

# The Effect of Minority Preferences on the White Applicant: A Misplaced Consensus?

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## I. INTRODUCTION

The fate of social science at the hands of lawyers has always provoked debate.<sup>1</sup> Such is the suspicion that greets its appearance in judicial opinions that even US Supreme Court unanimity is unable to avert controversy.<sup>2</sup> Nowhere is lawyerly appeal to social science more contentious than in the sphere of affirmative action.<sup>3</sup> Yet however problematic it may be to rely on contested findings, a lawyer's view of the costs and benefits of minority preferencing will inevitably shape his thinking on its legitimacy as a tool of public policy. Accordingly, the question of the impact of affirmative action has been prominent in judicial opinions ever since the *Regents of the University of California v. Bakke* decision,<sup>4</sup> in which five members of the

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1. See generally, ANGELO A. ANCHETA, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW (2006); ROSEMARY J. ERICKSON & RITA J. SIMON, THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS (1998); THE USE-NONUSE-MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS (Micheal J. Saks & Charles H. Baron eds., 1980); see also Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. TIMES, Jan. 29, 2007 available at <http://www.nytimes.com/2007/01/29/technology/29wikipedia.html?ex=1184731200&en=70f2d3a8a7ac4052&ei=5070> (discussing the recent trend towards judicial reliance on Wikipedia, the free online collaborative encyclopedia).

2. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In the opinion's famous footnote eleven, Chief Justice Earl Warren supported the Court's conclusion as to the constitutionality of separate-but-equal schooling by reference to several studies on the harms of racially segregated education. The move drew heavy fire from commentators on both sides of the debate. *Id.* at 495. See ANCHETA, *supra* note 1, at 1-2.

3. Judicial opinion itself can attest to this. In his dissent, Justice Thomas, joined by Justice Scalia, noted that "[t]he Court relies heavily on social science evidence to justify its deference," and that "no social science has disproved the notion that this discrimination engenders attitudes of superiority or, alternatively, provokes resentment among those who believe that they have been wronged by the government's use of race." *Grutter v. Bollinger*, 539, 364, 373 U.S. 306 (2003) (Thomas, J., dissenting) (citation omitted). In his concurrence, Justice Thomas criticises the dissent for "unquestioningly cit[ing] certain social science research to support propositions that are hotly disputed among social scientists," and for seeking to "leave our equal-protection jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists," *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 127 S. Ct. 2738, 2778 (2007) (Thomas, J., concurring). In response, the four Justice dissent asserts that "[i]f we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one." *Id.* at 2824 (Breyer, J., dissenting).

4. 438 U.S. 265 (1978). See Peter Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 46-62 (2002) (providing a synopsis of the political history of affirmative action).

Supreme Court famously held that the consideration of race in university admission decisions was not invariably prohibited by the Constitution.<sup>5</sup> In defending their decisions on the use of race, we can expect judges to continue to engage with what social science has to say about its consequences.

Unlike the question of the effect of affirmative action on the long-term prospects of its recipients,<sup>6</sup> that of its impact on majority race applications is susceptible to a straightforward mathematical analysis. Fittingly, mathematical terrain is where this question has been resolved. At one time, justification aside,<sup>7</sup> minority preferences were seen as materially handicapping a typical white candidate's application.<sup>8</sup> One version of this view held that under a policy of affirmative action the difference in the likelihoods of success enjoyed by otherwise equivalent white and minority applicants represented the percentage of disadvantage imposed by the policy on the prospects of the former.<sup>9</sup> This might be described as the maximalist position on the effect of minority preferencing on majority applicants.

Imagine, however, the question is answered in the negative; that the impact of minority preferences on the typical white applicant is negligible. In this scenario, policies of affirmative action would possess fewer drawbacks. "Innocent whites" could no longer be seen as having been truly disadvantaged. To that extent, the case for introducing affirmative action would come to appear more compelling, or at least less problematic. Just such a shift in the terms of the debate has in fact taken place. In recent years, a consensus has

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5. To take Justice Powell's pivotal opinion, "[t]he atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Bakke*, 438 U.S. at 312.

6. See, e.g., the literature cited *infra* in notes 24, 29, and 77 (highlighting an intensely contested issue).

7. "It is regrettable when any citizen's expectations are defeated by new programs serving some more general concern[.]" Ronald Dworkin, *Why Bakke Has No Case*, 24 N.Y. REV. BOOKS No.18 (Nov. 10, 1977). Note also, Justice Powell's remark in *Bakke* that "[s]uch rights [those affected by an admissions program involving the competitive consideration of race and ethnic origin] are not absolute." *Bakke*, 438 U.S. at 320.

8. For decisions emphasizing the impact on whites see *United States v. Paradise*, 480 U.S. 149, 171 (1987) (describing that narrow tailoring depends in part on "the impact of the [race-conscious action] on the rights of third parties"); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 281-83 (1986) (evaluating the burden on 'innocent' parties imposed by race-based hiring goals as part of narrow tailoring inquiry); *Tuttle v. Arlington County School Board*, 195 F.3d 698, 707 (4th Cir. 1999) (considering "the burden of the Policy on innocent third parties" in determining whether a local school district's race-conscious admissions policy was narrowly tailored).

9. Professor Goodwin Liu demonstrates the erroneous conflation of "the magnitude of affirmative action's instrumental benefit to minority applicants, which is large, with the magnitude of its instrumental cost to white applicants, which is small." See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1048 (2002).

developed among both advocates and opponents that the actual effects of minority preferencing on the typical white applicant are minimal.

In this essay, we will reconsider the grounds for this consensus. First, the essay establishes the level of agreement among judges and academics on the triviality of the effect of affirmative action on the white applicant's prospects of success (Part II). Second, the essay demonstrates how the prevailing position on the impact of minority preferencing on the white applicant is flawed in regard to both the calculation of relative admission likelihood and the application of the matriculant "yield" variable (Part III). The essay concludes by challenging the tendency to take the effects of affirmative action (on both preferred and non-preferred applicants) as exclusively indicative of its costs (Part IV).

In Part III, we make use of several case studies reviewed in the literature and show how these studies convey a rather different picture of the arithmetic of minority preferencing. In summary, the aim of the essay is to clarify the mathematics of the effect of affirmative action on majority applicants. In Part IV, I distinguish that question from that of its opportunity cost. The essay's scope is narrow—but its focus is justifiable. If there is any element of the debate on affirmative action that may be settled by something as straightforward as arithmetic, it is surely worth settling.

## II. THE CONSENSUS ON THE STAKES FOR WHITES

That the stakes for white applicants in the maintenance of affirmative action are minimal is now a matter of widespread, if sometimes grudging, agreement. The prevalence of this view is due in large part to the impact of a 2002 law review article by Professor Goodwin Liu.<sup>10</sup> Building on the findings of Professors William Bowen and Derek Bok in their seminal work on affirmative action, *The Shape of the River*,<sup>11</sup> Liu set out to dispel the "causation fallacy," that white applicants are significantly disadvantaged by the operation of preferencing in favor of minority applicants with whom they are competing for a particular pool of resources. The academic reception of Liu's claim and the mathematical reasoning underlying it has been uniformly positive.<sup>12</sup> Indeed, the scholarly standing of Liu's thesis is such that

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10. See generally *id.*

11. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998). Leading advocates of affirmative action in U.S. higher education, Bowen and Bok served as presidents of Princeton and Harvard universities respectively.

