

**A CONVERSATION ON THE NATURE, EFFECTS, AND FUTURE OF  
AFFIRMATIVE ACTION IN HIGHER EDUCATION ADMISSIONS**

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One of the panels at the Journal of Constitutional Law's Symposium dealt with "Preferences, the Mismatch Question, and Improving the Racial Pipeline." The four participants decided to skip the usual format of sequential presentations and instead have a conversation revolving around a series of questions. The result was so well received that we decided to adapt this approach into a joint contribution for the published Symposium. What follows is not a transcript or an adaptation of our January 2014 conversation, but rather a series of short essays on the questions discussed at the conference. For each of the twelve questions, one of us (in rotation) wrote a lead essay, and the rest of us made such responses and rejoinders as seemed fitting. We have edited the essays and added tables and charts to improve the flow of the exchanges and illustrate the content.

Collectively, we bring an array of perspectives and experiences to the conversation. Peter Arcidiacono is a labor economist at Duke and a leading scholar in the "peer effects" literature, which studies how one's peers affect one's learning and performance. Thomas J. ("Tom") Espenshade is an economist and sociologist at Princeton's Office of Population Research; his book *No Longer Separate, Not Yet Equal* (with Alexandra Radford) is a very influential and empirical dissection of the operation and effects of racial preferences at selective American universities. Stacy Hawkins is a law professor at Rutgers-Camden who combines expertise in constitutional law issues with extensive experience working with law firms and other elite institutions to increase racial diversity. Richard ("Rick") Sander is an economist and law professor at UCLA who has written widely about the potential for college and professional preference programs to boomerang on their intended beneficiaries. An important feature of this conversation, though an oversimplification, is that Peter and Rick have been critics of many aspects of affirmative action, while Tom and Stacy have documented many of its positive effects. The strong interest of all four in empirical assessments of these programs, and

the rarity with which the opposing sides in the affirmative action discussion frankly exchange and debate their views in detail, gives this conversation special interest.

*Question 1. What is the size and breadth of racial preferences?*

TOM ESPENSHADE: Most admission deans at selective colleges and universities have in their minds an ideal size and shape to the entering first-year class. To that end, they encourage and often solicit applications from certain types of students. And they employ admission “preferences” in their decisions about whom to admit. What we know about the size and breadth of racial preferences comes from data collected as part of the National Study of College Experience and reported in Espenshade and Radford.<sup>1</sup>

As shown in Table 1, black students who were admitted to top-tier private institutions in 1997 received an admission boost equivalent to, on an all-other-things-equal basis, 310 SAT points (out of 1600 total points) compared to white applicants. In other words, a white student had to have an SAT score 310 points higher than a statistically equivalent black student to have the same likelihood of being admitted. Hispanic students received an average admission boost equal to 130 SAT points compared to whites. There appeared to be (dis)affirmative action for Asian applicants. The Asian admission disadvantage equaled 140 SAT points compared to whites. A black student with an SAT score of 1100 had the same chance of being admitted to a selective private college or university as an otherwise identical Asian student with a 1550 SAT score. Preferences across racial and ethnic groups at public institutions operated in the same direction as those at private institutions, but with reduced intensity.

The admission “plus” factor for black students is large for three reasons: (1) given their lower average levels of college academic preparedness compared with other applicants, there would be many fewer black students on campus without race-based affirmative action; (2) high-achieving black students have many opportunities in the selective college admission process, meaning that admission deans often over-admit to offset a lower yield; and (3) the proportion of black students in the applicant pool may be lower than their desired representation in the freshman class.

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<sup>1</sup> THOMAS ESPENSHADE & ALEXANDRA RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 92 tbl. 3.5 (2009).

Table 1 also indicates the strength of admission preferences for students from various social class backgrounds. The evidence here suggests that the “plus” factor is inversely related to social class at private institutions. Students from lower social classes appear to have a slight advantage—again, on an all-other-things-equal basis—over middle-class students. The opposite seems to be true for upper-class students compared with middle-class students. However, none of the social class effects in Table 1 is strong enough to be statistically significant.

TABLE 1<sup>2</sup>

Race & Social Class Admission Preferences at Public & Private Institutions  
Measured in ACT and SAT Points, Fall 1997

	Public Institutions	Private Institutions
Item	ACT-Point Equivalents	SAT-Point Equivalents
<i>Race</i>		
(White)	–	–
Black	3.8	310
Hispanic	0.3	130
Asian	-3.4	-140
<i>Social Class</i>		
Lower	-0.1	130
Working	0.0	70
(Middle)	–	–
Upper- Middle	0.3	50
Upper	0.4	-30

2 ESPENSHADE & RADFORD, *supra* note 1, at 92 tbl. 3.5. The ACT test is a multiple-choice test that covers four areas: English, mathematics, reading and science. The ACT is scored in integers, with a maximum of 36 and a minimum of 1. The SAT examination in use in the Fall of 1997 had a verbal component (scored from 200 to 800) and a math component (scored from 200 to 800). The estimates in this table control for sex, citizenship, athlete and legacy status, SAT and ACT scores, number of AP tests taken, number of SAT II tests taken, average SAT II test scores, high school GPA and class rank, whether National Merit or National Achievement Scholar, high school type, elite 72 high school, state of residence, and NSCE institution.

PETER ARCIDIACONO: The scope of racial preferences can also be put into context by comparing them with other forms of preferences. Legacy preferences, for example, tend to be much smaller than those for African Americans. This is very relevant, since mismatch effects seem mainly to occur when the gap in credentials is large. The key question is whether harmful mismatch effects outweigh the benefits of attending a school with a more prestigious reputation or stronger peers. This balance tilts negative for some outcome measures when large preferences are present.

Racial preferences are particularly large and mechanical at law schools. This is ironic, since the Supreme Court, in its 2003 cases on affirmative action, rejected as too mechanical the “point” system used by the University of Michigan (UM) in its undergraduate admissions, while allowing the self-described “holistic” system of the UM law school to stand.<sup>3</sup> In that very year, the combined median GPA/LSAT index of African-Americans admitted to UM’s law school was lower than the index of more than 98% of the white admits.<sup>4</sup> Similar or even more extreme patterns hold at many elite public law schools.<sup>5</sup>

STACY HAWKINS: I agree with both Tom and Peter that academic credentials/preparedness are important in determining who is capable of succeeding in college and, therefore, who should be admitted to college. I also agree with Peter that colleges and universities should not be admitting students who are incapable of succeeding academically. However, for reasons I discuss in more detail later, I do not think academic credentials/preparedness is, or should be, the only relevant measure for deciding who should be admitted or who is capable of succeeding in college, even at the most selective schools. So, while I do not disagree with the data per se, I do not think it offers a complete picture of how admissions processes do or should work.

The real challenge, which I think is consistent with Peter’s framing of the issue, is determining how to construct admissions policies

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<sup>3</sup> See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 388–92 (2004) (critically examining the Supreme Court decisions in *Grutter* and *Gratz*, in the context of an empirical examination of differences in admissions processes of Michigan’s undergraduate university and Michigan’s law school).

<sup>4</sup> Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Tradeoff* J. ECON. LIT. (forthcoming 2015) (manuscript at 15) available at [public.econ.duke.edu/~psarcidi/aa.pdf](http://public.econ.duke.edu/~psarcidi/aa.pdf)

<sup>5</sup> *Id.* (“The data also show that the extent of preferential admissions for black students are even more pronounced at other elite public law schools, such as the University of Virginia and the University of Wisconsin.”).

that are broad enough to capture the type of diversity Tom says schools desire without casting the net so wide that they capture students whose slim prospects for academic success cannot justify their admission.

RICK SANDER: To summarize the discussion of this first question, let me highlight a few points.

We all seem to agree on the general size of preferences being used (at least as measured by conventional academic scores). As Peter points out, these vary quite a bit across different types of schools; it's now well-established that law schools have generally larger preferences than most selective colleges and that at many law schools there is very little overlap in black and white credentials.<sup>6</sup>

From a purely pragmatic perspective, the key question is then, "When are preferences too large?" For Peter and me, and perhaps Tom, the answer to this is, "When mismatch effects become significant." We are not sure what that threshold is, but we are pretty confident that many current racial preferences at many selective schools operate beyond that threshold. Stacy puts the matter differently: do admitted students have a reasonable chance of success? This is a subtle but quite different way of posing the question, because the most talented minority students are likely to achieve some degree of success even if they are at a school where mismatch partially handicaps their performance. A student admitted to Columbia with a large preference probably has an excellent chance of graduating, but a poor chance of getting a degree in chemistry, even if that is her primary field of interest.

We could combine Tom's approach with Stacy's approach by defining the size of preferences in terms of the rate at which students at colleges achieve their goals—i.e., achieving some level of class rank, or getting a degree in one's desired field. Schools don't generally generate and almost never provide this sort of data now,<sup>7</sup> but one could imagine them doing so, especially under regulatory or court prodding.

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<sup>6</sup> For data supporting this point, see Sander, *supra* note 3 at 402–05, 414–17, 433–34; Richard Sander, *Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter*, in *NEW DIRECTIONS IN JUDICIAL POLITICS* 277, 293–96 (Kevin T. McGuire ed., 2012) [hereinafter Sander, *Why Strict Scrutiny Requires Transparency*].

<sup>7</sup> A very encouraging step in this direction is a new initiative at George Mason University, known as "Beacon," which helps students assess their prospects of academic success and potential need for academic support. See *About Beacon*, GEORGE MASON UNIVERSITY, available at <http://beacon.gmu.edu/about-beacon/> (last visited Nov. 3, 2014).

I'd also like to reiterate Peter's point that preferences based on socioeconomic diversity are still quite small—and at many institutions nonexistent. The Supreme Court in *Fisher v. University of Texas at Austin* suggested that racial preferences should be a last resort when other diversity mechanisms can't quite achieve the level of diversity necessary to a college's educational mission.<sup>8</sup> But at the vast majority of colleges and professional schools, racial preferences are still a first resort.<sup>9</sup>

*Question 2. To what extent do racial preferences determine “where” students attend college, rather than “whether” they attend college?*

PETER ARCIDIACONO: At undergraduate institutions, racial preferences determine where, not whether, individuals attend college. The reason for this is that the vast majority of colleges and universities are not selective.<sup>10</sup> Individuals who are admitted under racial preferences were not on the margin of attending college at all. Evidence from statewide bans on racial preferences show virtually no effects on minority college enrollment rates overall following a ban, but do show evidence of bans reducing minority representation at flagship schools.<sup>11</sup>

For law schools, racial preferences operate on both the intensive margin (where individuals attend) and the extensive margin (whether individuals attend at all), as all law schools are selective. That said, as is the case with undergraduate institutions, the best law schools actually have a higher percentage of racial minorities than the next

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<sup>8</sup> See *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2415 (2013) (holding in all instances that a university must prove that its choice of means to attain racial diversity is narrowly tailored to that goal).

<sup>9</sup> In a survey I am currently conducting of selective public universities, I've learned that only a small fraction of these schools even collect objective socioeconomic data from applicants during the admissions process. Even fewer give these measures any weight in evaluating applicants.

<sup>10</sup> See, e.g., RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 26 (2012) (“Kane found that the vast majority of four-year colleges were not selective at all . . . .”); Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *THE BLACK-WHITE TEST SCORE GAP* 431, 431–53 (Christopher Jencks & Meredith Phillips eds., 1998) (publishing his findings on college selectivity).

<sup>11</sup> See, e.g., Peter Hinrichs, *Affirmative Action Bans and College Graduation Rates*, 42 *ECON. OF EDUC. REV.* 43 (2014) (“On net, affirmative action bans lead to fewer underrepresented minorities becoming graduates of selective institutions.”); Peter Arcidiacono, Esteban Aucejo, Patrick Coate & V. Joseph Hotz, *Affirmative Action and University Fit: Evidence from Proposition 209*, 3 *IZA J. LAB. ECON.* (forthcoming 2015) (“We find that Prop 209 led to a more efficient sorting of minority students, explaining 18% of the graduation increase in our preferred specification.”).

best.<sup>12</sup> Further, assessing the importance of the extensive margin due to a ban on racial preferences is difficult because much of it will hinge on the response of the historically black colleges and universities (HBCUs). If HBCUs expand in response to a ban, then the extensive margin will be mitigated.

