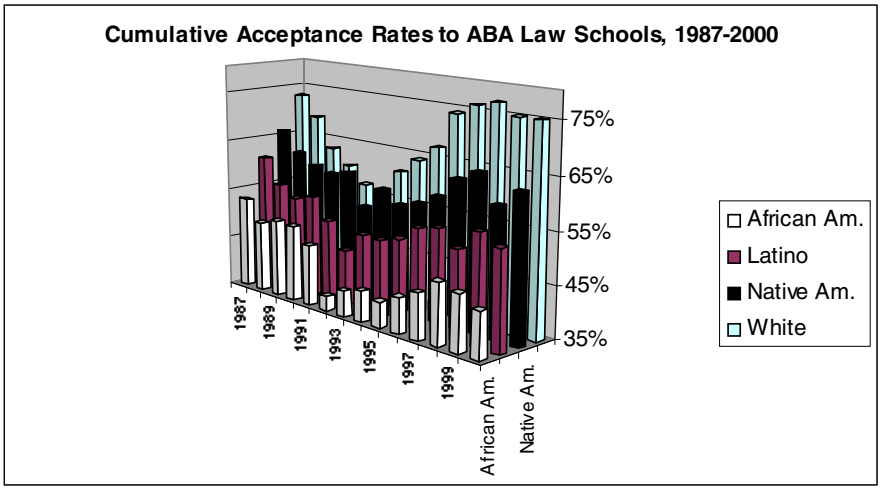
176. These figures were compiled for the author by the LSAC Data Management Department. Although applicants from elite private colleges usually have the highest admission rates, such schools produce fewer law school applicants because their student bodies are smaller overall. Thus, between 1996-97 and 2000-01, applications from a sample of such schools were as follows: Duke (1844), Stanford (1393), and Princeton (1285).
177. I begin the contemporary period with 1987 because that was the earliest year for which I could obtain continuous national data. Coincidentally, Welch and Gruhl's study of law and medical school enrollment trends ends with 1987. *See* Welch & Gruhl, *supra* note 124, at 107–32.
178. Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. Davis L. Rev. 1377, 1389 (2000).
179. *Id.* at 1389 & n.25.
180. *See, e.g.*, Cho & Westley, *supra* note 178, *passim*; Mari Matsuda, Where is Your Body? 50 (1996); Guerrero, *supra* note 62, *passim*; Rogelio Flores, *The Struggle for Mi-*

CHART 9[181]



Based on the national law school data, the Boalt Coalition for Diversified Faculty helped to organize a highly successful "Nationwide Law Student Strike for Diversity"(National Strike) on April 6, 1989.[182] Law students from at least thirty schools, including Stanford, UCLA, UC Davis, UC Hastings, University of San Diego, University of San Francisco, University of Chicago, University of Michigan, Harvard, New York University, Cornell, University of Wisconsin, University of Texas, Northwestern, Yale, University of Southern California, University of Alabama, University of New Mexico, University of Colorado, Brooklyn, Fordham, University of Nebraska, and University of Illinois, participated in the National Strike by boycotting class and conducting teach-ins to protest "discrimination based on race, gender, economic class, and sexual orientation within America's law schools."[183] Professors Cho and Westley persuasively document that the strike was associated with a substantial, though temporary, national increase in the hiring of minority law faculty.[184] For instance, between 1980 and 1987, on average, less than two Latinos per year were hired as full-time law teachers, compared to an average of twelve from 1989 to 1993.[185]