12. See Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned From the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503 at n.134 (2004); Ian Ayres, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2419 at n.19 (2003); Christopher Bracey, *The Cul de Sac of*

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*Race Preference Discourse*, 79 S. CAL. L. REV. 1231 at n.29 (2006); Girardeau A. Spann, *Affirmative Inaction*, 50 HOW. L. J. 611 at n.67 (2007); Barbara J. Flagg, *Diversity Discourses*, 78 TULANE L. REV. 827, 830 (2004) (“As Goodwin Liu has demonstrated, an individual white applicant’s chance of admission at a selective school is barely affected by the presence of an ‘affirmative action’ policy that gives some weight to minority status.”); Kerstin Forsythe, *Racial Preference and Affirmative Action in Law Schools: Reactions from Minnesota Law Schools and Ramifications for Higher Education in the wake of Grutter v. Bollinger*, 25 HAMLINE J. PUB. L. & POL’Y 157 at n.49 (2003); Shira Galinsky, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg’s Affirmative Action Jurisprudence in Grutter and Gratz and Beyond*, 7 N.Y. CITY. L. REV. 357, 375 (2004) (“[A]ffirmative action in university admissions . . . does not impose an undue burden on white students, as demonstrated by a study showing that the statistical chances for the acceptance of white applicants are not significantly diminished[.]” (citing Liu, *supra* note 9)); Joel K. Goldstein, *Justice O’Connor’s Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83, 126 (2003) (“[R]ace-conscious admissions . . . reduce the chances of a majority applicant by a relatively trivial percentage.” (citing Liu, *supra* note 9)); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 151 (2003) (“[T]he number of whites adversely affected by affirmative action is miniscule.”) (citing Liu, *supra* note 9)); D. Holley-Walker, *Narrative Highground: The Failure of Intervention as a Procedural Device in Affirmative Action Litigation*, 54 CASE W. RES. L. REV. 103 at n.7 (2003); Josh Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 ASIAN PAC. AM. L.J. 92 at n.109 (2006) (citing Liu, *supra* note 9 (debunking certain myths regarding affirmative action)); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of “A Systemic Analysis of Affirmative Action in American Law Schools”*, 7 AFR.-AM. L. & POL’Y REP. 1 at n.48 (2005) (“In light of the small number of African Americans in law schools, it is difficult to see how race-conscious admissions could have much of an impact on white applicants. (citing Liu, *supra* note 9); Trina Jones, *Brown II: A Case of Missed Opportunity?*, 24 L. & INEQ. 9 at n.74 (2006); P. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE. L. J. 1329 at n.82 (2005) (“As Goodwin Liu explains, the burden on any particular rejected applicant is quite minor, given the small effect affirmative action has on any one nonbeneficiary applicant’s chance of admission.”); Pauline T. Kim, *The Colorblind Lottery*, 72 FORDHAM L. REV. 9, 28 (2003) (“[A]s Goodwin Liu has demonstrated, the basic arithmetic of highly selective admissions indicates that . . . racial preferences have very little effect on the chance of admission for any individual member of the much larger class of white applicants.”); *Law Review Digest*, 32 J.L. & EDUC. 281, 283 (2003) (“The author makes a convincing argument that . . . statistical analysis leads to the conclusion that affirmative action does not greatly burden white applicants.”); Mexican American Legal Defense and Educational Fund (MALDEF), *Blend It, Don’t End It: Affirmative Action and the Texas Ten Percent Plan after Grutter and Gratz*, 8 HARV. LATINO L. REV. 33, 43 (2005) (“[I]t must be pointed out that at highly selective institutions the presence of affirmative action typically has a quite minimal effect on the admission rates for white applicants.” (citing Liu, *supra* note 9)); Jason Morgan-Foster, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions* 9 WASH. & LEE RACE & ETHNIC ANC. L.J. 73, 93 (2003); Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 at n.270 (2003); Kermit Roosevelt, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 at n.180 (2005) (“Thus the fact that affirmative action programs impose only a statistically minimal disadvantage on white applicants . . . is not relevant to the Court’s calculus.” (citing Liu, *supra* note 9)); Shaakirrah R. Sanders, *Twenty-Five Years of a Divided Court and Nation: “Conflicting” Views of Affirmative Action and Reverse Discrimination*, 26 U. ARK. LITTLE ROCK L. REV. 61 at n.346 (2003); Dennis J. Shields, *A View from the Files: Law School Admissions and Affirmative Action*, 51 DRAKE L. REV. 731, 743 (2003), (“[T]he point is that the admission of some minority students to the University of Michigan Law School as a result of affirmative action had no impact on Ms. Grutter specifically, and little impact on nearly all other nonminority candidates at Michigan[.]” (citing Liu, *supra* note 9)); Neil S. Siegel, *Race-Conscious*

divergence from its presumed implications is regarded as not merely mistaken, but “surprising”.<sup>13</sup>

Judicial discourse has reflected this reception. Whereas skeptical judges once railed against the implications of affirmative action for the ordinary white applicant,<sup>14</sup> the point appears to have been tacitly abandoned. The prevailing judicial contribution to the ongoing debate on affirmative action in

*Student Assignment Plans: Balkanization, Integration, and Individualised Consideration*, 56 DUKE L.J. 781 at n.112 (2006); Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT 221 at n.71 (2004) (“[T]he abolition of affirmative action will not significantly increase the probability that particular white applicants will be admitted to the program.” (citing Liu, *supra* note 9)); Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 497 (2005) (“If elite colleges did not engage in affirmative action, most white applicants would increase their chances of admissions by only one-fifth of a percent.” (citing Liu, *supra* note 9)); Robert E. Thomas & Bruce Louis Rich, *Under the Radar: The Resistance of Promotion Biases to Market Economic Forces*, 55 SYRACUSE L. REV. 301 at n.151 (2005); Ronald Turner, *The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative-Action Position: From Bakke to Grutter and Beyond*, 30 HASTINGS CONST. L.Q. 445 at n.16 (2003); Robert Paul Wolff & Tobias Barrington Wolff, *The Pimple on Adonis’s Nose: A Dialogue on the concept of Merit in the Affirmative Action Debate*, 56 HASTINGS L.J. 379 at n.73 (2005) ((citing Liu, *supra* note 9 (demonstrating the flawed nature of arguments about tangible harm experienced by White applicants in affirmative action programs)); Frank H. Wu, *The Arrival of Asian Americans: an Agenda for Legal Scholarship*, 10 ASIAN L.J. 1, at n.28 (2003) (“‘Goodwin Liu[’s] . . . critique of the ‘Bakke fallacy’ debunks the notion that every non-beneficiary of the programs has been directly harmed by their operation.” (citing Liu, *supra* note 9)); Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774 at n.53 (2003) (citing Liu, *supra* note 9 (demonstrating the statistically insignificant effect of affirmative action on white students’ admissions chances)).

13. William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 612 (2006).

14. See, for instance, Justice Kennedy stating in a dissenting opinion joined by Justice Scalia, “[w]hether or not such programs can be described as ‘remedial,’ the message conveyed is that it is acceptable to harm a member of the group excluded from the benefit or privilege.” *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting); see also Judge Smith’s majority opinion stating “[t]he beneficiaries of this system [the affirmative action program of the University of Texas Law School] are blacks and Mexican Americans, to the detriment of whites and non-preferred minorities.” *Hopwood v. Texas* 78 F.3d 932, 934 (5th Cir. 1996). In his opinion for the majority, Judge Marcus states: it is clear that literally hundreds of talented young men and women hoping to attend UGA passed through the TSI stage [a stage in the selection process at which race is taken into account], and for some, if not many, of those individuals—including the Plaintiffs in this lawsuit—race denied them a coveted place in UGA’s freshman class.

*Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234, 1259 (11th Cir. 2001). Indeed, since the admission of the Johnson plaintiffs would only have been guaranteed if they had themselves been granted the ‘race’ bonus, the latter holding appears to articulate the maximalist position on the effect of minority preferencing on majority applicants. In other words, the Johnson Court seems to have equated the magnitude of the disadvantage to majority applicants with the magnitude of the advantage to minority applicants. Given that, on the Court’s own figures, the simple abolition of the race bonus would in no way have assured the admission of the Johnson plaintiffs, the judgment incorrectly attributes the cause of their rejection to affirmative action.

university admissions was defined in the 2003 cases of *Grutter v. Bollinger*<sup>15</sup> and *Gratz v. University of Michigan*.<sup>16</sup> Barbara Grutter and Jennifer Gratz were aggrieved white applicants seeking review of the University of Michigan's refusal to admit them to its Law School and its undergraduate College respectively. In the Sixth Circuit's disposition of *Grutter v. Bollinger*,<sup>17</sup> Judge Clay's concurrence joined four of the five-judge majority in favor of the constitutionality of the admissions plan at issue, setting out the existence of "nothing to indicate that the law school's admission's policy ha[d] 'taken' anything from the 'Barbara Grutters of our society.'"<sup>18</sup> Support for this proposition was drawn exclusively from a Washington Post op-ed by Liu based on his aforementioned law review article.<sup>19</sup> In response, the three-judge dissenting opinion by Judge Boggs addressed the Liu study directly:

The concurring opinion and Liu may not characterize that wrong as a "substantial disadvantage," but the deprivation of equal consideration is a wrong to which the Constitution is opposed. . . . To say that Grutter's claims are to be ignored because the whole system that she has challenged has a relatively small discriminatory impact or because the magnitude of the violation as to her is small is to say that she has no rights that this court is bound to respect.<sup>20</sup>

In effect, the leading Circuit dissent in *Grutter* accepted the statistical conclusions of the Liu study, specifically that affirmative action presents a minimal burden for the typical white applicant. The ground of "substantial disadvantage" having been conceded, Judge Boggs was left with little by which to characterize the applicant's injury as justifiably overcoming the state's interest. To rebut the implications of Liu's findings, the dissent was obliged to rely on the proposition that any constitutional wrong which negatively affects an individual's interests (to any degree) may be litigated by that individual.<sup>21</sup> That the "minimal majority burden" position has become common ground amongst judicial advocates and opponents of affirmative

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15. 539 U.S. 306 (2003).

16. 539 U.S. 244 (2003).

17. 288 F.3d 732 (6th Cir. 2002).

18. *Id.* at 766.

19. Goodwin Liu, *The Myth & Math of Affirmative Action*, WASH. POST, Apr. 14, 2002, at B01.

20. *Grutter*, 288 F.3d at 809 (Boggs, J., dissenting).

21. Judge Boggs's dissent states:

To say that it is a matter of less importance that ten people are each deprived of a one-tenth chance of admission because of race than if one person is completely excluded from admission is to ignore both mathematics and our system of deciding cases and controversies. If Grutter's rights have been violated, the degree of the violation and the proper remedy are matters for the district court to determine in the first instance.

*Id.*

action is confirmed in the Supreme Court's approach. In *Gratz*, the Court ruled against the University of Michigan's twenty-point admissions credit for minority race applicants.<sup>22</sup> Neither the majority or concurring opinions cited any injury suffered by majority applicants by virtue of the points credit.<sup>23</sup> To ground its finding in the fact that the petitioner had been denied the opportunity to compete on an equal basis with minority applicants, the Court noted simply that he had been "denied admission even though an underrepresented minority applicant with his qualifications would have been admitted."<sup>24</sup> Evidently, the fact that an applicant would have been granted admission had he benefited from a preference does not mean that in the absence of such preferences he would have been granted admission. A litigant's situation cannot be remedied by a preference's abolition where his claim against the inequality of the preference is merely that he does not enjoy its relative benefits. Likewise, the claim that an applicant ought to have been included in a class which will gain special benefits is logically distinct from the claim that there ought to have been no such special class. Put differently, rather than supporting its finding of unconstitutionality by identifying an injury caused by the existence of the racial preference, the Court merely identified a scenario in which the application of the preference, had it been constitutional, would have caused an injury.<sup>25</sup> Traditional invocations of the harm caused to majority "innocents" are nowhere to be found. On the other hand, citing to Liu, the Ginsburg-Souter dissent makes explicit reference to the absence of such harm, "[n]or has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race."<sup>26</sup> Conversely, Christopher Bracey notes that "[t]he dissenting Justices in *Grutter* did not address the issue of white innocence directly, in part . . . because recent empirical studies suggested that the reduction in the probability of any white student being admitted because of the existence of an affirmative action policy was extremely modest."<sup>27</sup>

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22. The Supreme Court granted certiorari for *Gratz* before the Court of Appeals could render its judgment.

23. See *Gratz*, 539 U.S. at 249-82.

24. *Id.* at 262.

25. *Id.* at 268.

26. *Grutter*, 539 U.S. at 303 (Ginsburg, J., dissenting).

27. Bracey, *supra* note 12, at n.57 (citing Liu, *supra* note 9).

In light of the academic and judicial reception of Liu's work,<sup>28</sup> it seems fair to say that within the otherwise bitterly contested terrain of the affirmative

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28. Liu's mathematical analysis, though the most prominent on the point, is by no means alone. In *The Shape of the River*, Bowen and Bok note that if affirmative action is not used, "the overall white probability of admission would rise by only one and one-half percentage points: from 25 percent [with affirmative action] to roughly 26.5 percent [without affirmative action]." BOWEN & BOK, *supra* note 12, at 36. In a review of *The Shape of the River*, the foregoing conclusion was said to be "[o]ne of the most important findings of the study." Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 708 (1999). Subsequent affirmative action scholarship has indeed relied upon this conclusion. *See e.g.*, Turner, *supra* note 12. Ronald Turner uses this conclusion to ground his theory of "racegoating." *Id.* n.16. Judicial debate has also cited this conclusion: "William Bowen and Derek Bok showed in their 1998 book, 'The Shape of the River,' that eliminating racial preferences would have increased the likelihood of admission for white undergraduate applicants from 25 percent to only 26.5 percent." *Grutter*, 288 F.3d at 767 (Clay J., concurring). Critically, however, we are not reminded that an increase of X number of percentage points is far more significant than an increase of X percent. Percentage points (pp) are a way of expressing the arithmetical difference between two percentages. Consider someone's likely reaction if told their interest rate was to rise by 1.5 percentage points; it would mean they would either receive or pay out an additional 1.5% of the value of their debt or investment on every payment period. This is not a development that is likely to be dismissed as 'only' an increase of 1.5 points. Yet Ronald Dworkin's review of *The Shape of the River* cites the aforementioned finding as conclusive evidence that "the damage affirmative action inflicts on any particular non-preferred candidate is very small." Ronald Dworkin, *Affirming Affirmative Action*, 45 N.Y. REV. BOOKS No. 16, Oct. 22, 1998. (*Cf.* Dworkin's 1978 position, *supra* note 7.)

Similarly, another review of *The Shape of the River* notes that it "demolished" a "conservative shibboleth" in finding that "overall white probability of admission would rise by only 1.5 percentage points." *See* Ellis Close, *Cutting Through Race Rhetoric*, NEWSWEEK, Sept. 28, 1998, at 75; *see also* Andre Douglas Pond Cummings, "Never Let Me Slip, 'Cause If I Slip, Then I'm Slippin'": California's Paranoid Slide from Bakke to Proposition 209, 8 B.U. PUB. INT. L.J. 59, 70 at n.48 (1998) (citing Close, *supra*, at 24.). Likewise, though adopting a generally skeptical position on affirmative action, Peter Schuck characterizes the Bowen & Bok finding as meaning that whites as a group would suffer only a "trivial . . . 1.5% decline in probability of admission" and concludes that, "[a]ffirmative action in initial hiring and college admissions presents much closer cases, for it is in these areas that the evidence best supports the view that blacks as a group gain more from preferences than whites as a group lose." *See* Schuck, *supra* note 4, at 67, 96 (emphasis added); *see also* P. Phillip T.K. Daniel & Kyle Edward Timken, *The Rumors of My Death Have Been Exaggerated: Hopwood's Error in "Discarding" Bakke*, 28 J. L. & EDUC. 391, 414 (1999) (citing Bowen & Bok as finding that "eliminating affirmative action programs would raise white applicants' chances of admission no more than 1.5 percent.").