STACY HAWKINS: This response presumes that where underrepresented minorities (URMs) actually go to school is irrelevant, or that squeezing URMs out of the most selective/elite tier(s) of colleges and universities and conversely concentrating them in the lowest tier(s) of colleges and universities should not concern us.<sup>13</sup> I find both of these to be highly important considerations, and I find the prospect of concentrating URMs in the lowest tier(s) of our stratified system of higher education deeply problematic. Where URMs attend school is important both for students and schools. First, a number of researchers, most notably William Bowen and Derek Bok, have demonstrated the advantages that accrue to students who attend more elite colleges and universities both in terms of the immediate prospects for graduation and the longer-term prospects for career success.<sup>14</sup> Tom also notes this advantage in his response to Question Four, below.<sup>15</sup> Second, ensuring that URMs are adequately represented across the

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<sup>12</sup> US News provides a widely-used annual ranking of American law schools. Six law schools usually top the rankings: Yale, Harvard, Stanford, Columbia, University of Chicago, and New York University. According to the 2007 ABA-LSAC Official Guide to ABA Approved Law Schools, these schools had average black enrollments of 8.6% in 2006. Ten schools commonly ranked between 20<sup>th</sup> and 30<sup>th</sup> place are the University of Minnesota, George Washington University, University of Southern California, University of Alabama, William and Mary, Notre Dame, University of Washington, Boston University, University of Iowa, and Indiana University at Bloomington. According to the ABA-LSAC Guide, blacks made up an average of 5.8% of the enrollment at these schools. (If we remove the University of Washington, which operates in a state banning racial preferences, the average is 6.3%.) See LAW SCHOOL ADMISSION COUNCIL & AMERICAN BAR ASSOCIATION, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 22–30 (Wendy Margolis, Bonnie Gordon, Joe Puskarz & David Rosenlieb eds., 2006) (presenting data on the racial composition of students).

<sup>13</sup> Underrepresented minority students is a term now in widespread use within the literature on race-conscious admissions and has developed a common meaning, which includes largely black and Hispanic students. Although Native American students are underrepresented among college students, their numbers are often too small to be considered with the data concerning black and Hispanic students.

<sup>14</sup> See WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (providing evidence that students who attend more selective colleges and universities have better academic and professional outcomes on a number of measures, including graduation rates, advanced study, employment and earnings, and job satisfaction); see also Tom's response to Question Seven, *infra* at 707–13.

<sup>15</sup> See *infra* at 699.

broad range of academic institutions and throughout the hierarchy of higher education is also necessary to allow all schools the opportunity to reap the educational benefits of diversity, which it is worth noting the Supreme Court has said are not only “substantial,” but indeed “real.”<sup>16</sup> URM are already concentrated in the lowest tiers of academic institutions.<sup>17</sup> Eliminating race-conscious admissions plans would only exacerbate this concentration. This is not only bad for students and schools, but also bad as a matter of educational policy. The cruel irony of discontinuing race-conscious admissions by selective colleges and universities is that further concentrating URM in the lowest tier(s) of our higher education hierarchy would serve to reinforce the stigma that URM are academically inferior, rather than countering it.<sup>18</sup>

RICK SANDER: I share Stacy’s concern about concentrating black and Hispanic students at, for example, community colleges, which already happens to a significant degree and can hurt those students’ outcomes.<sup>19</sup> But it’s essential to keep two other points in mind. First, as Figure 1 below suggests, large preferences by selective schools have the effect of concentrating blacks more heavily at the very top, super-selective colleges and leaving selective Tier 2 and Tier 3 schools relatively less diverse—even though these schools also use very large (indeed often even larger) preferences.<sup>20</sup>

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<sup>16</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“[T]he educational benefits that diversity is designed to produce . . . are substantial . . . . These benefits are not theoretical but real.”).

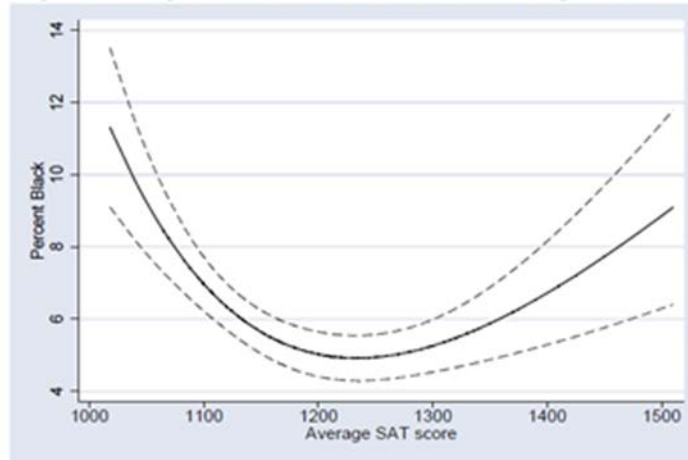
<sup>17</sup> For example, a chart in MISMATCH displays the distribution of black students across the tiers of higher education and demonstrates that among the eight tiers displayed, more than a third of black students (37%) attend schools in the bottom three tiers (Tiers 6, 7, and 8), less than a quarter (21.5%) attend schools in Tiers 3–5, and a mere 17% attend schools in the top two, or most selective/elite, tiers. SANDER & TAYLOR, *supra* note 9, at 23–24.

<sup>18</sup> Many opponents of race-conscious admissions plans argue that they should be eliminated because they are harmful to the interests of minority students insofar as they stigmatize URM as academically inferior. See, e.g., *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting) (arguing that students are “tarred as undeserving” when admitted through affirmative action).

<sup>19</sup> See *infra* text accompanying notes 46–48; see also William Bowen, Matthew Chingos, and Michael McPherson, *Crossing the Finishing Line: Completing College at America’s Public Universities* (2009).

<sup>20</sup> These points are elaborated in much more detail in SANDER & TAYLOR, *supra* note 10, at 19–24.



Figure 1: College Percent Black as a Function of Average SAT Score<sup>†</sup>

Source: Princeton Review Best 357 colleges and America's Best Colleges 2005 produced by U.S. News & World Report. Weighted by college enrollment.

By moderating preferences at the top, one could produce a win-win-win across the selective schools: improve minority outcomes, improve overall levels of integration on and across these schools, and make these colleges less legally vulnerable to challenges for their use of race.

Second, if one controls for academic preparation levels, African Americans are actually 30% more likely than whites to attend four-year colleges after high school.<sup>21</sup> Much of the concentration of minorities at community colleges reflects very low levels of academic preparation among many black and (to a lesser extent) Hispanic high school graduates. Mechanically extending preferences to underprepared students is not a good stand-alone solution. In contrast, when we do the same comparison of where low-SES and high-SES students attend college (controlling for race and academic preparation), low-SES students are about 70% less likely than high-SES students to attend four-year colleges.<sup>22</sup> Thus, relaxing racial preferences at the top, while increasing SES mobility across the spectrum, would yield much better and fairer outcomes across the board.

An overarching point here is that there aren't two relevant school levels: elite vs. non-elite, good schools vs. underfunded schools. There are more like eight to ten relevant levels of undergraduate ed-

<sup>21</sup> *Id.* at 251.

<sup>22</sup> *Id.*

ucation (and probably four or five relevant levels of legal education), and the challenge is improving matches across this spectrum.

*Question 3. Do preferences simply compensate for biases and inadequacies in our methods of evaluating applicants?*

STACY HAWKINS: The short answer is “no.” The question assumes that the consideration of race or ethnicity is an exception to the otherwise routine functioning of college and university admissions, but for many colleges and universities, that is simply not true. Colleges and universities have to determine what considerations, beyond academic credentials, are relevant to the institutional mission and should be reflected among the student body.<sup>23</sup> As Tom previously acknowledged, colleges and universities value many different student attributes in fashioning an ideal freshman class. Many colleges and universities consider the ability to amass sufficient racial and ethnic diversity among their student bodies as essential to their educational and institutional missions.<sup>24</sup> Thus, race-consciousness is not an exception to the otherwise routine functioning of the admissions process for those schools, but is an indispensable part of it.

This consideration of race/ethnicity is most often incorporated into what is already a process of holistic review of applicants for admission.<sup>25</sup> So, in addition to considering an applicant’s academic credentials as reflected by high-school GPA (HGPA) and test scores on the SAT or ACT, a holistic review process considers a whole host

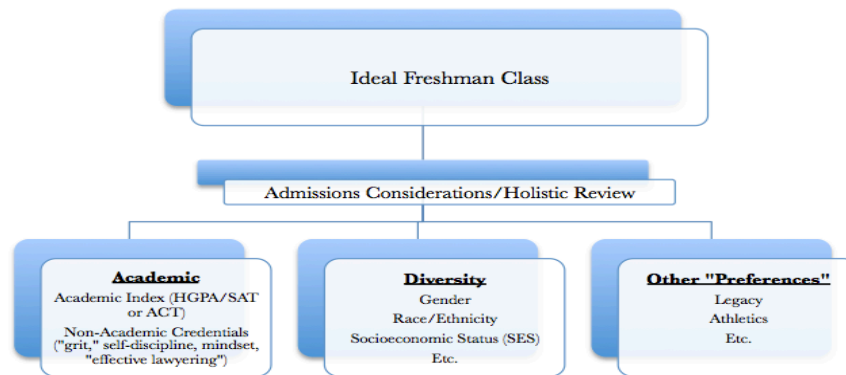
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23 Academic credentials are often reflected by an academic index as explained by Sander SANDER & TAYLOR, *supra* note 10, at 50. However, the holistic review process undertaken by many selective colleges and universities involves other non-academic considerations as well that range from personal attributes, such as leadership, to athletic ability and even diversity.

24 As acknowledged by the Supreme Court in sustaining the University of Michigan Law School’s race-conscious admissions plan against a challenge in *Grutter v. Bollinger*, student body diversity can serve multiple institutional and educational goals, including “better prepar[ing] students for an increasingly diverse workforce and society” and “ensuring that public institutions are open and available to all segments of American society” as the “training ground for a large number of our Nation’s leaders.” 539 U.S. 306, 330–332 (2003) (internal citations omitted).

25 Such holistic, or individualized, review is necessary to the constitutionality of race-conscious admissions plans. See *Grutter*, 539 U.S. at 337 (“[A] university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”); see also *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 314–15 (1978) (permitting the use of race as a “plus” factor, but prohibiting the use of racial quotas that elevate race as the determining factor in an application).

of personal, non-academic credentials in determining who to admit to a particular college or university. While some of these considerations are about amassing sufficient diversity among the student body, others are in fact calculated to identify those students who should be admitted because of their likelihood of academic and even later professional success. Social science research has identified several important non-academic credentials that are highly correlated with academic achievement, and even predictive of later professional success.<sup>26</sup> So identifying those students who merit admission to a particular college or university can, and often does, involve the consideration of many different factors beyond academic credentials.<sup>27</sup> Depending on what attributes the school values, those factors could include consideration of how the student's race/ethnicity, among other things, might contribute to student body diversity, or whether the student possesses important non-academic credentials that might be as predictive of that student's likelihood of future success as their academic credentials. A diagram of this kind of holistic review process, and the types of admissions considerations it entails, is provided below.



PETER ARCIDIACONO: I agree that race conscious admissions do not simply compensate for deficiencies in the admissions process in

26 See ADAM GRANT, GIVE AND TAKE: A REVOLUTIONARY APPROACH TO SUCCESS 6–7 (2013) (comparing the success of people with different reciprocity styles); see also Angela L. Duckworth & Martin E.P. Seligman, *Self-Discipline Outdoes IQ in Predicting Academic Performance of Adolescents*, 16 PSYCHOL. SCI. 939 (2005) (discussing the effect self-discipline has on student outcomes).

27 See Brief for Respondent at 12–15, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345) (discussing the University of Texas's holistic admissions process); see also Brief for Respondent at 38–49, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (discussing the admissions process at the University of Michigan Law School).

evaluating the academic merit of under-represented minorities. Racial preferences are much too large for this to be the case.<sup>28</sup>

I think the evidence is weak on the benefits of a racially diverse student body, particularly when diversity at one school comes at the expense of diversity at another school. The argument must be made that diversity at the most-selective schools is more valuable than diversity at the next set in order to justify current admissions practices.<sup>29</sup>

Beyond diversity benefits, Stacy raises the fact that it may not be optimal for admissions processes to focus solely on academic credentials; other measures such as personal character may also be important for future success. I agree, but in order to justify race-conscious admissions with this argument one would have to establish that these characteristics were positively correlated with being an under-represented minority.

Stacy cites some interesting work on what should constitute merit. I would prefer to frame the discussion less in terms of merit, and more in terms of preparation to successfully handle the course work. Different universities target their material to different levels of preparation. A student who has not had calculus may be well prepared for one school but not another.

RICK SANDER: Stacy raises an important point. University admissions officers, and many defenders of affirmative action, have long argued that racial preferences are not as large as they seem when one looks at, say, the relative test scores of admitted blacks and whites, because colleges consider many other personal characteristics. Peter notes that, as a matter of logic, these “other” characteristics would only shrink the racial gap if they were correlated with race—that is, if blacks and Hispanics had, on average, stronger “non-academic” skills than whites and Asians. It has been hard to get traction on these questions because these “soft” skills are almost never quantitatively measured by admissions offices.

A relatively new dataset from UCLA is helpful here. Over several years, UCLA undergraduate admissions readers were asked to assign each applicant three types of scores: “academic achievement” (drawing heavily on high school grades, AP courses, and test scores), “life

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<sup>28</sup> See *supra* text accompanying notes 3–5.