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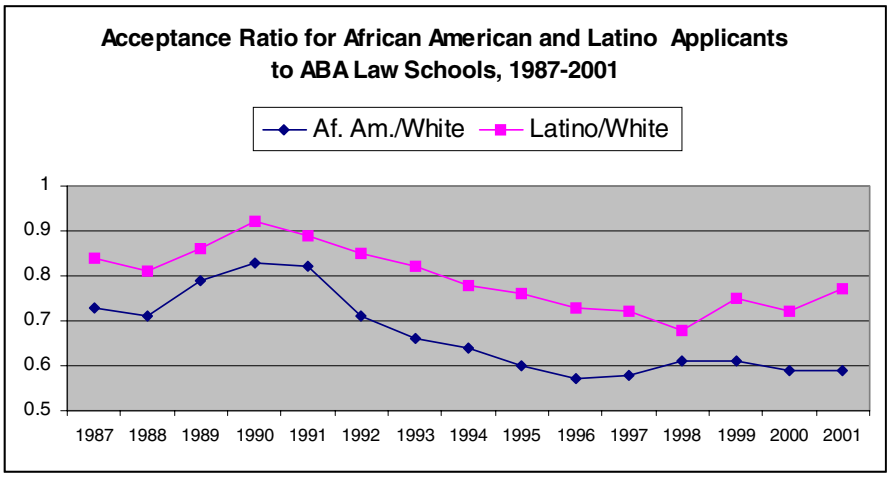
nority Admissions: The UCLA Experience, 5 CHICANO L. REV. 1 (1982); Vincent F. Sarmiento, *Raza Admissions at the UCLA School of Law: An Update on Current Policies and Recent Developments*, 14 CHICANO-LATINO L. REV. 161 (1994); Muratsuchi, *supra* note 55, *passim*.

181. Law Sch. Admission Council, National Decision Profiles, 1987–2000.
182. Cho & Westley, *supra* note 178, at 1395–96.
183. Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of an Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV. 51, 80–81 (2002).
184. Cho & Westley, *supra* note 178, at 1395–1403; *see also* GUERRERO, *supra* note 62, at 52–53.
185. Cho & Westley, *supra* note 178, at 1402 tbl.2. *See also* Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 ASIAN L.J. 39, 46 tbl.6, tbl.8 (1996) (analyzing comprehensive entry-level faculty hiring trends and noting that persons of color fared substantially better in 1990–1991 than in subsequent years); Michael A. Olivas, *The Education of Latino Lawyers: An Essay on*

National data in Chart 10 indicate that the admissions cycle immediately following the National Strike (1989–1990 applicants for enrollment in the fall of 1990) was, for African American and Latino applicants, the high-water mark of opportunity in the *Bakke* to *Grutter* era. Recall that in the 1976–1985 period, the Black-White acceptance ratio was in the .66–.70 range. The Black-White ratio jumped from .71 in 1988 to .86 in 1990. Likewise, Chart 10 reflects that the Latino-White ratio rose from .81 in 1988 to .92 in 1990. Regarding Chicanos specifically, between 1976 and 1985, the Chicano-White acceptance ratio was in the .80–.85 range, yet that ratio rose from .91 in 1988 to 1.00 in 1990, the only time in the last quarter-century in which Chicanos and Whites had equal cumulative acceptance rates to law school. Given that the 1990–1991 period represented historic highs for people of color both in terms of law-faculty hiring and law school admissions, it is reasonable to conclude that the student activism leading up to the National Strike—and the larger mood of which that strike was a tangible sign—had a significant influence on the structuring of opportunities in legal education in the early 1990s.

Chart 10[186]



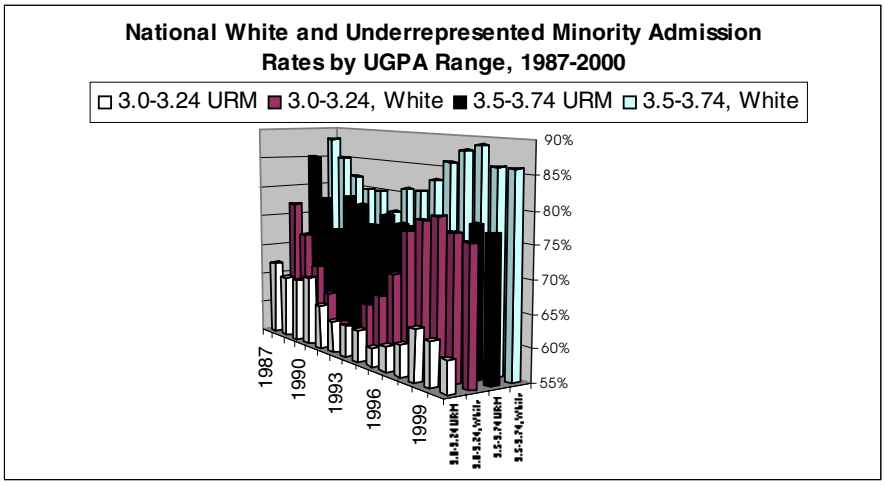
In addition to showing the important role that student activism must have played in increasing the number of minority law school professors and students, the national admissions data also suggest that *Hopwood*, Proposition 209, other affirmative action bans, and the threat of litigation had a chilling effect on admissions opportunities for students of color in the mid- to late 1990s. Although *Hopwood* and Prop. 209 affected only a handful of schools, the data in Chart 10 show that the fall of affirmative action has had a wider impact. Charts 11A and 11B add context to the charts above by listing admissions rates for Whites and underrepresented minorities with equivalent UGPAs. With the data broken down by UGPA range (3.0–3.24, 3.25–3.49, etc.), American Indians, African Americans,