*See also* Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. No. 2 293, 297 (2005) (arguing that "removing consideration of race would have a minimal effect on white applicants to elite universities."); Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions* 59 OHIO ST. L.J. 971, 992 (1999), (stating that "eliminating the ['handicapped parking'] space would have only a minuscule effect on the average parking search for nondisabled drivers"); Linda Wightman, *The Consequences of Race-blindness: Revisiting Prediction Models with Current Law School Data*, 53 J. LEGAL. ED. 229, 240 (2003) (disputing "[c]laims that minority-group admission preferences are solely, or even primarily, responsible for qualified white applicants failing to gain admission."); *see generally* Linda Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997).



action debate, a consensus has developed around the stakes for white applicants, namely, that they are minimal. In refuting the grounds for this consensus, it is appropriate to note what my analysis will not address. The essay will not consider whether the burden on majority applicants is justified or outweighed by considerations that favor the maintenance of affirmative action.<sup>29</sup> Conversely, it will not assess the possible benefits to white matriculants of the use of minority racial preferences in the admissions procedure of their institution.<sup>30</sup> Likewise, this essay will not examine the question of whether white applicants are “socially innocent” or previously advantaged by virtue of their race such that any negative consequences affirmative action causes them to bear are not properly regarded as a burden.<sup>31</sup> Equally, it makes no assumptions as to the appropriateness of the use of other “plus-factors” such as legacy preferences.<sup>32</sup> Finally, I offer no analysis of the effectiveness of policies of affirmative action<sup>33</sup> or their constitutionality.<sup>34</sup>

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29. See generally Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring after Grutter and Gratz*, 85 TEX. L. REV. 517 (2007) (providing an illuminating contribution to the debate on the method by which this analysis ought to be conducted).

30. See generally *Bakke*, 438 U.S. at 269-325. In substance, this question is simply a provocative rephrasing of the policy debate inaugurated by Justice Powell's *Bakke* compromise—how much value does a racially diverse student body add to a student's college and/or professional education? For a recent (favorable) review of the social science literature, see Faye J. Crosby & Amy E. Smith, *The University of Michigan Cases: Social Scientific Studies of Diversity and Fairness* in Richard L. Wiener et al. eds. SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING (2007).

31. See generally Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (offering a thoughtful perspective on this question).

32. A practice which is difficult to conceptually distinguish from racial preferencing; witness the elision of the two in Justice Powell's formulation of the Fourteenth Amendment standard in *Bakke*, “when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin.” *Bakke*, 438 U.S. at 320.

33. This is a hotly contested issue. See e.g., David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); Richard O. Lempert et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics"* 45-47 (John M. Olin Center for Law & Economics Working Paper Series, No. 60, 2006), available at <http://law.bepress.com/umichlwps/olin/art60> (demonstrating the ongoing scholarly dispute between Professors Sander and Lempert et al.); Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005); Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2005). Cf. Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q. J. ECON. No. 4, 1491, 1523 (Nov. 2002) (concluding that “[s]tudents who attend more selective colleges do not earn more than other students who were accepted and rejected by comparable schools but attended less selective colleges.”)

34. One can open virtually any volume of any law review and be confident of finding an exposition of this question.

## III. THE EFFECT OF MINORITY PREFERENCES ON THE WHITE APPLICANT

The difficulty with the consensus position on the stakes for majority applicants is that it mistakes the difference in two percentage likelihoods of an event occurring (A and B) for a percentage increase/decrease in likelihood from A to B. This is a straightforward mathematical error. To demonstrate the mistake, I will review the examples given by Liu himself—examples taken to show that “the admission of minority applicants and the rejection of white applicants are largely independent events, improperly linked through a causation fallacy.”<sup>35</sup>

[T]he hypothetical race-neutral [i.e., ‘race-blind’] likelihood of admission for all applicants within a given SAT interval may be estimated by dividing the total number of applicants actually admitted by the total number of applicants. This assumes that admissions officers would admit applicants with similar SAT scores (black or white) at the same rate, and that the number of applicants actually admitted within a given SAT interval equals the number that would have been admitted under a race-neutral process. Within the 1200-1249 SAT interval, for example, Bowen and Bok’s five selective institutions admitted 543 out of 2816 white applicants and 147 out of 245 black applicants in 1989—a total of 690 out of 3061 applicants. Thus, the hypothetical likelihood of admission for an average applicant (white or black) scoring 1200-1249 on the SAT would have been 22.5% (690 divided by 3,061)—only slightly higher than the actual 19.3% rate of admission for whites in this SAT interval.<sup>36</sup>

The notion that 22.5% is only “slightly” higher than 19.3% derives from a belief that the former percentage is merely 3.2% greater than the latter. This is incorrect. Working with these figures, the white applicant is 16.6% more likely to gain admission under a race-blind selection procedure than he is under a race-sensitive selection procedure.<sup>37</sup> Arguably at least, an increase of this order in an applicant’s chances of admission is substantial. Using the same statistical method, Liu assesses the figures for the applicants to the University of Michigan with whom Jennifer Gratz competed for admission. Within the group of applicants having test scores equivalent to Gratz, white applicants had a 32% chance of admission.<sup>38</sup> Had the university admitted applicants at the same overall rate regardless of race, the likelihood of

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35. See Liu, *supra* note 9, at 1049.

36. *Id.* at 1074.

37. To find a percentage increase you take the difference as a fraction of the original amount and multiply it by 100. Thus,  $32/193 * 100/1 = 3200/193 = 16.58\%$

38. *Id.*

admission for an average applicant with Gratz's test score interval would have been 39%.<sup>39</sup> Liu extrapolates from this:

[A]ffirmative action increased the average likelihood of rejection for white applicants from 61% to 68%. Affirmative action, to be sure, had some effect. But the key point is that admissions decisions concerning white applicants remain, on average, far better explained by an applicant's combined qualifications than by the effect of affirmative action.<sup>40</sup>

But the effect of affirmative action in the Gratz scenario is greater than that indicated by Liu's analysis. If affirmative action was prohibited, the white applicant's chances of success would increase from 32% to 39%. This represents an increase of 22% in her likelihood of admission,<sup>41</sup> or a decrease of 10% in her likelihood of rejection. The latter figure is the product of an alternative means of characterizing changes in probability—one which would make a majority applicant's loss appear less consequential. Thus, instead of saying that a majority applicant has a 32% chance of success, we say that he has a 68% chance of failure. The loss of seven such 'failure' percentage points seems of less importance than going from a 32% to a 39% chance of success. However, two points need to be borne in mind. First, losing seven percentage points of a 68% probability is equivalent to a 10.3%, not a 7% drop in that probability ( $7/68 * 100/1 = 700/68 = 10.294\%$ ).

More importantly, in the context of disputes about resources, conceiving probabilities of failure as the subject of "change of status" analyses is itself problematic. The idea that one may hold a property interest in one's chances of getting something—an assumption underpinning claims of discrimination by eligible applicants of any race—does not extend to one's chances of *not* getting something. The reason our odds of getting something holds an interest

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39. *Id.*

40. *Id.* at 1074.

41.  $7/32 * 100/1 = 700/32 = 21.875\%$ . Increases of this magnitude seem to challenge the characterization of affirmative action as having "little effect on the odds of admission" for majority applicants. See Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 693 (1998). Moreover, the comparison of admission rates for minority and majority applicants within given test score intervals may itself understate the effect of racial preferencing. See Espenshade, *supra* note 28, at 293 (demonstrating that whites are majority recipients of certain other non accomplishment plus factors such as legacy preferences); RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 166, 235 n.75, 300 n.70 (1996) (discussing the impact of geography preferences); Kane, *supra* note 28, at 988 (discussing the impact of socio-economic preferences), though the latter produce a mild redistributive effect. The success rate for whites may thus be greater than for minority applicants with equivalent test scores and non-test score accomplishments. Consequently, dividing the number of admissions at each test score interval by the number of applicants with those scores may understate the rate at which whites could expect to gain admission in the absence of racial preferencing.

for us is because the same can be said of the “something” in question. Thus, assuming we do not have a property interest in securing the failure of our application, we cannot be said to have a property interest in retaining a particular probability of the occurrence of that outcome. Moreover, insofar as we have no interest in retaining a probability of failure in the face of its reduction, it is quite unlike any other property. On either conception of admission/hiring likelihood though, one’s impression of the percentage change facing affirmative action plaintiffs is likely to affect one’s view of the significance of that change. Accordingly, clarity as to the meaning of percentage representations is important.