<sup>29</sup> These points are elaborated upon below, in response to Questions 5 and 6. See also Peter Arcidiacono, Shakeeb Khan & Jacob L. Vigdor, *Representation Versus Assimilation: How do Preferences in College Admissions Affect Social Interactions?*, 95 J. PUB. ECON. 1 (2011) (analyzing the effects of racial preferences in admissions at selective and non-selective colleges).

challenges” (mainly socioeconomic background), and “personal achievement” (such things as leadership, musical proficiency, and community service). These three scores jointly determined virtually all admissions decisions.<sup>30</sup>

My analysis of this data (which is publicly available and covers over 100,000 undergraduate applicants to UCLA over three years) shows that there is essentially no correlation between race and “personal achievement,” at least as measured by admissions file readers.<sup>31</sup> Indeed, the only strong predictor of personal-achievement scores in the data was academic achievement; high school seniors with high test scores and grades had, on average, personal achievement scores that were about one standard deviation higher than applicants with low test scores and grades.<sup>32</sup>

Moreover, analysis of dozens of application processes at colleges and law schools around the country shows that selective schools give far more weight to academic achievement and preparation than to other types of accomplishment and activity. In general, academic factors alone explain about 80% of admissions decisions at selective schools.<sup>33</sup>

None of this is to dismiss the value of “soft” factors in assessing college applicants. On the contrary, I think we should be investing more in the development of measures of staying power, leadership potential, interest in community service, and the like.<sup>34</sup> But I think the data shows that such things currently play a fairly minor role in college admissions and certainly do not, on average, give minority

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<sup>30</sup> See UCLA, *Public Records Datasets on UCLA Admissions 2004–2006, Investigation of UCLA Holistic Admissions*, PROJECT SEAPHE (2013), available at [http://seaphe.org/?page\\_id=678](http://seaphe.org/?page_id=678).

<sup>31</sup> The only other systematic data on this question I know of is in an article Peter coauthored with Estaban Aucejo, Hanming Fang, and Ken Spenner. See Peter Arciacono et al., *Does Affirmative Action Lead to Mismatch? A New Test and Evidence* 2 QUANTITATIVE ECON. 303 (2011). These authors used internal admissions data from Duke, and similarly found a relation between academic achievement and other personal achievements, and no racial advantage for minority applicants in levels of personal achievement. *Id.* at 306.

<sup>32</sup> An analysis of the UCLA data by the author is available at Richard Sander & Medha Uppala, *Racial Discrimination in UCLA Undergraduate Admissions: An Inquiry in Depth* 11 (Working Paper, Sept. 15, 2014) (on file with author).

<sup>33</sup> See Sander, *Why Strict Scrutiny Requires Transparency*, *supra* note 6, at 293 (explaining that by simply knowing each applicant’s LSAT and undergraduate GPA, one is able to make correct predictions as to whether that applicant is admitted or rejected by an admissions council 80% of the time (compared with only 50% when one knows nothing of the applicant’s characteristics)).

<sup>34</sup> One of the challenges in such “soft” measures, in the view of many admissions officers, is that it can be easier to “game” them—i.e., tell the admissions officer what they want to hear—and thus provide less reliable information than traditional measures like high school grades.

applicants a higher level of preparation for college work than would be inferred from their academic numbers.

STACY HAWKINS: Peter, your suggestion that the conversation is best framed in terms of “preparation” rather than “merit” seems to assume that the two are mutually exclusive, but I do not believe they are. At the same time, merit and preparation are also not coextensive. Although it is certainly true that how well-prepared a student is to handle coursework at a particular instructional level is an important consideration for deciding whom to admit, it should not be the only relevant consideration for schools. If colleges and universities are sincere in their efforts to admit diverse student bodies they will also consider whether, notwithstanding their level of academic preparation, students have the ability to succeed at that particular institution. This determination would certainly consider their academic ability or preparedness as demonstrated by some standard measure, but it should also consider whether the student has non-academic credentials, such as self-discipline or “grit,” that are also highly predictive of academic success.<sup>35</sup> In fact, in some studies these non-academic credentials were more predictive of academic success than were students’ academic credentials.<sup>36</sup> Because I think these two considerations are entirely compatible, I agree with Rick that we should be investing more in understanding the role non-academic credentials play in the admissions process, or ought to play given Rick’s suggestion that they currently play a nominal role, as well as better assessing the correlations between these non-academic credentials and subsequent academic performance. As we develop a better understanding of how these non-academic credentials influence a student’s academic success, we can better determine how to incorporate them into the admissions process.<sup>37</sup>

Another related area of agreement between Rick and I is the need to hold colleges and universities accountable for supporting the success of their admitted students. It certainly is not the case that colleges and universities can admit highly capable students who are less well-prepared than their peers and expect them to succeed without some level of institutional support. If colleges and universities grant

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<sup>35</sup> See *supra* text accompanying note 26 (discussing the usefulness of non-academic factors in college admissions).

<sup>36</sup> See Angela Duckworth’s study as discussed in PAUL TOUGH, *HOW CHILDREN SUCCEED: GRIT, CURIOSITY AND THE HIDDEN POWER OF CHARACTER* 74–75 (2012).

<sup>37</sup> See *supra* note 36 for an explanation of the tools developed by Duckworth to assess non-academic credentials as discussed in TOUGH, *supra* note 36.

admission to students on the basis of their prospects for academic success, the schools should be held accountable for providing the necessary support to ensure that those students succeed, or at least that institutional impediments do not impair their academic success.<sup>38</sup>

PETER ARCIDIACONO: I think the importance of selecting students based on “preparation” rather than “merit” depends on what colleges are doing. If colleges are teaching material that doesn’t build on past preparation, then admitting students based on their individual potential for growth or their prospective contributions to the general college environment is easier to defend. But if college curricula presume strong preparation, admitted students with weaker preparations are placed at a systematic disadvantage. Consequently, large preferences put selective universities with purportedly rigorous curricula in the awkward position of either teaching in a way that downplays academic preparation, or offering courses that are not accessible to a portion of their students. Different parts of the university may respond in different ways. At universities today, preparation may be more relevant in the sciences than in the non-sciences, resulting in universities that are two-tiered. This can have dual bad effects: it hurts those who want to do the sciences but aren’t prepared for them, and it also hurts those who are prepared and wish to pursue rigorous courses of study in the non-sciences; these students can find that the offered material doesn’t build on their preparation.

*Question 4. What is “mismatch”? Is it more useful to think of it as a single concept or as a family of related concepts?*

RICK SANDER: The idea of mismatch in higher education has been around for a good fifty years, but it has been the subject of serious empirical investigation for only the last twenty, and much of the best work has been written in the past five. Sometimes the mismatch hypothesis is called “the peer effects question” or “the fit hypothesis.” As the literature has developed and examined a broader range of peer effects, it has become clear that “mismatch” really describes a family of related hypotheses, and not just one.<sup>39</sup>

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<sup>38</sup> See *infra* text accompanying note 53 (discussing institutional impediments to URM’s academic success).

<sup>39</sup> I introduced this three-way classification of mismatch effects in *The Stylized Critique of Mismatch*. See Richard Sander, *The Stylized Critique of Mismatch*, 92 TEX. L. REV. 1637, 1642–

The “learning mismatch” hypothesis posits that a student will learn less in a classroom if her level of academic preparation is far away from the mean level preparation level of her peers.<sup>40</sup> If she is far below the median, the pace of the class may leave her behind; if she is far above the median, she will not be optimally challenged.<sup>41</sup>

The “competition mismatch” hypothesis suggests that regardless of one’s learning level, having a level of academic preparation far below one’s peers can be difficult and demoralizing—low grades and a feeling of perpetual struggle can produce high attrition.<sup>42</sup>

“Social mismatch” is a hypothesis that, holding other things equal, students at college (or in other education settings) tend to form more friendships with those classmates who have similar levels of academic preparation and performance. Race-based preferences can thus, according to this hypothesis, contribute to racial isolation and self-segregation, rather than enhancing diverse interactions.<sup>43</sup>

Conceptually, these are all “first-order” effects of mismatch—that is, each one would directly result from one’s relative position in a classroom or a class of admitted students. Much of the debate over mismatch, however, concerns things like college graduation and post-graduate earnings, which are best thought of as “second-order” ef-

43 (2014). For a discussion of the distinction among different types of mismatch, see also Arcidiacono & Lovenheim, *supra* note 5 (manuscript at 5).

40 See Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools?*, 10 J. EMPIRICAL LEGAL STUD. 171, 176 (2013) (specifying and rigorously testing the hypothesis that students below the median will learn less than they would have at a less elite school, and thus will lower their chances of passing the bar exam on their first attempt.).

41 *Id.*; Esther Duflo et al., *Peer Effects, Teacher Incentives, and the Impact of Tracking: Evidence from a Randomized Evaluation in Kenya*, 101 AM. ECON. REV. 1739 (2011) (finding that when students are randomly assigned into two groups sorted by performance on a test of learning, teaching within these groups that are more homogenous in academic preparation generates higher rates of learning).

42 This idea has been around since at least the 1960s. See James A. Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men*, 72 AM. J. SOC. 17, 30–31 (1966) (suggesting that attending the “best possible” school is not in a student’s best interest if he or she will be among the lower ranked students in their class). The “competition mismatch” hypothesis has been effectively developed and applied to admissions preferences. STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 116–38 (2003) (discussing academic self-confidence). It has also been applied to the problem of high minority attrition from STEM fields, and the relation of that problem to admissions preferences. See Frederick L. Smyth & John J. McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 RES. IN HIGHER EDUC. 353, 373 (2004) (finding that large racial admissions preferences tended to undermine the rate at which talented minority students attained science degrees).

43 This point is elaborated on below. See *infra* Questions 5 and 6 at 702–07.



fects—harms here only follow if “first-order” problems occur, and may be offset by other policies.

TOM ESPENSHADE: We have some data from our study of selective colleges and universities<sup>44</sup> on what Rick calls “second-order effects” of mismatch. We considered what happens to six-year college graduation rates and to class rank at graduation if a given student matriculates at an increasingly selective school. Here, school selectivity is measured by the average SAT score among the entering (1993 and 1997) freshman classes. Three selectivity tiers are recognized depending upon whether average SAT scores are below 1300 (on a 1600-point scale), between 1300 and 1400, or greater than 1400.

We first used our data to re-estimate a model from Bowen and Bok and found that college graduation rates improve with increased selectivity, suggesting an absence of mismatch.<sup>45</sup> Students who attended an institution in the top tier of selectivity had twice the odds of graduating in six years as statistically equivalent students in the lowest selectivity category. When we estimated an expanded model that included a broader array of students’ academic performance variables, the effect of college selectivity was still positive but no longer statistically significant.<sup>46</sup> This suggests that part of the measured effect of school selectivity is due to students’ superior academic credentials at top schools.

However, there is evidence for mismatch when the effect of school selectivity on class rank at graduation is studied. Controlling for numerous demographic and academic characteristics, we found that graduating from a middle-level (selective) institution instead of one in the bottom tier was associated with a drop of 15.4 points in percentile class rank.<sup>47</sup> Attending a top-tier school instead of one at the bottom resulted in an additional decline of 3 percentage points in class rank.<sup>48</sup>

Because people are rarely asked (or even know or remember) what their class rank was at graduation but are often queried about where they went to school, we concluded that the positive effects of school selectivity on college graduation probably outweigh the negative effect on class rank conditional on college graduation.

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44 See ESPENSHADE & RADFORD, *supra* note 1, at 226–62

45 *Id.* at 233–36.

46 *Id.* at 236–40.

47 *Id.* at 250–51 tbl. 6.2; *id.* at 243–57 (discussion of methods and findings).

48 *Id.*

RICK SANDER: Tom's note gets at a key question about preferences in higher education: how important are grades? Almost all scholars who have studied the question (including me) find, as Tom does, that the larger a "preference" (of any type) a student receives, the lower her grades will be. But do low grades matter?

I studied this question in some depth with some unusually good data on law students and their subsequent careers as lawyers.<sup>49</sup> We found that law school grades were as powerful as law school eliteness in predicting initial success on the job market. But what surprised us was the power of law school grades in predicting the long-term success of lawyers. Among the Chicago lawyers studied by Jack Heinz and his colleagues in 1995, even a crude measure of law school grades predicted long-term earnings far better than did law school eliteness. And among University of Michigan graduates who got jobs as associates in big law firms, white, male students with high GPAs were four to eight times more likely to make partner at their firm than were white, male students with low GPAs.<sup>50</sup>

This initially seems odd, because, as Tom points out, many people don't even remember their class rank ten years after graduation. And although law firms pay a lot of attention to grades in hiring people, they pay no attention to grades in deciding which associates to promote to partnership. The answer must be that grades predict other, unobserved characteristics of lawyers. Our evidence suggests that part of what grades predict are personality characteristics associated with success, like ambition or self-discipline. But a large part of what grades predict is the depth of learning one achieves in law school. This brings us back to mismatch: if a mismatched student learns less in law school, that is partly reflected in low grades and that learning deficit can be a very long-term handicap to the practicing lawyer.