Crop Cultivation, 14 Chicano-Latino L. Rev. 117, 128–31 (1994) (reviewing Latino hiring trends at law schools).

186. Law Sch. Admission Council, National Decision Profiles, 1987–2001.

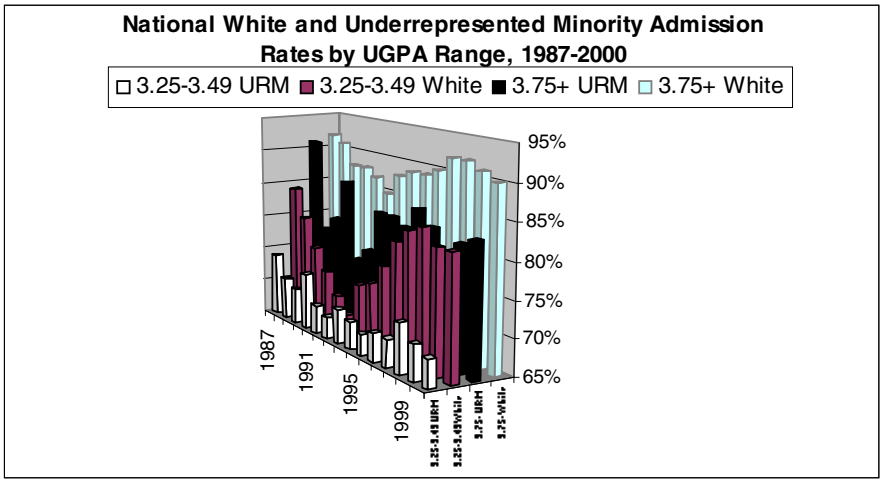
Chicanos, Puerto Ricans, and other Latinos were combined into a single category for sample size reasons. What is most noticeable about Charts 11A and 11B is how admissions rates for underrepresented minorities (URMs) are basically flat between 1992 and 2000. In contrast, admissions rates for White applicants, in most cases already higher than those for URMS with the same UGPAs, increased significantly between the mid-1990s and the late 1990s. Thus, Chart 11A reveals that by 1996, White applicants with 3.0–3.24 UGPAs had admissions rates similar to URM applicants with 3.5–3.74 UGPAs. Likewise, Chart 11B indicates that in the late 1990s, White applicants with 3.25–3.49 UGPAs had admissions rates similar to URM applicants with 3.75+ UGPAs. National data over the last fifteen years demonstrate that law schools respond to both progressive and conservative political developments.

CHART 11A[187]



187. *Id.*

Chart 11B[188]



VIII. Conclusion

The findings presented in this Article support four central claims. First, before affirmative action began in the late 1960s, legal education and the legal profession were almost entirely de facto segregated. Second, affirmative action must be placed in its proper context, because even when these programs exist, nationally, White students consistently have higher admissions rates than students of color in the years since *Bakke*. Third, race-neutral alternatives to affirmative action in law schools are ineffective at producing significant levels of diversity. When public law schools in California, Texas, and Washington banned affirmative action the number of underrepresented minorities was lower than it had been in three decades. Fourth, recent national admissions data indicate that student activism has a tangible effect on admissions rates. Affirmative action bans and threats of litigation have had a chilling effect on admissions rates for students of color nationwide.