Following Liu, Pauline Kim provides a mathematical analysis of the impact on white applicants of the selection policy at issue in *Tuttle v. Arlington County School Board*.<sup>42</sup> *Tuttle* did not involve selective university admissions policies, but a policy for allocating seats in an oversubscribed elementary school, which, for our purposes, presents a straight analogy. After offering seats to applicants whose siblings already attended the school, the Arlington School Board conducted a weighted lottery to fill the remaining seats in the kindergarten class. In order to increase the probability of selecting children from certain groups, weights were assigned based on a number of factors, including race.<sup>43</sup> Dropping the weightings, the white plaintiffs in *Tuttle* stood a 28.4% chance of securing non-sibling admission. Under the Arlington School Board’s diversity policy, however, their odds of admission stood at 23%.<sup>44</sup> According to Kim, “[t]he concrete impact of the Arlington School Board’s policy, then, was not to deny the plaintiffs places in the kindergarten class at [the school in question], but to decrease their odds of admission by something less than 5.4%.”<sup>45</sup>

On its face, Kim’s conclusion is incorrect. The elimination of the Arlington County School’s diversity policy would increase the white applicant’s odds of admission from 23% to 28.4%—an increase of 23.5%, not an increase of 5.4%.<sup>46</sup> Again, one would be hard-pressed to regard such an increase as “slight.”<sup>47</sup> Interestingly, having set out her findings, Kim footnotes

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42. 529 U.S. 1050 (2000). See Kim, *supra* note 12, at 27-28.

43. *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d at 701-02.

44. See Kim, *supra* note 12, at 27.

45. *Id.* We need not concern ourselves with the impact of the other weightings on white chances of admission.

46.  $54/230 * 100/1 = 5400/230 = 23.487\%$ .

47. See Kim, *supra* note 12, at 28. Kim applies Liu’s approach to similar effect in analysing Barbara Grutter’s chances of admission; “[i]n the year Grutter applied, 29 out of 135, or 21.5% of all applicants with similar GPAs and LSAT scores were admitted. The acceptance rate for Caucasians with these grades and scores under the Law School’s diversity policy was 19.3%. Thus, under a race-blind admissions policy Grutter’s odds of admission would have been 2.2% higher.” *Id.* at 30. On the contrary,

a direct challenge to the prevailing mathematical method of representing change using percentages:

Although mathematically accurate, this characterization [the 19% decrease in “white” odds of success brought about by affirmative action (from 28.4% to 23%)] removes from view the expected chance of success in the absence of any race-conscious policy. Particularly when that chance was low to begin with, expressing the loss in terms of a percentage reduction in odds misleadingly suggests a greater absolute loss to white plaintiffs than is in fact the case.<sup>48</sup>

The first point to note is that in the context of a lawsuit seeking prospective relief, talk of decreases in odds is itself misleading. *Tuttle*'s white plaintiffs were challenging the use of a racial preference in applicant selection. Removing that preference would increase their odds of success rather than prevent any decrease in their odds. It thus seems more accurate to talk of a 23.5% change in probability rather than a 19% change in probability. Second, “mathematical accuracy” does not permit mutually-contradictory alternatives to both qualify as answers to an arithmetical question. The reason that the expression of loss as a percentage reduction removes from view the paucity of the expected chance of success in the absence of race-conscious policies is because that chance of success in no way answers the question Kim has asked: What loss did the white plaintiff suffer? A person's loss can only be measured against what they possessed prior to the relevant event. The fact that they had less of something prior to that event as compared to another person to whom the event has affected in the same way does not mean that the diminution of what they possessed is any less significant to them. We could say that what the plaintiffs had was insignificant to begin with, such that their loss of it was also insignificant. But this is not a point which can be made by comparing “before and after” odds of success in the manner of Kim and Liu. On the contrary, it is dependent on the assertion that the plaintiff-applicants had no worthwhile chance of admission in the first place, such that they would suffer no injury if it was taken away from them – for any reason.<sup>49</sup>

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under a race-blind admissions policy, Grutter's odds of admission would be 11.4% higher:  $22/193 * 100/1 = 2200/193 = 11.398\%$ .

48. *Id.* at n.85.

49. Note that the percentage loss in odds of success experienced by white applicants does not in itself reveal the extent of a scheme of minority preferencing. A white applicant would suffer a twenty-five percent loss in his probability of success regardless of the number of seats shifted from white to minority applicants by virtue of affirmative action as long as that number remained a quarter of the total number of white applications that would otherwise have been successful. Thus, the percentage loss suffered by the white applicant and the percentage of resources that are redirected towards preferred groups are not necessarily the same thing. Put differently, to establish the overall cost to society of a policy of affirmative

Moreover, a percentage cannot express an “absolute loss.” It cannot therefore suggest a “misleading” one. The idea of a percentage is that value A is placed in terms of value B, where the latter is equivalent to the figure “100.” As such, a percentage is necessarily a relational proposition, not an absolute one. One could not lose an absolute percentage of something—that is a contradiction in terms. To say that one has lost 5.4% is to say that one has lost a quantity of something whose original value is stipulated to be “100.” The complicating factor is that in *Tuttle*, and in similar scenarios, the something in question is a percentage of something else. The *Tuttle* 28.4% thus becomes the entity whose value we are stipulating to be “100” for the purposes of our expression. To lose 5.4% of 28.4(%) is to lose a quantity you have stipulated to equate to 1.5. Yet in *Tuttle* the white plaintiffs lost more than 1.5 of their 28.4. On the contrary, they lost 5.4 of their 28.4. The analysis of change is a relational assessment. To assess it, we must first find our data points, compare them, establish which data point represents the original position, then relate any differences between original and subsequent data points in terms of the value represented by the former. The only mathematical method of representing this last step is by stipulating a numerical value for the original position (“100”) and expressing the difference as a fraction of this value, that is, in percentage terms. In short, the Liu method errs by confusing the difference in the percentage likelihoods of white admission under and absent minority preferencing with the percentage increase/decrease from one percentage of likelihood to the other. As such, its view of the arithmetic of selective admissions is mistaken.<sup>50</sup>

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action, it is indeed necessary to reflect on the value of the white applicant’s chances of admission in the absence of minority racial preferencing.

50. An alternative approach to characterizing the loss produced by affirmative action is by way of decision theory. See generally ROBERT T. CLEMEN, MAKING HARD DECISIONS: AN INTRODUCTION TO DECISION ANALYSIS (1996). Specifically, we might use the concept of expected value,  $eV = P*V$  (where V is the payoff, and P is the probability of it being realised), to represent the impact on white applicants. Taking *The Shape of the River* data reviewed by Liu, we have a 19.3% chance of success for a white applicant at a given SAT interval, which, with the suspension of racial preferencing, would rise to 22.5%.

Let’s assume that the lifetime payoff for gaining admission to the applied school over and above the next most preferred school is \$10,000. For the sake of argument, let us also assume that this payoff is equivalent for all the applicants at this SAT interval. At 100% probability of success, the expected value of the application to the applicant would equal \$10,000. For every percentile decrease in probability, the application will be worth exactly \$100 less to the applicant, and *vice versa*. At first glance, this would appear to bear out Liu’s approach: under decision theory, the increase in value between the 19.3% and 22.5% rates of probability is an absolute figure, not one which is calculated using relative gains and losses.