STACY HAWKINS: It is quite helpful to think of mismatch in terms of first and second-order effects and further to understand that it is really the second-order effects that are the crux of the "harm" arguments. These second-order effects have to do with how well students perform as measured by various outcomes, such as graduation or

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<sup>49</sup> Richard Sander & Jane Bambauer, *The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers*, 9 J. EMPIRICAL LEGAL STUD. 893, 895 (2012) ("The consistent theme we find throughout this analysis is that performance in law school—as measured by law school grades—is the most important predictor of career success."). The data was powerful in part because we had data from students at the full range of American legal education (about 200 schools) and knew which schools students attended.

<sup>50</sup> Sander & Bambauer, *supra* note 49, at 911.

grades/class rank, and long-term measures such as career earnings. And yet it will always be the case that even if we could design an admissions system to perfectly predict who is capable of succeeding, there would still be some students who do not achieve their full academic or career potential and, therefore, “fail” by some measure. The reasons for this are many and varied and will often be outside of the control of the school, the student, or both.<sup>51</sup> However, there are some reasons why a student might not achieve his or her full academic potential that should concern the school because they are subject to some institutional control. This, Rick, is what I think you mean when you say that second-order harms are not inevitable if first-order effects are “offset” by schools. For URMs in particular, the evidence shows that on average they underperform relative to their credentials.<sup>52</sup> So this is not a function of poor predictions. There are some known phenomena that may explain the academic underperformance of URMs, which schools ought to proactively seek to address because they are well within their control. These include stigma threat, racially hostile environments, and social isolation on college campuses.<sup>53</sup> Even if we cannot agree completely on the proper measure or means of avoiding all the second-order harms of mismatch, we ought to agree that if URMs are underperforming academically for reasons that are known to be within the school’s control, particularly those that are unrelated to URMs’ academic ability, colleges and universities have an obligation to act to “offset” these harms.

RICK SANDER: I do agree with Stacy that colleges have an obligation to do much more than they generally do now to help admitted students succeed. But I disagree that second-order mismatch effects are the ones that matter most. Rather, they are the ones that have been most debated. Universities do not deny that the first-order problems exist; they simply tend to brush them under the rug. But if

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51 Students may experience life events that impact their performance, including, for instance, marriage, the death of a loved one, or financial hardship. Some of these might be within the student’s control (marriage), the school’s control (loss of scholarship or financial aid), or may be outside of anyone’s control (death).

52 See SANDER & TAYLOR, *supra* note 10, at 25 (acknowledging that “the academic index of black and Hispanic students . . . *overpredicts* their academic performance in college; in other words, students tend to do somewhat worse than whites with the same academic index”) (emphasis in original).

53 For a full discussion of these impediments to URM student success, see Stacy Hawkins, *Mismatched or Counted Out? What’s Missing from Mismatch Theory and Why It Matters*, 17 U. PA. J. CONST. L. 853–908 (Feb. 2015) (discussing the impact of social stigma and hostility on URM performance).

large preferences do have these first-order harms, those are profoundly troubling. They need to be better measured (by, for example, developing measures of learning at college comparable across different institutions), and we must pursue strategies to counter them, including closer scrutiny of preference policies.

*Question 5. The idea of “social mismatch” is relatively new. What is this, and what does the relevant evidence say about it?*

PETER ARCIDIACONO: A potential benefit of race-based preferences is that it may increase cross-racial interaction rates. However, since at the undergraduate level racial preferences affect where individuals go to college and not whether they attend at all, shifting minorities from one campus to another results in more cross-racial interaction at one school at the expense of cross-racial interaction at another school.

There is evidence that lowering the extent of racial preferences at top schools would increase certain kinds of interaction overall (the sum of interactions at top schools and other schools) for two reasons.<sup>54</sup> First, because racial preferences (as currently constructed) result in African Americans making up a greater share of the student body at the top schools than at the schools below them, a lessening of racial preferences at these schools would result in a more even distribution of African Americans across selective schools. Second, racial preferences drive a wedge between the academic backgrounds of different racial groups in the same school, and individuals are more likely to interact with individuals of similar academic backgrounds.

What this means is that the marginal admit under affirmative action at Harvard finds his or her academic characteristics to be very different from those of the majority group. My colleagues and I showed, using the same data Bowen and Bok used in *The Shape of the River*, that raising a white student's SAT score (while holding the student's other characteristics constant) makes it more likely she will know two or more Asians well and less likely she will know two or more African Americans well. This point is further emphasized in

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<sup>54</sup> See Arcidiacono, Khan & Vigdor, *supra* note 29, at 2–3 (presenting evidence that, independent of race, students tend to form friendships with other students with similar levels of academic preparation and that, consequently, smaller racial preferences in admission could produce greater cross-racial interaction and friendships).

Table 3: Patterns of Friendships Before and During College Conditional on SAT Score Category: NLSF

<i>Panel A: Share of Friends During College</i>						
		Black	Hispanic	Asian	White	Obs
Black	$SAT \leq \overline{SAT}$	59%	7%	9%	25%	582
	$SAT > \overline{SAT}$	45%	7%	9%	38%	120
Hispanic	$SAT \leq \overline{SAT}$	14%	22%	12%	52%	476
	$SAT > \overline{SAT}$	10%	12%	12%	65%	218
Asian	$SAT \leq \overline{SAT}$	10%	5%	33%	52%	254
	$SAT > \overline{SAT}$	7%	4%	38%	51%	527
White	$SAT \leq \overline{SAT}$	8%	4%	11%	76%	304
	$SAT > \overline{SAT}$	6%	5%	13%	76%	495

<i>Panel B: Share of Friends Before College</i>						
		Black	Hispanic	Asian	White	
Black	$SAT \leq \overline{SAT}$	58%	6%	7%	29%	
	$SAT > \overline{SAT}$	42%	5%	11%	42%	
Hispanic	$SAT \leq \overline{SAT}$	10%	32%	10%	48%	
	$SAT > \overline{SAT}$	6%	18%	11%	65%	
Asian	$SAT \leq \overline{SAT}$	9%	6%	31%	54%	
	$SAT > \overline{SAT}$	4%	4%	40%	51%	
White	$SAT \leq \overline{SAT}$	6%	5%	9%	80%	
	$SAT > \overline{SAT}$	5%	4%	10%	81%	

Share of friends before college refers to high school senior year friends. Share of friends during college refers to freshmen year friends since college began.

later research, which showed that, within a school, African Americans with the lowest SAT scores have the fewest other-race friends.<sup>55</sup>

What is interesting about this 2013 study is that African Americans actually have friends of similar racial compositions in high school and in college, despite their colleges having student bodies with a much smaller share of African Americans. Indeed, predicting cross-race friendships in college based on high school interactions results in a dramatic over-prediction of how much cross-race friendship we expect in college, compared to what we actually observe. Given how segregated most high schools are, and how integrated most selective colleges are, one may have expected the college environment to facilitate more cross-racial friendships, but this is not the case.

STACY HAWKINS: I think “social mismatch” suggests the need for greater student body diversity, not less. Peter makes two points: first

<sup>55</sup> Peter Arcidiacono et al., *Racial Segregation Patterns in Selective Universities*, 56 J. L. & ECON. 1039, 1042 (2013) (“The percentage of black same-race friendships is higher for those whose SAT scores are relatively low given the college they attend: on average, marginal black students who are admitted have a greater share of same-race friends.”).

that “racial preferences” result in a less even distribution of URMs, at least as measured by black students,<sup>56</sup> across selective schools, rather than a more even distribution; and second that “racial preferences” exacerbate racial isolation among students rather than foster the kinds of “productive” social interactions Tom discusses below. On the first point, I would note that notwithstanding the distribution across the top and middle tiers, the data demonstrates that black students are already concentrated among the least selective tiers of schools.<sup>57</sup> If the reduction or elimination of race-conscious admissions plans exacerbates this concentration, and the “cascade effect” identified by Rick in *Mismatch* suggests that it would, it will have serious negative consequences by reinforcing the stigma of black academic inferiority. Second, and this is the more important point, if the aim of student body diversity is to “break down racial stereotypes, and enable[] [students] to better understand persons of different races,” as the Court said in *Grutter*, it would seem that race-conscious admissions plans, and the student body diversity they produce, are designed specifically to mitigate the phenomenon of social mismatch.<sup>58</sup> Below I discuss how the phenomenon of “stigma threat” likely contributes to “social mismatch.” The solution, therefore, should involve combatting stigma threat directly.<sup>59</sup> This could help to offset the effects of social mismatch and prevent the more harmful second-order effects of mismatch from occurring. However, I do agree with Peter that we should expect colleges and universities, precisely because of their commitment to student body diversity, to facilitate more cross-racial interactions than they do. As Tom notes below, we ought to hold colleges and universities accountable for demon-

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<sup>56</sup> I use the term “black” rather than African-American deliberately. This is a subtle, but important, distinction in recognition of the fact that many of the “black” students, especially those at elite colleges and universities, do not identify as African-American but are themselves immigrants or are descendants of immigrants (rather than former slaves) from the Caribbean and Africa, or are mixed-race. See Chrystal A. George Mwangi, *Complicating Blackness: Black Immigrants & Racial Positioning in US Higher Education*, 3 J. CRIT. THOUGHT & PRAXIS (2014), <http://lib.dr.iastate.edu/jctp/vol3/iss2/3/> (investigating the impact of this phenomenon on arguments in support of affirmative action); Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges & Universities in the United States*, 113 AM. J. EDUC. 243 (2007) (documenting the overrepresentation of black students of immigrant origins as a compared to black students of native origin in selective colleges and universities).

<sup>57</sup> See SANDER & TAYLOR, *supra* note 10, at 23–24; see also *supra* note 16.

<sup>58</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (internal citation omitted).

<sup>59</sup> See Hawkins, *supra* note 53, at 893–95 (highlighting research focused on combatting stigma threat).

strating that they have in fact leveraged their student body diversity to productive educational and institutional benefit.<sup>60</sup>

RICK SANDER: I disagree with Stacy. The “social mismatch” research shows the superficiality of the Supreme Court’s pronouncements today on campus diversity, which in turn has been abetted by superficial pronouncements by college presidents. Simply admitting a diverse class does not produce diverse interactions; if students on a campus from different racial groups have widely differing academic preparation, one is creating a recipe for self-segregation and racial stereotyping.

Moreover, as Peter and I noted in the discussion of Question 2, above, reducing racial preferences at the most highly selective schools would actually increase levels of diversity across the top several tiers of selectivity and would not increase the concentration of minorities in low tiers. If we add in new strategies for socioeconomic diversity, we can produce truly beneficial reforms that help students across the spectrum.

*Question 6. If social mismatch is real, what are its constitutional law implications? How does this shape our understanding of the “educational benefits of diversity”?*

TOM ESPENSHADE: Ever since race-based affirmative action in higher education was first challenged in the courts,<sup>61</sup> it has had to pass two related constitutional tests. Its goals or aims must satisfy a compelling governmental interest, and its means or remedies must be narrowly tailored. Typically, the Supreme Court has deferred to universities’ judgments that the educational benefits that flow from a diverse student body are essential to their academic missions.

Courts have usually focused more attention on the second prong of the strict scrutiny test—whether the means of racial preferences are narrowly tailored. In *Fisher*, for example, the Court held, “[s]trict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way *without a court giving*

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<sup>60</sup> Patricia Gurin and her colleagues offer the University of Michigan Intergroup Relations Program (IGR), which provides first-year students a number of curricular and co-curricular opportunities for cross-racial and cross-ethnic engagement, as a promising example of how student body diversity can be leveraged for educational benefit. See Patricia Gurin, Biren A. Nagda & Gretchen E. Lopez, *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17 (2004).

<sup>61</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978).

*close analysis to the evidence of how the process works in practice*".<sup>62</sup> The same evidence-based test ought to be applied to whether diversity in admissions produces the educational benefits often claimed for it.

Diversity in admissions is a necessary, but not sufficient, condition to result in educational benefits. Students must mix and mingle on campus and not self-segregate into relatively homogeneous racial groups. And the cross-racial social interactions must be of the productive kinds that lead to learning from difference. In our data mentioned earlier, nearly two-thirds of students socialized often or very often with students of other races during their college careers.<sup>63</sup> Roughly one-half had a best friend or a roommate of another race.<sup>64</sup> And one-third dated someone of another race.<sup>65</sup> White students were the most racially isolated, however, whereas Hispanic students were least so. Students who interacted with peers from a different racial background in one of these four social domains were much more likely to report that they had "learned a lot" from someone different from themselves.<sup>66</sup>

STACY HAWKINS: I agree that student body diversity is a necessary but not sufficient condition for achieving its intended benefits. I would point out, however, that the Supreme Court in *Grutter* recognized at least three putative benefits of student body diversity: improving classroom learning, better preparing students for the global workforce, and training a diverse set of future civic leaders.<sup>67</sup> Only one of these benefits would require that students engage in the kinds of productive "cross-racial social interactions" Tom discusses here. There is no doubt that the cross-cultural competence required for effective participation in the global workforce depends on these kinds of productive social interactions between students of different races and ethnicities, and colleges and universities should facilitate these interactions.

