Volume 2, Issue 2  
2011

Table of Contents

The Hidden Costs of Textualism: Does It Matter What Slaves Thought “Direct Tax” Meant?  
Andre L. Smith

The Expressive Paradox: How Free Speech and Racial Minority Protest Perpetuate Stereotypes in America  
Andrew Sternoff

The Mismatch Hypotheses in Law School Admissions  
Gregory Camilli, Darrell D. Jackson  
With  
Chia-Yi Chiu Ann Gallagher
TABLE OF CONTENTS

THE HIDDEN COSTS OF TEXTUALISM: DOES IT MATTER WHAT SLAVES THOUGHT “DIRECT TAX” MEANT?  
Andre L. Smith 109

THE EXPRESSIVE PARADOX: HOW FREE SPEECH AND RACIAL MINORITY PROTEST PERPETUATE STEREOTYPES IN AMERICA  
Andrew Sternoff 140

THE MISMATCH HYPOTHESES IN LAW SCHOOL ADMISSIONS  
Gregory Camilli, Darrell D. Jackson  
With  
Chia-Yi Chiu & Ann Gallagher 165
THE HIDDEN COSTS OF TEXTUALISM: DOES IT MATTER WHAT SLAVES THOUGHT “DIRECT TAX” MEANT?

ANDRE L. SMITH*

I. INTRODUCTION

The purpose of this article is to show, contrary to some scholarly suggestions, that textualism has little to no efficiency advantage over other statutory construction techniques. Correctly implemented, textualism can consume as much time and resources as dynamism, purposivism or intentionalism. The reason is two-fold: first, textualism requires an analysis of both the plain meaning and statutory context; and secondly, textualism demands an investigation into various interpretive communities and a determination as to the meaning each would ascribe to a text. For example, the word “income” varies in breadth and scope depending on whether the interpretive community consists of lawyers, tax lawyers, accountants, laypersons, or other groupings. In addition, little agreement can be found on the interpretation of the term “direct tax” as used in the United States Constitution. Thus, textualism can require a judge to undertake the arduous activity of determining the 1787 interpretation of “direct tax” according to women, slaves, free Blacks, and Native Americans. This determination is particularly important when the major or predominant interpretative group equivocates on the matter. Consequently, empirical research is necessary to conclude that reliance on the plain meaning is less costly than divining intent or considering foreseeable consequences.

Adrian Vermeule and Cass Sunstein best present the argument that textualism is a less costly activity than considering purposes. Behind each statute a multitude of purposes may be available to consider, with each requiring the exercise of some discrete expertise. Purposivism could require a judge to become acquainted with different fields of study to decide each case. Dynamism is a broader inquiry into foreseeable consequences than purposivism. Thus, it would be even more costly, unless one was allowed to inquire by “feel” or to deploy one’s “situation sense.” Intentionalism could be accused of having a focus on legislative history and being a needlessly costly endeavor; however Vermeule and Sunstein do not discuss it. Vermeule and Sunstein’s charge of relative inefficiency can stand only when these other statutory construction techniques are compared against an overly simplistic and unrealistic conception of textualism. Proponents of textualism typically offer the would-be textualist little more than “focus on the text,” as if the correct answer will simply appear after mere concentration. Yet, real textualism, particularly in relation to plain meaning, requires a number of calculations and allows more judicial discretion than is typically acknowledged. Thus, a text-based analysis with regards to “direct tax” cannot be deemed more efficient than a purposive one.

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Part II of this article presents a debate between Professors Calvin Johnson and Erik Jensen over the meaning of “No Direct Tax without Apportionment.” According to Professor Jensen, apportionment of direct taxes was intended to significantly limit the federal government’s ability to tax citizens directly. On the other hand, Professor Johnson believes the Constitution requires apportionment only of federal requisitions levied directly upon the States. Professor Johnson’s theory places the issue of slave counting at the core of the debate over taxation and representation. For students of legal construction, interpretation and deliberation, Professors Johnson and Jensen’s debate inspires a couple peculiar questions. First, when interpreting or deliberating over the Constitution, do slaves’ thoughts about the meanings of particular words or phrases matter at all? Secondly, if what they thought does matter, how important is it and how would it be discovered?

Part III shows that the answer to the question ‘does it matter at all’ is ‘it depends.’ Different deliberative/interpretive techniques—textualism, intentionalism, purposivism, and dynamism—answer the question differently. Furthermore, the results may represent a political irony. In actuality, Justice Scalia’s brand of originalist textualism accords the most respect for the views of slaves on constitutional issues as well as women’s views. His theory requires judges to consider what the Constitution’s text meant to the People of the United States. He considers the Federalist papers not as evidence of the Framers’ intent, but of the People’s thoughts as to what specific words meant. The Federalist papers may represent the best evidence of original constitutional meaning; however additional evidence also is available to further grasp how the People of the United States understood the

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4 See generally JOHNSON, RIGHTEOUS ANGER, supra note 3.