But while decision theory offers an absolute scale with which to measure loss, it also involves characterizing losses in tangible terms. Thus, on Liu’s figures, an SAT equivalent white applicant’s application is worth \$1,930 under affirmative action, whereas it would be worth \$2,250 in its absence. This works out at a \$320 loss for the white applicant by reason of his race. Were the impact of affirmative action on majority applicants conveyed in such terms, it seems doubtful that the loss would prove politically or

Professor Liu's work is not alone in underestimating the effects of affirmative action on majority applicants. Thus, notwithstanding the data presented by Bowen and Bok in *The Shape of the River*, we cannot attribute an increase of 'only' X percentage points unless we are satisfied that the percentage change in position appears equally insignificant.<sup>51</sup> Consider Thomas Kane's hypothetical demonstration of the (mistaken) causation fallacy:

[M]any families are likely to misperceive the impact of racial preference in college admissions. Harvard College, for example, accepts roughly 10 out of 100 applicants. Only 1.5 out of the 10 that are admitted (15 percent of students) are black or Hispanic. Even if ending racial preferences excluded all black and Hispanic students (an upper-bound estimate, since many minority applicants would be admitted using color-blind procedures), only 1.5 out of the 90 students who were denied admission would now find a space. Yet, if more than 1.5 out of the 90 students who are now denied think they would be the next person in line when racial preferences are ended, the perceived costs of affirmative action are likely to exceed the actual costs.<sup>52</sup>

However, the effect on the average white admissions search of the diversion of 1.5 admissions by way of minority preferencing is not "minuscule."<sup>53</sup> In keeping with the spirit of Kane's hypothetical, let's assume that all 100 applicants are otherwise equally qualified for the 10 positions and that only

legally acceptable. See Liu, *supra* note 9, at 1106. (Technically, for white applicants, race blind selection exhibits first order stochastic dominance over racially preferred selection.) We find an oblique reference to decision theory in Justice Breyer's dissent in *Parents Involved in Community Schools*. Making the point that the program at issue was less detrimental to unsuccessful white applicants than that approved in *Grutter*, Justice Breyer noted that "[d]isappointed students are not rejected from a State's flagship graduate program; they simply attend a different one of the district's many public schools, which in aspiration and in fact are substantially equal." *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2825 (Breyer, J., dissenting).

51. See e.g., *supra* note 28 (discussing the application of the Bowen & Bok finding of an increase of 1.5 percentage points in white probability of admission). An increase of 1.5 percentage points corresponds to a 6 percent increase in probability.

52. See Kane, *supra* note 28, at 993. Even the trenchantly anti-affirmative action review of Bok & Bowen by Stephan & Abigail Thernstrom, *Reflections on the Shape of the River* 46 UCLA L. REV. 1583, 1629 (1999) implicitly concedes the substance of Kane's point as it relates to whites:

[w]hite resentment, they claim, is like the annoyance many drivers feel at "handicapped parking spaces." Doing away with "the reserved space would have only a minuscule effect on parking options for non-disabled drivers." . . . [yet] it is not only whites who are excluded when blacks and Hispanics are admitted to schools by racial double standards. . . . The cost of racial double standards in admissions is currently being paid by many Asian students.)

*Id.*

53. See Kane, *supra* note 28, at 992.

1 out of the 1.5 minority admissions depended on affirmative action. In such circumstances, it is certainly true that any given member of the 90 disappointed applicants would be foolish to think that they had been displaced by the operation of Harvard's racial preference. But they would not therefore be wrong in thinking that the preference had cost them significantly. Under affirmative action, non-racially preferred applicants would have a 9.1% chance of admission (99 competitors, 9 admissions). In the absence of affirmative action, each of the 100 applicants has a 10% chance of success (100 competitors, 10 seats). Consequently, were affirmative action suspended in Kane's hypothetical, the chances of success for non-racially preferred applicants would increase by 10%.<sup>54</sup> Unlike many of the benefits of higher education, of course, likelihoods are intangible. Nevertheless, the loss of a given likelihood of success is not merely a perceived loss—it is as genuine as the loss of the opportunity to draw as many cards as one's opponent in a game of chance.

The well-known Wightman study of the effects on the composition of US law school matriculants of abandoning racial preferences (as updated in 2003) avoids the particular error we have been discussing; however, in analyzing the benefits accruing to majority applicants, it commits a comparable one.<sup>55</sup> Analyzing data from 68,029 applicants to 179 law schools during the 2000-01 application year, Wightman uses combined LSAT/GPA logistic regression models to predict the admission decisions that would have been reached in the absence of the consideration of race (and all other non-test score data). The 68,029 applicants in question generated 323,381 law school applications, averaging 5.1 applications per applicant. Nearly three-quarters of the applicants received at least one offer of admission.<sup>56</sup> From her analysis, Wightman concludes that:

The impact on white applicants of considering race as a factor in making admission decisions is not so dramatic as is sometimes suggested. There were nearly 9,000 applications from white applicants that resulted in an offer of admission but would have been rejected under the numbers-only [test-score only] model that was tested. . . . The numbers of applicants from minority groups who were admitted, but who would not have been by the same numbers-only model, was relatively small, especially compared with the just-noted

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54. We would need to make further assumptions about the scenario to calculate the exact increase in probability, but these figures suffice to make the general point.

55. Linda Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models with Current Law School Data* 53 J. LEGAL EDUC. 229 (2003).

56. *Id.* at 231.



numbers of . . . applications from white applicants that would have been denied.<sup>57</sup>

Wightman's conclusion is problematic for a number of reasons. The number of preferred applications which were admitted, but which would not have been admitted without a minority racial preference, is necessarily equal to the number of non-preferred applications that were denied by the inclusion of race as a factor. This is the only logical position, and it is duly reflected in Wightman's own figures.<sup>58</sup> Wightman notes that the number of applicants from minority groups who would not have been admitted anywhere but for non-test score considerations is smaller than the number of white *applications* which would not have been admitted but for non-test considerations. But comparing the success of minority applicants to majority applications is not relevant to establishing the impact on white applicants of factoring race into admissions decisions. Moreover, the number of white applications which would not have succeeded in the absence of non-test score considerations (9,000) has no direct bearing on an assessment of the effect of non-test score considerations on whites.<sup>59</sup> Uncovering this effect involves finding the net number of white applications rejected/accepted by virtue of the application of non-test score considerations. Using Wightman's own data, we find that applying non-test score considerations leads to a 7,642 net decline in the number of successful white applications, i.e., the 8,729 white applications advantaged by non-test score considerations less the 16,371 white applications disadvantaged by such considerations.<sup>60</sup> Though Wightman does not advert to the finding in presenting the overall proportions of law school applications admitted and predicted-to-be-admitted as per test score by racial group, the study's third Table reflects this figure.<sup>61</sup> In the 2000-01 round of applications, LSAT/UGPA scores predicted that 47% of white applications would be admitted. The percentage of white applications actually admitted is given as

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57. *Id.* at 252-53

58. *Id.* at 239, tbl. 4. Drawing this position from the figures means assuming a non-negative relationship between test scores and other accomplishments, and an equal inter-racial distribution of non-test score accomplishments. Leaving aside applications from applicants marked "other/no response," the net number of minority applications which decisively benefited by non test score considerations (7,717) was effectively equal to the net number of white applications which were decisively disadvantaged by non test score considerations (7,642). Admittee "yield" is discussed below. *Id.*

59. Individual variations are irrelevant to determining the impact of minority preferences on a hypothetical majority applicant. To assess change in the chances of a hypothetical majority applicant we need to examine the sum of these individual variations, namely, the net failure of majority applications under a race conscious selection element.

60. Wightman, *supra* note 55, at 239, tbl. 4.

61. *Id.* at 237.