But it is not at all clear that the other two putative benefits depend on these types of social interactions between students. For example, students would realize the classroom learning benefits of diversity so long as they attend racially and ethnically diverse classes where they are able to engage in and faculty are able to facilitate discussion of

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62 *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2421 (2013) (emphasis added).

63 ESPENSHADE & RADFORD, *supra* note 1, at 182 tbl. 5.3.

64 *Id.*

65 *Id.*

66 *Id.* at 312 fig. 8.2.

67 *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).



how different backgrounds and experiences can inform different perspectives on and deepen understanding of the particular academic inquiry.<sup>68</sup> In this way, the academic enterprise is enhanced by the presence of diverse students, even if these benefits are not realized through students' social interactions. Similarly, training a diverse set of future civic leaders, while certainly enhanced by the cross-cultural competence gained from social interactions among diverse students, does not require such interaction.<sup>69</sup> Nevertheless, the data Tom cites seems to indicate that significant cross-racial social interaction is occurring, although more could be done to facilitate the kinds of "productive" cross-racial interactions he describes. Most troubling is the lack of cross-racial interaction by white students. This might well be a function of "stigma threat" interacting with social mismatch theory as discussed previously. Thus, one of the ways colleges and universities might facilitate greater social interaction between white students and URMs is to counter "stigma threat" directly rather than attempting to reduce student body diversity.<sup>70</sup>

PETER ARCIDIACONO: A big part of why whites *appear* to be racially isolated in this sort of data analysis is purely mechanical. Since whites predominate on college campuses, they would have largely same-race friends even if friendships were randomly assigned. In the National Longitudinal Survey of Freshmen, whites report that 76% of their friends are white, but they attend colleges that are 73% white. African Americans report that 58% of their friends are African American, but they attend colleges that are 7% African American.<sup>71</sup> So yes, whites have a smaller percentage of interracial friendships, but the

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68 The study of the University of Michigan IGR, *see supra* note 60, by Gurin and her colleagues demonstrates the extent to which intergroup dialogues within the classroom setting support pedagogical interests such as enhancing students' abilities to demonstrate perspective, as well as generally increasing their sense of shared values with others who are racially/ethnically different. *See* Gurin, Nagda & Lopez, *supra* note 60, at 28. This effect of increasing shared value was most significant for white students, which supports the hypothesis that student body diversity can help to offset social mismatch.

69 *See* Richard Delgado, 1998 *Hugo L. Black Lecture: Ten Arguments Against Affirmative Action – How Valid?*, 50 ALA. L. REV. 135, 137 (1998) (describing the "Who's Who" of the legal elite produced by Boalt Hall's 1974 graduating class, including state and federal court judges at both the trial and appellate levels, law professors, and leaders of the state bars, and noting that this assembly of accomplished minority lawyers was made possible by the school's then race-conscious admissions plan, which produced a student body comprised of 30% minority students).

70 For a detailed discussion of how colleges and universities might counter stigma threat, *see* Hawkins, *supra* note 53, at 897.

71 Arcidiacono et al., *supra* note 55, at 1045.

distribution of their friendships across races looks much more like random assignment than is the case for any other group.

*Question 7. Social mismatch theory seems related to the idea of stereotype threat. How strong is the evidence on stereotype threat, and what does it tell us about this debate?*

STACY HAWKINS: There are actually two distinct but related phenomena—stigma threat and stereotype threat.<sup>72</sup> Stigma threat is the belief that members of certain “stigmatized” groups, i.e., racial and ethnic minorities and/or women, are less capable than members of non-stigmatized groups, i.e., whites and/or men, in a particular domain. Thus the presumption that URM students have inferior academic credentials and are, therefore, the beneficiaries of “large racial preferences” in the college admissions context, triggers stigma threat.<sup>73</sup> This “stigma threat,” which is commonly associated with feelings of hostility and resentment by members of the non-stigmatized group against members of the stigmatized group, is likely related to social mismatch theory insofar as members of the non-stigmatized group may alienate members of the stigmatized group because of the belief in the stigmatized individual’s inferior status in the academic domain.<sup>74</sup> The related phenomenon, stereotype threat, occurs when members of the stigmatized group internalize the perception that

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<sup>72</sup> See Hawkins, *supra* note 53 at 871–73 for a more detailed discussion of the difference and interrelation between the two.

<sup>73</sup> For a discussion of the holistic review process employed by most selective colleges and universities, which considers factors in addition to academic credentials in determining admission, see *id.* at 864–65, 883.

<sup>74</sup> See R.A. Lenhardt, *Understanding the Mark: Race, Stigma and Equality in Context*, 79 N.Y.U. L. REV. 803, 835 (2004) (noting the mutually reinforcing nature of stigma and stereotypes, and observing that they “are so commonly held that they are perceived not as gross overgeneralizations about a group and its members, but as cultural truths, or actual facts”). This belief may even operate in the absence of racial preferences, thus divorcing its effects from race-conscious admissions policies. See Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1221–24 (2010) (detailing a study of biomedical students at schools both with and without affirmative action, demonstrating that those attending schools that banned affirmative action experienced overt racism at nearly twice the rate of students attending affirmative action schools and also that those students attending schools that banned affirmative action experienced more external stigma than those students attending affirmative action schools); Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First – Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299, 1343 (2008) (describing an empirical study of graduates of seven law schools with differing affirmative action policies and finding that there was no statistically significant difference in internal stigma between URM students at schools with or without affirmative action policies).

they are less capable than members of the non-stigmatized group, which then inhibits their performances within that domain.<sup>75</sup> The evidence on both stigma and stereotype threat is convincing. Not only does this evidence transcend race, but it also transcends the context of higher education. For instance, studies have demonstrated the effects of stigma/stereotype threat in impairing the career and academic prospects of women in science, technology, engineering, and math (STEM) disciplines.<sup>76</sup> What we know from this research is that stigma threat is real, and stereotype threat can suppress performance by members of the stigmatized group in the domain in which the stigma operates. So in the domain of higher education, the stigma that URMs are less capable academically than their peers could invoke stereotype threat, thereby inhibiting URMs' academic performances. It is also true that the isolation of stigmatized URMs on college and university campuses, which is more directly related to social mismatch, can also inhibit academic performance.<sup>77</sup> What this tells us is that the academic underperformances of URMs, relative both to their peers and to predictions based on their own academic credentials, may be a function of the phenomena of stigma/stereotype threat in addition to, and perhaps as much as, any gap in academic credentials.

RICK SANDER: I agree with Stacy that the stigma issues are important and should cause us real concern. And since large racial preferences really do tend to produce large performance gaps, I don't think one can solve the problem simply through student workshops and the like.<sup>78</sup> Rather, the stigma problem supports the idea

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<sup>75</sup> See generally CLAUDE STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO (2010).

<sup>76</sup> See Ernesto Reuben, Paola Sapienza & Luigi Zingales, *How Stereotypes Impair Women's Careers in Science*, 111 PROC. NAT'L ACAD. SCI. EARLY EDITION 4403, 4403 (2014) (describing a study in which employers' expectations of women's math performance revealed negative sex-based stereotypes or "stigma threat"); see also Carol S. Dweck, *Is Math a Gift? Beliefs That Put Females at Risk*, in WHY AREN'T MORE WOMEN IN SCIENCE? TOP RESEARCHERS DEBATE THE EVIDENCE, 47, 50 (Stephen J. Ceci & Wendy M. Williams eds., 2006) (demonstrating the effect of stereotype threat in suppressing the performance of women's math ability).

<sup>77</sup> See Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity and Campus Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 286 (2001) (noting that the academic performance of students of color at the University of Michigan Law School suffered because they felt isolated and alienated).

<sup>78</sup> One of the most important gaps in the literature on affirmative action is the absence of any study (so far as I know) examining the relationship between the size of credential disparities among students across racial lines, and the actual formation (or non-formation) of racial stereotypes by students. A connection is implied by the social

that we should (a) try to keep racial preferences small, (b) blend them with socioeconomic preferences to further weaken the perceived correlation of race and performance, and (c) hold universities accountable to performance standards for students receiving preferences—that is, ensure that any admitted group has performance levels that at least reach the 30<sup>th</sup> percentile of the whole student body.

Whether stigma translates into a stereotype threat that itself reduces student performance is, I think, still a highly contested question. As several scholars have pointed out, it has been hard to show stereotype-threat effects in real-world testing situations.<sup>79</sup> My own work on law schools found that African-American students performed at pretty much the exact level predicted by their credentials, and that African-American students' grades on conventional law school exams were very similar to their grades in legal writing classes.<sup>80</sup> But in any case, even the possibility of stereotype threat would also seem to support the sort of reforms I've described.

TOM ESPENSHADE: We also have data from selective colleges and universities on academic underperformance. We know that, on average, underrepresented minority students (URMs, meaning here black and Hispanic students) perform less well academically in college than white students. Part of this is due to lower levels of college preparedness, again on average, among URMs compared to whites. What academic underperformance refers to, however, is the fact that, controlling for pre-college academic credentials, URMs perform less well than whites. Our data do not permit an analysis of the reasons for underperformance, but stereotype threat is surely a viable candidate.<sup>81</sup>

We examined underperformance in the context again of six-year graduation rates and class rank at graduation. The test is based on an examination of the effects of race and ethnicity, controlling for

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mismatch literature, but it seems quite important to understand the stigma-forming process.

79 See Paul R. Sackett & Ann Marie Ryan, *Concerns about Generalizing Stereotype threat Research Findings to Operational High-stakes Testing*, in STEREOTYPE THREAT 249–63 (Schmader & Inzlicht eds., 2012).

80 Sander, *supra* note 3, at 418–36; see also Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963, 1967–69 (2005) (finding that blacks perform about the same as whites with similar credentials). Reanalysis of the regressions with better data (that controls for undergraduate college quality) shows even more strongly the similarity in academic performance in law school across racial lines, when one controls for entering credentials.

81 CAMILLE Z. CHARLES, MARY J. FISCHER, MARGARITA A. MOONEY & DOUGLAS S. MASSEY, *TAMING THE RIVER: NEGOTIATING THE ACADEMIC, FINANCIAL, AND SOCIAL CURRENTS IN SELECTIVE COLLEGES AND UNIVERSITIES* 185–87 (2009).

school selectivity, other demographic and high-school characteristics, and a broad array of academic measures (including high-school GPA and class rank, SAT I and SAT II scores, number of AP exams taken, whether a National Merit or National Achievement Scholar, and the like). Black and Hispanic students have between 40 and 50 percent lower odds than whites of graduating in six years, others things held constant.<sup>82</sup> On average black students graduate from college with a class rank 17.3 percentage points lower than statistically equivalent whites.<sup>83</sup> The gap for Hispanic students is 14.9 percentage points compared with whites.<sup>84</sup> Interestingly, there is also academic underperformance among Asian students compared to whites. Even after controlling for college major, the average class rank for Asian students is 10 percentage points below otherwise identical white students.<sup>85</sup>

STACY HAWKINS: Tom's research seems to offer strong support for the effect of stereotype threat in suppressing the academic performance of URM students at the undergraduate level. I could imagine that law school is different for a lot of reasons.<sup>86</sup> However I agree with Tom that it is particularly interesting that even Asian students underperform relative to their academic credentials at the undergraduate level. It does not seem likely that this could be explained by stereotype threat,<sup>87</sup> but it could be related to the racial hostility and social isolation felt by minority students generally on majority white college and university campuses, from which Asian students are not immune.<sup>88</sup> In

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<sup>82</sup> ESPENSHADE & RADFORD, *supra* note 1, at 234–35 tbl. 6.1.

<sup>83</sup> *Id.* at 250–51 tbl 6.2.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> For instance, Peter notes that “preferences” at law schools tend to be “particularly large and mechanical.” See *supra* text accompanying note 2. So they may not account for the types of non-academic credentials that might signal strong academic prospects, notwithstanding weaker grades and test-scores. Law schools also largely employ blind grading, which would likely mitigate the effects of stigma/stereotype threat in the interactions between faculty and URM students.

<sup>87</sup> Asian students generally do not suffer from negative stigma or stereotypes about their academic ability. See generally JAMES FLYNN, *ASIAN AMERICANS: ACHIEVEMENT BEYOND IQ* (1991) (discussing and rebutting the common belief that Asian Americans possess greater academic abilities or higher intellectual acuity than do even whites).