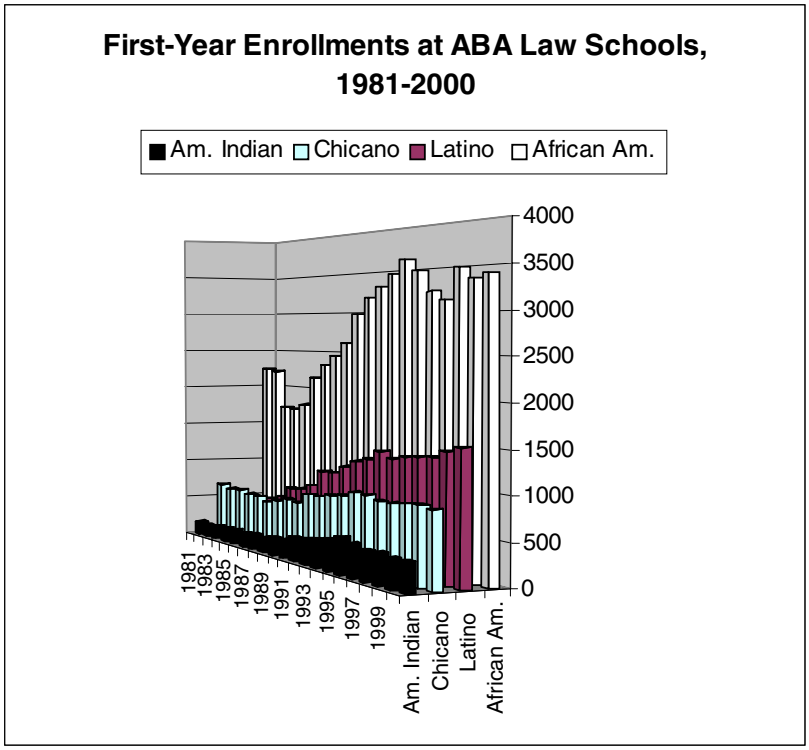
In summary, efforts to diversify legal education have met with mixed success. On one hand, as the figures in the Appendix indicate, total first-year enrollment levels for American Indian, Chicano, Latino, and African American students have risen significantly in the last two decades, even though overall enrollment levels have been nearly flat. On the other hand, admissions rates for students of color, both cumulatively and among those with equivalent UGPAs, continue to lag behind those of White applicants. In fact, it is discouraging to note that the Black-White acceptance ratio was lower overall between 1996 and 2001 than for any other period since *Bakke*. Much remains to be done before it can be said with a straight face that law school admissions operate on an equal playing field. It is also clear from the pre-affirmative action era as well as from data on recent affirmative action bans in California, Texas, and Washington, that if

188. *Id.*

the Supreme Court prohibits institutions of higher learning from using race and ethnicity as a significant plus factor in admissions, law schools will experience substantial resegregation.

APPENDIX

CHART 12[189]



189. 2002 OFFICIAL GUIDE, *supra* note 83, at 805–07.

Table 8[190]

	American Indian	Chicano	Latino (excluding Chicanos)	African American	Overall Enrollment
1981	160	665	452	2238	42521
1982	154	628	520	2217	42034
1983	169	642	458	1735	41159
1984	173	607	537	1735	40747
1985	183	609	589	1800	40796
1986	176	564	727	2159	40195
1987	189	610	750	2339	41055
1988	177	656	819	2463	42860
1989	220	640	1019	2628	43826
1990	224	768	1023	2982	44104
1991	286	770	1123	3169	44050
1992	313	807	1210	3303	42793
1993	336	838	1259	3455	43644
1994	377	902	1367	3600	44298
1995	436	896	1304	3474	43676
1996	391	861	1346	3223	43245
1997	355	859	1367	3126	42186
1998	361	885	1384	3478	42804
1999	342	901	1468	3353	43152
2000	348	883	1529	3402	43518

190. 2002 Official Guide, *supra* note 83, at 805–07.