43%. Accordingly, had affirmative action been abolished, white applications would have enjoyed a 9.3% greater chance of admission.<sup>62</sup>

Moreover, there is reason to believe that this figure understates the boost to white applications produced by the removal of minority preferencing. First, though Wightman made use of the most recent data then available, matching prior and subsequent trends suggests that 2000-01 may have represented an ebb position in the number of majority-race law school applications.<sup>63</sup> The proportion of majority-race applications is important because the bigger it is, the higher the test score average of the applicant pool. The higher the test score average, the more difficult it is for groups with relatively low test scores to compete for admission. Thus, the greater the proportion of majority applications in the general pool, the greater the need for minority preferences to ensure the same proportion of minority admissions, which leads to larger racial preferences.<sup>64</sup>

This factor is illustrated through comparison with Wightman's data for 1991;<sup>65</sup> a year with a much higher volume of applications than 2001. The 1991 figures show an LSAT/GPA predicted rate of admission for white applications of 30% with an actual admission rate of 26%—making the 1991 abolition of affirmative action worth an increase of 15.4% in a white applicant's chances of admission to his preferred law school. The post-2001 growth in the volume of white applications suggests that in the event of an abolition of affirmative action, a 9.3% figure for the resulting increase in "white" chances of admission may be on the lower side.

Second, among the 179 law schools whose admission rates are accumulated, Wightman's figures take no account of those which do not use racial preferences.<sup>66</sup> Evidently, a national abolition of affirmative action

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62. Thus, 216,997 applications were submitted by whites in 2001. Forty-three percent of that number is approx 93,309 applications (the proportion of white applications actually admitted); 9.3% of 93,309 is 8,678 applications; 8,678 plus 93,309 successful applications equals 101,987, which constitutes 47% the total number of white applications (47% being the proportion of white applications for which test scores predict admission).

63. See Wightman *supra* note 55, at 234, tbl. 1. Thus, Wightman reports that whereas in 1991 there were 72,742 white applicants, by 2001 that figure had fallen to 47,541. Conversely, the number of preferred applicants had increased by 774. Post-2001 data suggests a return to early nineties applicant levels. See Lempert, *supra* note 33; Michael A. Olivas, *Law School Admissions After Grutter: Student Bodies, Pipeline Theory, and the River*, 55 J. LEGAL EDUC. 16, 25-27 (2005).

64. We must of course qualify this point as it relates to Asian-American applicants; Asian-Americans have higher test scores than any other racial group, including whites, and, with the latter, comprise the class of non-preferred applicants. See Wightman, *supra* note 55, at 237, tbl. 3.

65. *Id.*

66. California and Washington State's public law schools have been unable to use racial preferences since the passage of Proposition 209 (1996) and Initiative 200 (1998) respectively. A similar prohibition applies to Michigan's public law schools since the passage of Proposal 2 in late 2006. For almost a decade,

would provide no boost for white applications to such schools. But the presence of such schools in Wightman's data pushes the national rate of actual admission for white applications closer to the national LSAT/GPA predicted rate of admission. In the absence of non-affirmative action schools, the actual rate of white admission would be marginally less and the difference between it and the predicted rate of white admission would be greater. The admissions chances of white applicants from 2001 who were subject to minority preferencing would therefore have benefited by something greater than 9.3% had such preferencing been abolished. This conclusion is confirmed when we recall that the other non-test score, non-accomplishment factors that law schools commonly take into account—such as geography, socio-economic status and legacies—tend to benefit more majority applicants than minority ones. The lack of control for such factors in the Wightman analysis means that this tendency may work to downplay the full effect of minority racial preferences on the white success rate.<sup>67</sup>

A further factor associated with the case for considering minority preferencing a minimal burden on majority applications is 'matriculant yield'—the number of matriculants produced by the offer of a given number of admissions. As this factor is commonly put forward in the literature supporting the causation 'fallacy', it is appropriate to canvass it before concluding. The idea is that when admissions processes use racial preferences, the yield "tends to be lower for highly qualified black candidates than for comparable white candidates because the black candidates are likely to be admitted by more schools."<sup>68</sup> In the absence of racial preferences, however, the rate at which black applicants accept offers of admission "would almost surely rise" and "would move up toward the white yield."<sup>69</sup> The elimination of affirmative

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Florida and Texas have experimented with less emphatic proscriptions of affirmative action in higher education. For an overview of the impact of such measures on minority admissions, see Michelle Locke, "Race Blind" Admissions Controversy Still Smolders, WASH. POST, May 7, 2007, at A06.

67. See Wightman, *supra* note 55, at 241. Wightman notes that "the number of white applications that would have been granted a positive admission decision increased by 8 percent when the analysis assured that the predicted-to-be-admitted number matched the number actually admitted." *Id.* The figure of 8% is mistaken—we saw that the correct figure (ignoring for a moment the study's methodological imprecisions) is 9.3%. Wightman appears to produce the 8% figure by calculating the percentage increase from the white proportion of all those applications actually admitted (73.4%, Table 4) to the proportion of admitted applications that would have been white had the LSAT/UGPA score predictions held true (79.3%, Table 4). However, the proportion of all successful applications belonging to a particular race is not the same as the proportion of applications made by that racial group which were successful. A critical determinant in the former is the relative size of the group vis-à-vis the other groups that have made successful applications. Relative group size is immaterial in the latter measurement—allowing us to compare success rates across racial groups of different sizes (such as whites, blacks etc.).

68. BOWEN & BOK, *supra* note 11, at 33-34.

69. *Id.* at 35.

action is said to mean that selective institutions would not need to make as many offers of admission as they otherwise would in order to fill the same number of seats. By decreasing the total number of offers required to produce the same number of matriculants, the projected increase in black yield tends to lower the hypothetical race-blind rate of admission, thereby reducing the increase in white chances of admission were minority preferences abolished.<sup>70</sup> At first glance, the hypothesis appears plausible. But a close inspection reveals that a “yield variable” has no place in assessing the impact of affirmative action on white applicants. At a practical level, minority applicants are more likely than equivalent whites to have received offers of admission from private educational institutions—the very top tier of which are more prestigious than even the most prestigious public schools. Given that many private institutions pursue affirmative action policies and the virtual certainty that a constitutional finding against such policies would be confined to public institutions, the presumptive reason for lower black yield would still apply in the event of a conservative overturning of the *Bakke/Grutter* licence. Conversely, to the extent that an abolition of affirmative action does decrease the number of minority applicants with better offers, it will increase the number of white applicants with better offers. This in turn will decrease the rate of white yield, applying upward pressure on the number of admission offers required to secure the same number of matriculants, thereby countering the downward pressure produced by the increase in black yield. In other words, if affirmative action accounts for lower black yield, it must also account for higher white yield. With its generation of correspondingly more offers of admission for whites, we can expect an abolition of affirmative action to decrease white yield at every test score interval by an amount corresponding to the decrease in black yield at every interval that was due to affirmative action.<sup>71</sup> The net result is that average applicant yield would be unaffected by the abolition of racial preferencing. Consequently, we have no reason to believe that universities would need to make fewer offers of admission to produce the same number of matriculants. As such, in the absence of affirmative action, we can expect the race-blind rate of admission at each test score interval to be unaffected by matriculant yield, and hence to hold its position relative to the non-preferred applicants’ rate of admission. Racial variations in yield thus provide no evidence for thinking that the increase in a majority applicant’s chances would be less than otherwise estimated.

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70. See Liu, *supra* note 9, at 1076-77.

71. This dynamic applies to all non-preferred racial groups. Note also the need to avoid circularity in this argument; lower minority yield cannot be attributed to a phenomenon of more minority offers where the existence of that phenomenon is then attributed to lower minority yield.

## IV. CONCLUSION

In the assessment of an application for admission to a selective institution, it is common ground that, notwithstanding policies of affirmative action, a range of factors will be considered.<sup>72</sup> Accordingly, the question of what causes a majority applicant to fail to gain admission will likely depend on a number of factors. However, in assessing the impact of race in selective admissions decisions, it would be a mistake to assume that affirmative action causes only minimal decreases in the odds of admission for white applicants. The mistake is not that the decreases are invariably substantial. Rather, it is that one cannot calculate a percentage decrease by equating it to the difference in quality A “before and after” the occurrence of event B.