<sup>88</sup> There has recently been a wave of social media campaigns documenting the outsider status of racial and ethnic minorities across college and university campuses. See, e.g., Ahsante Bean, *I, Too, Am Harvard*, YOUTUBE (Mar. 3, 2014), <https://www.youtube.com/watch?v=uAMTSPGZRiI>; Sy Stokes, *The Black Bruins*, YOUTUBE (Nov. 4, 2013) <https://www.youtube.com/watch?v=BEO3H5BOIFk>; 33, YOUTUBE (Feb. 10, 2014), <http://www.youtube.com/watch?v=5y3C5KBcCPL>.

addressing these seemingly related phenomena, I would agree with Rick that colleges and universities should ensure that in casting their admissions net widely enough to capture diverse students, they do not cast so widely that they admit students who have little prospect for academic success. So we ought to better understand how admissions decisions are made, especially how to evaluate what Rick calls the “soft variables,” and I call non-academic credentials,<sup>89</sup> that may be highly predictive of academic success. At the same time, I also agree with Rick that on the back end, we should hold colleges and universities accountable for providing academic and institutional support to admitted students.

I would be concerned, however, with limiting this support only to students admitted with some “preference,” precisely because doing so would exclude the Asian or URM students who might also be underperforming due to institutional impediments, such as stigma threat or a generally inhospitable campus climate, but who were not admitted on the basis of any preference. I would also hesitate to measure the success of these students against the median of student performance for several reasons. Students are admitted for a variety of reasons and with correspondingly different expected contributions to the student body. These admitted students, and particularly those admitted under any “preference,” might have a wide range of academic and non-academic abilities and might face differing personal and institutional challenges.<sup>90</sup> To the extent that we measure all students’ academic performances by a single standard (the median), we ignore not only these differences, but also the fact that some students will always be in the bottom of the class.<sup>91</sup> Given these facts, it should not be a measure of failure either for the school or for the students

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<sup>89</sup> Specifically these include traits such as self-discipline and “grit,” as that term has been used in the literature on academic success. See GRANT, *supra* note 26 at 104–06; Duckworth & Seligman, *supra* note 26, at 939 (stating that non-intellectual strengths, such as self-discipline, contribute to academic success).

<sup>90</sup> See Robert J. Rydell, Sian L. Beilock & Allen R. McConnell, *Multiple Social Identities and Stereotype Threat: Imbalance, Accessibility, and Working Memory*, 96 J. PERSONALITY & SOC. PSYCHOL., 949, 949–50 (2009) (explaining that when two possible social identities are available to an individual, one positive and one negative, the person will activate the positive social identity, which will affirm a positive self-image, inhibit the negative self-image and reduce stereotype threat).

<sup>91</sup> Linda F. Wightman, *Are Other Things Essentially Equal? An Empirical Investigation of the Consequences of Including Race as a Factor in Law School Admission*, 28 SW. U. L. REV. 1, 27 (1999) (observing that “[a] critical point that is often overlooked in the discussions about academic standards is that even if no students for whom race was a factor had been admitted, still by necessity, ten percent of the students would be predicted to perform in the bottom ten percent of their class”).

that some students inevitably rank at the bottom of the class. This, like the academic credentials emphasized in the admissions process, is simply too narrow a measure. If the determination of who merits admission is defined broadly, so too should the measure of students' academic success.

PETER ARCIDIACONO: Economists tend to be skeptical of stereotype threat, in part because it is difficult to verify outside of a lab setting. But it is interesting that in this discussion stereotype threat is being used as an explanation for underperformance of minority groups conditional on enrolling. I have seen arguments suggesting stereotype threat as a reason for SAT score gaps between minority and majority students.<sup>92</sup> In this case, the argument is that the minority candidate should be admitted with lower test scores because his or her underlying preparation is just as strong as that of majority students' with higher test scores. If this is were the case, then minorities would actually perform better in college than their majority counterparts. So one must argue that stereotype threat is even larger in university test settings than on the SAT—when the available direct evidence has failed to show it in either context.<sup>93</sup> The sort of broad evidence of underperformance mentioned by Tom and Stacy cannot distinguish between underperformance due to differences in unobserved academic background or due to stereotype threat. So we should try to study closely variations in actual policies on college campuses to disentangle problems that can be addressed through better counseling from those that are best addressed by actually narrowing gaps in academic preparation among entering freshmen that are strongly correlated with race.

*Question 8. Perhaps the fiercest area of mismatch debate has concerned "law school mismatch." What is the state of that debate?*

RICK SANDER: Over the past few years, there have been two prominent works on the issue of law school mismatch. Together, they say a lot about where we stand.

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<sup>92</sup> See, e.g., Christine R. Logel, Gregory M. Walton, Steven J. Spencer, Jennifer Peach & Zanna P. Mark, *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 EDUC. PSYCHOLOGIST, 42, 43 (documenting results of a study on students taking the SAT) (2012).

<sup>93</sup> See generally Sackett & Ryan, *supra* note 79; Sander, *supra* note 3, at 424 (discussing the similarity of black/white grade gaps across radically different methods of evaluation).

The first is the lengthy article<sup>94</sup> by labor economist Doug Williams, which was published in the summer of 2013 by the *Journal of Empirical Legal Studies*, a prestigious and peer-reviewed journal. Williams provides an unusually clear theoretical explanation of mismatch, derives from it several distinct empirical tests, and presents the results of dozens of variations on these tests, to examine how robust his findings are across different groups of students and different outcomes. Many of his results clarify earlier findings by others writing about law school mismatch. Williams' findings overwhelmingly support the existence of law school mismatch, and generally appear to account for most or all of the otherwise unexplained racial gap in first-time bar passage rates.

The second is a brief<sup>95</sup> filed in *Fisher v. University of Texas at Austin*, which has become known as the Empirical Scholars Brief. Its signatories include many of the early critics of the law school mismatch hypothesis (for example, Ian Ayres and Daniel Ho) and several other eminent social scientists. The brief argues that the mismatch literature—in particular, the work on law school mismatch—is beset by fundamental methodological flaws and errors that render it invalid. But, remarkably, there are only three specific criticisms made of the law school mismatch work, and *all three are “demonstrably false” claims*.<sup>96</sup> I have written to each of the signatories, pointing this out, and none has responded or further defended the work. Nor have these scholars, so far as I know, made any attempt to publish a version of their brief in an academic journal. At this juncture, the only credible work standing is work that supports the law school mismatch hypothesis.<sup>97</sup>

STACY HAWKINS: The case of law school, as I have already acknowledged, is thorny for many reasons. For instance, if it is true, as both Rick and Peter have acknowledged, that law schools rely more heavily and mechanically on academic credentials in deciding who to admit than do most undergraduate institutions, this more mechanical admissions process almost surely fails to account in any meaningful way for the kinds of non-academic credentials valued in a holistic re-

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<sup>94</sup> Williams, *supra* note 40, at 172–73 (explaining how the Article proceeds).

<sup>95</sup> Brief of Empirical Scholars as *Amici Curiae* in Support of Respondents at 8, 9, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2012) (No. 11-345).

<sup>96</sup> See Richard Sander, *Mismatch and the Empirical Scholars Brief*, 48 VAL. U. L. REV. 555, 570–80 (2014).

<sup>97</sup> There are now a total of four peer-reviewed analyses of law school mismatch phenomena, and all four find strong evidence of mismatch effects.



view process.<sup>98</sup> The data show that these non-academic credentials are highly correlated with student academic achievement even when students possess academic credentials weaker than their peers.<sup>99</sup> Consequently, law students who are not screened for these non-academic credentials may not exhibit the kinds of qualities, traits, or behaviors that are capable of offsetting relatively weak academic credentials.<sup>100</sup> Also, the format of law school in largely assessing student performance through a single, anonymous exam, rather than on the basis of frequent and often transparent evaluative tools, such as exams, projects, or papers, may alter the effects of stigma/stereotype threat on URMs' academic performances in law school. Although it seems clear from the research that URMs do experience stigma/stereotype threat in law school, the effects of these phenomena on their academic performances may be different because of the unique format of law school.<sup>101</sup> These are all questions worthy of further study.<sup>102</sup>

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<sup>98</sup> It is interesting to note, however, that in the companion cases *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), challenging the race-conscious admissions plans at the University of Michigan, it was the law school that employed a holistic review process, whereas the undergraduate school employed a more mechanical point system.

<sup>99</sup> In studies of both junior high school and college pre-med students, Carol Dweck found that "mindset" was more predictive of academic achievement than previously demonstrated academic performance. CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS*, 57–58 (2006) (describing a study of junior high school students with an effort or growth mindset who increased their grades after an initial transition period, as compared to students with an ability or fixed mindset, whose grades continued to decline); *see also id.* at 60–62 (describing the differences in motivation and study habits between pre-med students with a growth versus a fixed mindset, and attributing the difference in academic performance between the two to their mindset, rather than the fact that "they were smarter or had a better background in science").

<sup>100</sup> See Hawkins, *supra* note 53, at 889–91, for a discussion of URM students in the Posse Foundation Program who are screened for non-academic credentials in addition to academic credentials for admission to selective colleges and universities. Notwithstanding relatively weak academic credentials, these URM students demonstrated academic achievement on par with peers who had superior academic credentials.

<sup>101</sup> See Onwuachi-Willig, *supra* note 74, at 1319–20 (describing an anecdotal study of Harvard Law School students and concluding that the stigma threat they experienced was the result of institutional and societal racism, rather than being caused by race-conscious admissions).

<sup>102</sup> In fact, Timothy Clydesdale, in an exhaustive study of the BPS data on which Sander also partly relies for his own law school mismatch hypothesis, suggested that further inquiry into the reasons for the academic underperformance of URMs in law school as measured by grades and bar passage was needed. See Timothy Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711, 737 (2004) (suggesting that further research is needed to fully understand and disaggregate the effects of gaps in academic credentials from other environmental or institutional effects, such as stigma or

*Question 9. Is there significant debate about the problems of “competition” mismatch, as illustrated by the “science mismatch” work of Smyth and McArdle, or the “academic mismatch” work of Cole and Barber?*

PETER ARCIDIACONO: The case for mismatch effects is perhaps strongest in the persistence of minorities in STEM majors. My colleagues and I have shown<sup>103</sup> that, conditional on gender, a higher fraction of African American students entered with an initial major in the sciences or economics than white students. However, their persistence rates were substantially lower. The results were particularly striking for men: 58% of African American men switched out the sciences and economics compared to only 8% of white men.<sup>104</sup> Aucejo, Spenner, and I show that these gaps in persistence rates are driven by differences in academic background: conditioning on measures such as SAT scores or first year grades results in no significant racial differences in persistence rates. (This, of course, implies that these “science mismatch” effects are not driven by stigma or stereotype threat.)

We also show that science classes give lower grades, require more study time, and are more likely to be the student’s most challenging courses. Students are also more likely to report that they switched their major because of not being adequately prepared or because of the course difficulty if their initial major was in the sciences.<sup>105</sup>

But is it absolute preparation or how prepared one is relative to one’s peers that matters? Both Smyth and McArdle,<sup>106</sup> using the same data that Bowen and Bok used in *The Shape of the River*, and Aucejo, Hotz, and I,<sup>107</sup> using data on the University of California system, find evidence of a strong role for relative preparation. The latter paper shows, for example, that most minority students at UC Berkeley

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stereotype threat, on academic performance outcomes for URMs). Although Sander disputes the empirical methods employed by Clydesdale in this study, even Sander acknowledges that race remains a factor, albeit it a “very minor factor,” in explaining the academic performance of URMs in law school after controlling for academic credentials. See SANDER & TAYLOR, *supra* note 10, at 77.

103 Peter Arcidiacono et al., *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, 1 IZA J. LAB. ECON. 1, 18–20 (2012), available at <http://www.izajole.com/content/1/1/15> (“Over 30% of individuals who switched majors in their sophomore year did so in part because of their academic background.”).

104 Peter Arcidiacono, Esteban Aucejo, & Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, 1 IZA Journal of Labor Economics 5 (2012).

105 *Id.*

106 Smyth & McArdle, *supra* note 42, at 373–74.

107 Peter Arcidiacono et al., *University Differences in the Graduation of Minorities in STEM Fields: Evidence from California* (Nat’l Bureau of Econ. Research, Working Paper No. 18799, 2013), available at <http://public.econ.duke.edu/~psarcidi/stem.pdf>.

would have higher persistence rates in the sciences had they attended UC Riverside.

TOM ESPENSHADE: Peter, your point about relative standing being more important than absolute academic credentials is supported by other research. The general framework derives from relative deprivation and social comparison theories (such as Davis in 1966 and Marsh in 1987).<sup>108</sup> It is assumed that individual behavior is motivated by a social comparison dynamic. Controlling for individual students' abilities, an increase in school-wide achievement levels is expected to lower academic self-concepts and depress occupational and educational aspirations.<sup>109</sup>

A well-known study,<sup>110</sup> whose findings created discomfort among supporters of race-based affirmative action, concluded that affirmative action may be one reason that colleges and universities have relatively few minority faculty members. In an analysis based on data from 7,600 graduating college seniors in the spring of 1996, the authors concluded that the underrepresentation of minority faculty is due to supply constraints. Black and Hispanic students are failing to pursue Ph.D. programs in sufficient numbers. Being surrounded by even better prepared white and Asian students in college makes it difficult for able minority students to excel and lowers their academic self-confidence. As a consequence, minority students are less likely to choose college professor as a career. Cole and Barber concluded that African-American students would be twice as likely to pursue academic careers if they attended non-elite schools instead of elite ones.

Peter or Rick, do you know whether anyone has examined the undergraduate alma maters of majority versus minority students who are enrolled in today's Ph.D. programs?

RICK SANDER: There is some research on black science students suggesting that those attending historically black colleges (where academic mismatch due to racial preferences should be entirely missing) had far higher rates of enrolling in, and completing, science

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108 Davis, *supra* note 42, at 25 ("In the absence of any objective evidence, students tend to evaluate their academic abilities by comparison with other students. . . . Since more conclusions are drawn on the basis of GPA standing on the local campus than by comparison with students on other campuses, GPA is a more important variable in influencing self-evaluations and, consequently, career decisions."); Herbert W. Marsh, *The Big-Fish-Little-Pond Effect on Academic Self-Concept*, 79 J. EDUC. PSYCHOL. 280, 291 (1987).

109 See Thomas J. Espenshade et al., *The Frog Pond Revisited: High School Academic Context, Class Rank, and Elite College Admission*, 78 SOC. OF EDUC. 269, 287 (2005).

110 COLE & BARBER, *supra* note 42, at 234.

doctoral programs.<sup>111</sup> I'll also note that at the University of California, the end of racial preferences in doctoral programs produced declines in enrollment, but sharp increases in success (that is, the proportion of black and Hispanic graduate students earning doctoral degrees rose dramatically).<sup>112</sup>

STACY HAWKINS: If I relate this conversation back to Rick's explanation of mismatch as a family of hypotheses—learning mismatch, competition mismatch, and social mismatch—with both first- and second-order effects, competition mismatch is a first-order effect that is particularly amenable to the kinds of “offsets” that Rick suggested can inhibit the second-order effects that most concern us, like graduation rates or class rank. If the first-order effect of competition mismatch is lower self-confidence, as Tom suggests, research by Carol Dweck demonstrates that lower self-confidence can be “offset.”<sup>113</sup> In particular, Dweck found that when women who struggled in math were retrained to think of math as a function of effort, rather than innate ability, their performance improved.<sup>114</sup> If part of the problem of mismatch is the extent to which it impairs self-confidence, rather than a deficit in skills or ability per se, then there are effective methods for offsetting this problem.

Dweck's research suggests one method, but in addition to retraining students to think about their own abilities in different terms, we should also retrain ourselves to think about students' abilities in different terms. Just because a student has academic credentials below the median of her peers, it does not mean that we should view her as academically incapable. In addition to inspiring self-confidence in students, Dweck's work also demonstrates that it is

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111 See JOAN BURRELLI & ALAN RAPPAPORT, NAT'L SCI. FOUND., NSF 08-319, ROLE OF HBCUS AS BACCALAUREATE-ORIGIN INSTITUTIONS OF BLACK S&E DOCTORATE RECIPIENTS (2008). The authors report that in 2006, HBCU graduates accounted for 33% of blacks receiving STEM doctorates, but only 21% of all black bachelor degrees. The top eight colleges, in terms of producing eventual black STEM doctorate holders, were all HBCUs. However, this last statistic is particularly misleading, because of course HBCUs produce, numerically, more black B.A.s than do majority-white institutions. The real issue is how HBCUs fare in producing black graduates who go on to STEM doctorates *when one controls for academic credentials*. On this point, there is little direct published evidence, though studies such as Smyth & McArdle, *supra* note 42, apparently find blacks at HBCUs to encounter less mismatch and thus have much better STEM outcomes.

112 See SANDER & TAYLOR, *supra* note 10, at 154.

113 See Dweck, *supra* note 76, at 50–52 (“[W]e have also seen that sending a message that these abilities can be developed can alleviate the vulnerability.”).

114 *Id.*

equally important that we express confidence in their abilities.<sup>115</sup> It is well-established in the social science literature, for instance, that teacher expectations have a significant effect on student performance.<sup>116</sup> These are the types of interventions that colleges and universities can and should be making on behalf of their students. These types of “offsets” could reduce the magnitude of the harmful second-order effects of competition mismatch, improving graduation rates and perhaps even grades/class rank in the process.<sup>117</sup>

*Question 10. Let’s discuss “undermatching” a bit. How good a job are selective colleges doing of finding all the talent, particularly among the ranks of minority students and low-SES students? Are many of these students ending up at weak colleges with limited resources?*

STACY HAWKINS: The data is pretty convincing that highly selective colleges and universities are doing a poor job of attracting and admitting talented, low-SES students, including URMs.<sup>118</sup> However, among those students they do attract—that is, among those who apply—it is much less clear how good these schools are at selecting among applicants those students with the necessary talent and ability to succeed.<sup>119</sup> This uncertainty about the efficacy of the admissions process includes both the extent to which selective colleges and universities fail to identify all of the available talent, as suggested by the phenomenon of “undermatching,” for which we have only limited data, as well as the extent to which they may be admitting students who are unlikely to succeed, the phenomenon referred to as “mismatch”

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115 *Id.*; See GRANT, *supra* note 26, at 98–99 (citing a study by Harvard psychologist Robert Rosenthal, subsequently replicated by others, in which he concluded that “[t]eachers’ beliefs created self-fulfilling prophecies”); see also David Scott Yeager et al., *Breaking the Cycle of Mistrust: Wise Interventions to Provide Critical Feedback Across the Racial Divide*, 143(2) J. EXPERIMENTAL PSYCH. 804, 819–20 (2014) (discussing the effects of feedback on students).

116 GRANT, *supra* note 26, at 99 (“Teachers’ beliefs created self-fulfilling prophecies.”).

117 A group of researchers led by David Scott Yeager conducted a study of public middle schoolers in which they implemented a number of interventions designed to offset the effects of stigma and stereotype threat for black students, and in just one marking period, the students were able to raise their achievement by a third of a grade on a 4-point scale, closing the racial achievement gap by 39%. Some of the interventions included setting high teacher expectations and instilling self-confidence in the students that they had the ability to meet these expectations. See Yeager, *supra* note 114, at 808–20.

118 See Caroline Hoxby & Christopher Avery, *The Missing “One-Offs”: The Hidden Supply of High-Achieving, Low-Income Students*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2013, at 9–10.

119 This does not mean they are not trying, through holistic review, to cast the net widely for talent, but we have little data about how effective these efforts have been.

and which most acutely affects URMs. Rick suggests “mismatch” is a significant phenomenon.<sup>120</sup> However, the overreliance on academic credentials in assessing the size and scope of “mismatch,” to the exclusion of non-academic credentials—including in particular non-academic credentials that many scholars have found to be highly correlated with academic success—as well as the failure of “mismatch” to account for environmental phenomena that might impair URMs’ academic performance irrespective of academic ability, obscures the true picture of which students may actually be mismatched, i.e., unlikely to succeed, and which are underachieving for reasons unrelated to their ability to succeed.<sup>121</sup> At the same time, while the reasons may be unclear, it is clear that URMs do underperform academically relative to their peers and, perhaps more importantly, relative to predictions based on their own academic credentials.<sup>122</sup> So, while the available data does not allow us to fully assess the efficacy of the college admissions process in selecting for the best students, it does appear that colleges and universities can and should do a much better job of supporting the academic success of those students who are admitted, particularly URMs who may face unique institutional challenges, including stigma/stereotype threat, that impair their academic performances, but that are highly amenable to effective interventions.<sup>123</sup> Providing institutional support for these students, in the form of both academic and social resources, might vastly improve their academic outcomes.<sup>124</sup>

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120 See *supra* notes 39–43 and accompanying text. Although Hoxby and Avery’s study does question the efficacy of college recruiting practices, they do not purport to translate the failure to attract high talent, low-SES students into a broader indictment of the admissions practices of selective colleges and universities. Sander’s mismatch theory, however, suggests that the phenomenon of colleges and universities selecting students whom they otherwise should not admit based on their inability to succeed, i.e., mismatch, is widespread among colleges and universities that employ race-conscious admissions plans. See *supra* text accompanying notes 6, 20 (discussing large preferences employed by super selective colleges and even larger preferences by less selective, but still quite good colleges).

121 See GRANT, *supra* note 26, at 6–7; Duckman & Seligman, *supra* note 26, at 944 (“We suggest another reason for students falling short of their intellectual potential: their failure to exercise self-discipline.”); see also Hawkins, *supra* note 26 and accompanying text (discussing this issue in more detail).

122 See Sander, *supra* note 52, at 1650 (noting that URMs’ academic performance is overpredicted based on their academic credentials).

123 For a discussion of effective interventions, see Hawkins, *supra* note 53, at 899.

124 See Hawkins, *supra* note 53 at 903–04, for a discussion of the recommendations for institutional support of URMs as a way to facilitate their academic success.

PETER ARCIDIACONO: I agree that much more could be done to get better matches between students and schools. There are a number of recent papers suggesting that students could improve their educational outcomes with information, information that would be fairly cheap to provide.<sup>125</sup>

Given that students seem to benefit from information on the probabilities of acceptance and expected financial aid, information on their prospects of success would likely be beneficial as well.<sup>126</sup> For example, universities could inform admitted students about the graduation probabilities and grades of students who had enrolled in their schools with similar academic backgrounds and similar intended majors. With this information, students would be less likely to both overmatch and undermatch as it would be much clearer where the student was a good fit. And, if universities were compelled to provide this sort of information, they would also have strong incentives to take the sort of institutional support (to improve outcomes) that Stacy advocates.

*Question 11. The broader pipeline problem is an enormous issue, which we can't do justice to in this format. But what general points should we be keeping in mind?*

TOM ESPENSHADE: Not everyone needs or wants to go to college. But there are many talented individuals who would benefit from higher education, yet for whom college, for whatever reason, is not a realistic alternative or opportunity. Identifying these individuals and helping them enter and move along the pipeline to college graduation—not just college enrollment—should receive higher priority.

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<sup>125</sup> Amanda Pallais, *Small Differences that Matter: Mistakes in Applying to College*, J. LAB. ECON. 1, 2 (forthcoming April 2015) (“Additionally, a number of recent papers find that providing students with information about colleges or assistance with the college application process change students’ college matriculation outcomes, particularly those of low-income students.”); see Eric P. Bettinger et al., *The Role of Application Assistance and Information in College Decisions: Results from the H&R Block FAFSA Experiment*, 127 Q. J. ECON. 1205, 1207, 1230–31 (2012) (“Treated participants for whom we provided streamlined personal assistance to complete the FAFSA were not only more likely to apply for financial aid but were significantly more likely to attend college and receive aid.”); Caroline M. Hoxby & Sarah Turner, *Informing Students About Their College Options: A Proposal for Broadening the Expanding College Opportunities Project*, HAMILTON PROJECT, at 5 (Discussion Paper, 2013), available at [http://www.hamiltonproject.org/files/downloads\\_and\\_links/THP\\_HoxbyTurner\\_FINAL.pdf](http://www.hamiltonproject.org/files/downloads_and_links/THP_HoxbyTurner_FINAL.pdf) (“A key feature of intervention is that each student’s materials are customized by analyzing and combining a vast array of data on students, their high schools, their local colleges, and their likely net costs, so that each student receives information relevant to her circumstances.”).

<sup>126</sup> See the discussion of the Beacon initiative at George Mason University, *supra* note 7.

Many actors are, of course, important in this process of educational transformation—including parents, teachers, schools, neighborhoods, peer groups, and other influential adults. Colleges and universities can also play an important, but perhaps limited, role.

There should be more outreach to find talented minority and lower socioeconomic status students and then encourage them to apply to college. This recruitment process needs to begin sooner than it presently does, it needs to involve building relationships with students one at a time, and it needs to extend into nontraditional recruitment catchment basins. In this respect, college admission deans could take a page out of the playbook of their athletic coaches. Recruitment of nontraditional students might be eased if colleges stopped competing with each other quite so much for status and prestige and instead transferred most of their financial aid dollars from merit aid to need-based aid.

Finally, racial and socioeconomic achievement gaps are a substantial impediment, not just to diversity in higher education, but also to workforce competitiveness and to reducing adult inequality. We know from our simulations<sup>127</sup> that if the racial achievement gap could somehow be eliminated, race-based affirmative action would no longer be necessary to sustain today's levels of racial diversity. Higher education can play a role here—especially those institutions that are at the top of the educational hierarchy. Selective colleges and universities should put a small sliver of their collective endowments behind a research effort to uncover the early origins of learning gaps by race/ethnicity and socioeconomic status.

RICK SANDER: I am very largely in agreement with Tom on these steps. The work of Caroline Hoxby and Christopher Avery demonstrates convincingly how dramatically elite colleges can stimulate applications from, and enrollment of, high-achieving, low-SES students by doing a better job of outreach and recruiting.<sup>128</sup> And when colleges have the proper incentives and work collaboratively, they can narrow racial and SES achievement gaps in high school. Berkeley, UCLA, and other schools started building serious partnerships to improve K-12 education when Prop 209 restricted their ability to use racial preferences; during the decade and a half after Prop 209's implementation, these efforts helped to both dramatically increase UC

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<sup>127</sup> ESPENSHADE & RADFORD, *supra* note 1, at 374 tbl 9.8.