In assessing the costs of affirmative action, however, the question arises as to whether it makes sense to concentrate on its impact on individual applicants—preferred or non-preferred. Ultimately, all forms of minority racial preferencing operate to direct, on the basis of race, an amount of resources towards particular racial groups within a larger group of potential recipients.<sup>73</sup> The percentage by which non-preferred probabilities of success decrease is a function of the quantity of resources so directed, *i.e.*, the number of decisively disadvantaged white and Asian applications, and the proportion of non-preferred applications. Accordingly the impact of affirmative action on a non-preferred applicant’s chances of admission will be exclusively determined by the number of non-preferred applications that are to be decisively disadvantaged (and pre-application perceptions thereof). In this context, arguments about the significance of an individual’s loss in odds of success appear to act as proxies for arguments about the quantity (if any) of the existing resources that ought to be distributable on the basis of race. That this underlying question lends itself to the language of quotas would seem a poor reason for policy analysis to concentrate on derivative measures of

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72. This is the case despite some disagreement over the typical weight of racial preferences. Whereas some advocates of affirmative action tend to downplay its impact in admissions decisions, *see* STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 32 (1999), others take the view that its weight is substantial and should be acknowledged as such, *see* Liu, *supra* note 9, at 1067; *see generally* Issacharoff, *supra* note 41. Note Issacharoff’s embarrassment at a claim in a court brief to which his name was attached that “race operated as simply one of many criteria that went into a selection process.” *Id.* at n.14.

73. This applies to all measures that consider race in the distribution of resources, be they explicit or substantive. Thus, “race neutral” distributions that refer to factors chosen for their correlation with race rather than to race itself, direct, on the basis of race, an amount of resources towards particular racial groups within a larger group of potential recipients. Indeed any race conscious measure that distributes resources in ways that are more to some people’s liking than others involves allocating a quantity of resources according to race. For discussion of indirectly race conscious measures and a possible distinction in terms of the evils of individual racial classification, *see* Justice Kennedy’s concurrence in *Parents Involved in Community Schools v. Seattle*, 127 S. Ct. at 2788 (Kennedy, J., concurring).

program cost.<sup>74</sup> Such an approach is unnecessary and may be unhelpful. It is unnecessary because the only reason an administrator would be unable to determine the identity of preferred candidates who would not have succeeded but for the preference (and hence the quantity of resources allocated according to race) is that such candidacies are not fully commensurable with the candidacies of non-preferred candidates. However, such incommensurability could only come about where a separate track for acquiring a given quantity of the resource has been established for preferred candidates.<sup>75</sup> In either case, we are measuring the extent of a particular direction of resources on the basis of race.

Moreover, a focus on derivative measures of cost is unhelpful insofar as it conveys the impression that the cost of a racial direction of public resources falls simply on a group of individuals. In competing for admission, applicants of non-preferred races are collectively disadvantaged to a degree equivalent to the advantage collectively enjoyed by applicants of preferred races. But the larger issue remains: Will society benefit by investing its resources along what, in principle, are arbitrary lines? Individual losses aside, there is the opportunity cost to pursuing affirmative action, borne by society itself – in the gain that would have been realized by a distribution of the resources on non-racial grounds.<sup>76</sup> This cost may be outweighed by the gains to society accruing from affirmative action, but it cannot be equated simply with the admissions disadvantages borne by non-preferred racial groups.<sup>77</sup> As is often

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74. “Racial quota” has been a loaded term in political discourse. A prominent example of its imputed connotations is the “white hands commercial” run by Jesse Helms in his United States Senate campaign against challenger Harvey Gantt (an African-American). As a pair of white hands crumple a rejection letter from an employer, a voice says, “You needed that job and you were the best qualified. . . . But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is.” See Ed Timms & Doug J. Swanson, *Racial Politics Surging as Economy Declines*, DALLAS MORNING NEWS, Dec. 2, 1990, at 1A (quoting commercial). See also Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1 at 32-35 (1995) (discussing the impact of “quota” characterization in Supreme Court jurisprudence).

75. Otherwise, the “plus” experienced by applicants by virtue of affirmative action could be discounted to reveal how many admittees would have lost their place in its absence.

76. Recall that opportunity cost is not the same as a “perception cost,” *i.e.*, the distinct cost to society of some of its members feeling disadvantaged by the operation of affirmative action, where such policies are an otherwise appropriate practice. Though occasionally canvassed by commentators favorable to affirmative action, the point appears vulnerable to the rejoinder that to alter policy on the basis of such feelings would represent a deliberate indulgence of racist prejudice. See generally Dworkin, *supra* note 7; Kane, *supra* note 28,

77. Or, for that matter, with any disadvantages borne by members of preferred groups. For a view supportive of the salience of the stigma question, see generally STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991). Empirical research on the impact of affirmative action fuelled stigma is inconclusive, for a brief overview see Faye J. Crosby et al., *Understanding Affirmative Action*, 57 ANN. REV. PSYCHOL. 585, 593-94 (2006).

noted in defense of affirmative action, admission to the university of one's choice is not "a right" in the sense of being something to which citizens are necessarily entitled. The corollary is that the efficiency of non-racial distributions of public resources be overcome by weightier considerations—be they redress based<sup>78</sup> or instrumental.<sup>79</sup>

Focusing on derivative measures is also unhelpful where it encourages the reification of labels, such as in arguments that characterize quotas as being qualitatively distinct from "ranges."<sup>80</sup> Every means of minority racial preferencing yields a university admissions advantage owing exclusively to an applicant's race, the racial profile of the applicant pool, and the quantity of resources to be racially redistributed. However sophisticated the means of affirmative action, it will result in a quantity of resources being distributed to members of certain racial groups that would otherwise have been distributed to members of different racial groups. Put differently, in any minority preferencing scheme concerning a particular pool of resources, majority applicants will, by virtue of their race, be automatically excluded from a quantity of those resources commensurate to the redistributive impact of the scheme in question. Whatever value there is to distributing this quantity of resources without regard to race is a cost that society incurs in pursuing such schemes.

The suggestion that the policy analysis of affirmative action heed its character as a way of directing particular quantities of resources towards racial groups is unlikely to appeal to its supporters. Yet having articulated one's position in terms of quantities of racially-distributed resources, one might credibly maintain that individuals are not receiving goods because of their race's presence in society but because of the consequences that have been (wrongly) attached to their race's presence in society. The ultimate success of that a position would be open to argument. Before this debate can make much headway in higher education, however, the doubts about the actual value of the resource proposed for racial distribution—university selectivity benefits—must

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78. Michigan Law School's "special reference to the inclusion of students from groups which have been historically discriminated against" would seem to fall under this category. See *Grutter*, 539 U.S. at 316.

79. For a number of instrumental considerations in the context of university admissions see *id.* at 330-32. In the public school context, see Justice Breyer's elaboration of the educational and democratic elements of what he saw as the school districts' compelling interest in using race based selection criteria in *Parents Involved in Community Schools*, 127 S. Ct. at 2820-25 (Breyer, J., dissenting).

80. The *Grutter* decision did little to weaken the Supreme Court's attachment to this distinction—no "outright balancing" or "quota system." *Grutter*, 539 U.S. at 30, 34. (For background on the Supreme Court's handling of "quotas," see Spann, *supra* note 74, at 32-35.) O'Connor's distinction between racial balancing and achieving meaningful minority numbers was subsequently invoked by the Court in its criticism of the affirmative action policies at issue in *Parents Involved in Community Schools*, 127 S. Ct. at 2743-44.

first be resolved.<sup>81</sup> In the end, it may be that the latter will present a more serious question for the practice of affirmative action by universities than any question of principle.

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81. See Dale & Krueger, *supra* note 33, at 1512. "Employers and graduate schools may value their higher class rank [those students who choose to attend a less selective and therefore less academically competitive college] by enough to offset any other effect of attending a less selective college on earnings." *Id.*