<sup>128</sup> See Hoxby & Avery, *supra* note 118, at 45–46 (describing different recruitment interventions for “income-typical” students, like alumni contacts).



applications from under-represented minorities, and sharply narrow racial gaps in high school completion.<sup>129</sup>

Public policy can help by making it easier for colleges to cooperate. Current antitrust restrictions on higher education have arguably exacerbated escalating tuition by colleges, as admissions offices compete through merit scholarships that now greatly outstrip (at many schools) need-based aid. The tasks of understanding the test-score gap, and of finding, supporting, and recruiting low-SES students, are ones that require more, not less cooperation among colleges. The higher education antitrust rules are up for congressional review in 2015; there is thus a great opportunity for higher education leaders, federal officials, and scholars like us to develop a new blueprint that fosters healthy intercollegiate competition while allowing forms of collaboration that help to build a better pipeline.<sup>130</sup>

STACY HAWKINS: Here is an area where we are all in substantial agreement. I, too, believe that colleges and universities should expand their outreach to and admission of minority and low-income students with academic credentials that place them among the nation's top students academically, but who currently fail to apply to or enroll in selective colleges and universities, i.e., are "undermatched," in significant numbers. I also agree that colleges and universities, particularly our most elite research universities, have an obligation to advance our common knowledge and understanding of the causes of and solutions for closing the racial and SES achievement gaps in education more broadly. However, neither of these responsibilities should in any way detract from the efforts of colleges and universities to enroll and educate diverse students today. Even among those students currently applying to selective colleges and universities, admissions officers could be doing a better job of identifying those students who are most likely to succeed academically by relying on a more ro-

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129 See Richard H. Sander and Medha Uppala, *Racial Discrimination in UCLA Undergraduate Admissions: An Inquiry In Depth* (Sept. 15, 2014) (unpublished manuscript) (on file with author). The authors report an analysis of census microdata showing that Hispanic high school graduation rates rose between 2000 and 2009, rose from 58% to 78%, and African-American high school graduation rates rose from 74% to 84%; in both cases the minority-white gaps shrank sharply. Unique applications to the University of California rose, among Hispanics, from 6,933 in 1997 to 31,908 in 2013; among blacks, unique applications rose from 2,141 to 5,978. .

130 For further elaboration on these ideas, see generally, Richard Sander, *A Collective Path Upward: Working Smarter and Cooperatively to Improve Opportunity and Outcomes*, in *THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS* 215 (Richard D. Kahlenberg ed., 2014).

bust conception of “merit” than is reflected by the academic indices so heavily relied on by many elite colleges and universities.<sup>131</sup> These schools could take a lesson from the Posse Foundation, which has been identifying high potential diverse students based on its own dynamic assessment process (“DAP”) for more than 20 years.<sup>132</sup> The academic success of Posse scholars demonstrates that these selection methods are proven and, when combined with appropriate institutional support, produce high-performing URMs.<sup>133</sup> The Posse Foundation has been so successful that its methods have been adopted for broad use by a number of its partner schools.<sup>134</sup> These methods should be studied, replicated, and adopted more broadly by selective colleges and universities. It is true, as Tom points out, that we face difficult, long-term challenges to reducing the educational and employment disparities by race/ethnicity and socioeconomic status, but there are things we can do to combat these problems even in the short-term. We should invest in more research on these issues, but there are some things that we already know work. We ought to be doing all that we can to deploy our existing resources even as we work to address these challenges long-term.

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131 According to Sander, approximately 80% of admissions decisions can be explained on academic factors alone. Sander, *Why Strict Scrutiny Requires Transparency*, *supra* note 5, at 293.

132 DAP refers to the “Dynamic Assessment Process” developed by the Posse Foundation that selects students on the basis of both academic and non-academic credentials, which results in an acceptance rate lower than Harvard’s. See *Fulfilling the Promise: The Impact of Posse After 20 Years*, THE POSSE FOUND., INC. ALUMNI REPORT, at i (2012) (describing its rigorous selection process) available at <https://www.possefoundation.org/m/alum-report-web.pdf>; see also Tina Rosenberg, *Beyond SATs, Finding Success in Numbers*, N.Y. TIMES, Feb. 15, 2012, [http://opinionator.blogs.nytimes.com/2012/02/15/beyond-sats-finding-success-in-numbers/?\\_r=0](http://opinionator.blogs.nytimes.com/2012/02/15/beyond-sats-finding-success-in-numbers/?_r=0) (noting that there are 14,000 applicants for 600 Posse slots). In spite of the fact that only 24% of Posse scholars surveyed said they were academically prepared for college at the time of acceptance/enrollment, 90% of Posse scholars graduate from college and a significant percent achieve academic honors. See *Fulfilling the Promise*, *supra*, at 1, 7. Learning and competition mismatch notwithstanding, the academic success of these students belies the claim that academic preparedness alone is determinative of academic success.

133 The Posse Foundation supports the academic success of its scholars by sending them to schools in cohorts of ten where they receive both institutional and Foundation support. See *Fulfilling the Promise*, *supra* note 132, at 1. Posse scholars have a graduation rate of 90%; 51% of Posse scholars make the dean’s list and 24% graduate with academic honors. *Id.* at 1, 8.

134 Rosenberg, *supra* note 132 (describing DePauw’s efforts to replicate the Posse model with its entire freshman class, which boosted freshman retention from 87% to 92% in just one year).

*Question 12. There are three key institutions setting policy in this arena: the Supreme Court, the rest of the federal government, and universities themselves. What does our discussion imply about what each of these institutions should be doing?*

RICK SANDER: Over the past generation, affirmative action policy has mostly been the province of the Supreme Court, supplemented by occasional statewide referenda. These are very blunt instruments of policy. The Court, for instance, has ruled against university defendants in three of its four major cases on racial preferences in higher education; but its rulings have been vague and seem to have had little effect upon on-the-ground admissions.<sup>135</sup>

I would like to see universities, academics, and legislators work toward a “grand compromise” on affirmative action, built on several principles:<sup>136</sup>

- Universities and federal agencies working together to improve the pipeline, with a goal that low-SES students at given credential levels apply to elite colleges at roughly the same rate as high-SES students;
- Easing antitrust restrictions and otherwise fostering cooperation among colleges so that need-based aid supplants merit aid at selective schools;
- Relying more on modest socioeconomic preferences and less on racial preferences to achieve diversity, but recognizing that both are valuable tools when mismatch can be avoided (i.e., by not letting either kind of preference become very large);
- Judging whether preferences are “too large” not simply by comparing credentials, but by assessing how the students receiving preferences actually perform, thus giving universities an incentive to improve student outcomes; and
- Creating greater transparency about both admissions and student outcomes.

Notice that these various steps are mutually reinforcing: for example, when we do a better job of identifying and encouraging “diamonds in the rough,” the need for very large preferences declines. Collectively, these steps ought to increase overall university diversity, improve social mobility, raise student achievement levels, and con-

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<sup>135</sup> See Sander, *Why Strict Scrutiny Requires Transparency*, *supra* note 6, at 291–92 (noting little change in the demographics of admissions at the University of Michigan).

<sup>136</sup> See Sander, *supra* note 130, at 215–16; Aaron Danielson & Richard Sander, *Thinking Hard About ‘Race-Neutral’ Admissions*, 47 U. MICH. J.L. REFORM 967, 1016–20 (2014) (suggesting seven higher education reforms).

tribute to strong cross-racial and cross-class social interaction on campuses. They seem fully consistent with Supreme Court jurisprudence. A compromise of this type could recast one of our most controversial social policies into a constructive form commanding broad consensus.

TOM ESPENSHADE: In terms of how the Supreme Court might proceed going forward, the Court should put the burden of proof on universities for both prongs of the strict scrutiny test—that is, the arguments (1) that diversity produces the kinds of educational benefits that universities claim for it and (2) that race-based preferences are narrowly tailored and that race-neutral alternatives do not exist. Further, if the *Fisher* case is ultimately decided in favor of the University of Texas, the Court should consider making the O'Connor “sunset provision” in *Grutter* more explicit by attaching a “date certain” to racial preferences. A greater sense of urgency is needed around understanding the underlying reasons behind racial and socioeconomic learning gaps.

*Fisher* raised the evidentiary bar facing the University of Texas. In the future, universities need to be more thoughtful and deliberate in constructing an evidentiary base to back up their decision-making. Many offices of institutional research are understaffed. Perhaps they need to make more and better use of their faculties in formulating relevant research questions and helping to produce the research. Duke University has been exemplary in this regard.

Finally, if universities are serious about the educational benefits of diversity, they will put as much emphasis on campus life issues (especially around patterns of social interaction across racial and socioeconomic boundaries) as they do on diversity in admissions. The work of diversity does not begin and end in the admissions office. These efforts might often have to be intentional. Serendipity is too important to be left to chance.<sup>137</sup> One promising approach is to form community service activities on campus that involve the energies of all students. If these small but diverse groups focused for an extended period on a variety of projects within the campus community or off campus, they would meet the conditions of sustained cross-racial or cross-class, equal status contact in pursuit of a common objective

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<sup>137</sup> George D. Kuh, *The National Survey of Student Engagement: Conceptual Framework and Overview of Psychometric Properties*, FRAMEWORK & PSYCHOMETRIC PROPERTIES, at 1 (2001), available at [http://nsse.iub.edu/pdf/psychometric\\_framework\\_2002.pdf](http://nsse.iub.edu/pdf/psychometric_framework_2002.pdf) (arguing the importance of undergraduate experience on development).

that Gordon Allport showed<sup>138</sup> can break down walls of racial prejudice and produce learning from difference.<sup>139</sup>

STACY HAWKINS: I absolutely agree that the work of facilitating student body diversity does not end with admissions decisions and that colleges and universities must find more and creative ways to leverage student body diversity for productive and demonstrable benefit for students and themselves. I also agree with Rick that colleges and universities should absolutely do a better job of supporting the success of their admitted students. The Obama Administration's recently announced plan to hold colleges and universities receiving federal funding accountable for student performance outcomes can increase incentives for schools in this regard.<sup>140</sup> This agreement is important and encouraging, but there remain some areas of disagreement. However, even in these areas, the distance between our respective positions and principled commitments may not be as large as some might expect. I do not think the recommendations about admissions should necessarily be about the size of "preferences," but instead should focus on whether schools are making the best predictions about students' likelihood of success based on a broader conception of merit that includes consideration of both academic and non-academic credentials. To the extent that Rick's objections to this recommendation may be animated by practical concerns about implementation, the Posse Foundation's DAP selection method is instructive of how schools can effectively expand their considerations of merit and improve the diversity of students admitted without compromising their likelihoods of academic success.<sup>141</sup>

I also cannot agree that the sunset provision of *Grutter* should be made more explicit by attaching a "date certain" for when race-conscious admissions plans must end. History demonstrates that our predictions of when race will become constitutionally irrelevant are dangerously inaccurate. If the constitutional strict scrutiny test is correctly formulated in requiring that such race-conscious admissions plans be justified by a compelling end and further be necessary to achieve that end, there should be no constitutional concern that

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138 GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 488–89 (1954) (arguing that contact and acquaintance engagements are important to breaking down racial enmity).

139 ESPENSHADE & RADFORD, *supra* note 1, at 392–93; *see generally id.*, at 391–94.

140 *See* Press Release, White House Office of the Press Sec'y, Fact Sheet on the President's Plan to Make College More Affordable: A Better Bargain for the Middle Class (Aug. 22, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/08/22/fact-sheet-president-s-plan-make-college-more-affordable-better-bargain>.

141 *See supra* note 132 and accompanying text.

race-conscious admissions plans will outlive their usefulness.<sup>142</sup> Thus, setting a “date certain” by which race-conscious admissions plans must end would be at best constitutionally superfluous, or worse, risk cutting short the effort to achieve the beneficial effects of student body diversity.<sup>143</sup> The desire to “get beyond race” should not impose a requirement of colorblindness even where the exacting standard of constitutional strict scrutiny recognizes that the consideration of race remains both compelling and necessary.

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<sup>142</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003) (applying strict scrutiny to the race-conscious admissions plan of the University of Michigan Law School and finding that the plan was supported by a “compelling interest” in student body diversity and was “narrowly tailored” or “necessary” to the achievement of the interest in student body diversity); see also *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2415 (2013) (affirming the strict scrutiny standard applicable to race-conscious admissions plans by public colleges and universities).

<sup>143</sup> These benefits include improved classroom learning, better preparation for work in a global economy, and fostering legitimacy in public institutions as a pathway to civic leadership for citizens of all races and ethnicities. See *Grutter*, 539 U.S. at 330.