6 Id. at 23.

7 Id. at 38.
Constitution. In fact, Scalia’s originalist-textualism theory requires judges deciding constitutional questions to also consider the meaning most likely supplied by Blacks, women, and perhaps Native Americans—to the degree and the extent possible. This notion is especially true if evidence exists that the judges’ understanding differs slightly from the dominant public sphere of the time.

On the other hand, alterative theories of constitutional interpretation, such as originalist intentionalism and dynamism, ignore slaves’ views on constitutional matters. Dynamists believe in a “Living Constitution” and thus, encourage judges examining a constitutional issue to consider the decisional choice most consistent with the majority of important modern-day social and legal principles.8 Dynamism is very inclusive and permits judges to consider a myriad of factors, including what the People at the time of enactment thought the Constitution meant.9 Although, this theory is frequently offered as a distinct contrast to constitutional originalism; dynamism has been suggested to oppose dead hand control and to disregard the views of the people alive at the time of the Constitution’s drafting.10

Thus, Part III illustrates the major techniques for legal construction, interpretation and deliberation and evaluates which techniques require consideration of slaves’ understandings, specifically in reference to the Direct Tax Clause of the Constitution. Ultimately, the meaning of “direct tax” depends on the technique deliberately employed. Interpretations of the words’ meaning as understood during enactment may have a different result from interpretations that reconstruct the words’ meaning to represent modern understandings and concepts.11 Still, no convention exists to guide a word-meaning analysis under either the original meaning or a living constitution interpretation.12 An originalist may emphasize the meanings as intended by the authors, as understood by the ratifiers, or as comprehended by the People of the United States. In contrast, a realist may emphasize

8 See, e.g., WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, 150 (1994); Bruce Ackerman, The Living Constitution, 120 HARV. L. REV. 1727, 1805 (2007) [hereinafter Ackerman, Living Constitution].

9 ESKRIDGE, supra note 8, at 34 (“The arguments for textualism as the foundational method in statutory interpretation are strong ones.”); see also, Ronald Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve, 65 FORDHAM L. REV. 1249, 1249-50 (1997).

10 For a middle ground position, see Lawrence Lessig, Fidelity in Translation, 71 TEX. L. REV. 1165 (1993).

11 This is, after all, the fuss over constitutional and statutory construction. See Dworkin, supra note 9, at 1253; Andrew Oldenquist, Is the Death Penalty on Life Support? Retribution and the Death Penalty, 29 U. DAYTON L. REV. 335, 342-41 (2004) (“Scalia and Oxford professor Ronald Dworkin offer contrary views about the application of the Eighth Amendment.”).

original purposes rather than meanings, attempt to translate original meanings into the language of modern times, or reject original meanings entirely.  

Considering only slaves’ views, neither interpretation legitimates nor discredits a deliberative/interpretive technique. Ironically, the technique that embraces slaves’ views, textualism, is considered by some progressives as a means of ignoring the pleas of the disempowered, while some techniques that ignore slaves’ views, like dynamism and purposivism, are credited amongst progressive interest groups. This juxtaposition suggests that textualism requires empirical inquiry and is incomplete without evaluating the meaning of the Constitution’s words according to slaves and women.

Part IV deals with the subsequent questions under the textualist regime: ‘how important are these interpretations;’ ‘can they be discovered;’ and ‘if so, at what cost?’ According to a similar textualist application, the first question is answered by looking at the poverty of American history and how slaves’ views were discounted by forty percent. The second question must be viewed through the lens of why discovering African immigrant views may be difficult. The unlikelihood of discovering their views is not due to an inability of the African immigrant to think on the matter, but to the fact that their views were neither sought nor preserved.

Hopefully, this contention that slaves’ views were not sought nor preserved will be disproved. After all, the notion that slaves had no thoughts on what the words of the Constitution meant is likely untrue. The assumption is that slaves were brought from a

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13 ESKRIDGE, supra note 8, at 219, 223, 239. These scholars can be described as realist, though each of their methods of deliberating over the Constitution differs markedly from each other. See e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); STEPHEN F. BREYER, ACTIVE LIBERTY (2003); Ackerman, Living Constitution, supra note 8; Lessig, supra note 10.

14 The beef over methods of statutory and constitutional construction is after all political. See Phillip P. Frickey, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 MINN. L. REV. 241, 267 (1999).


16 This notion follows and relies upon Professor Diop’s tracing of African cultural unity through five thousand years of recorded history, back to Ancient Egypt and Nubia. CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA xi (1987).

17 Id., and accompanying text.

18 Scholars have identified several African slaves taken from aristocratic African families, among them Equiano the African and Prince Abdur Rahman. VINCE CARRETTA, EQUIANO THE AFRICAN 9 (2005); TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 3 (2007).

19 Diop does not address the United States Constitution. Rather, he demonstrates that despite Africa’s size along with the external forces responsible for its retardation African societies are well experienced in terms of governance and civilization building, such that a slave captured from an aristocratic family would indeed have studied law and civil administration and may indeed have thoughts or understandings relating to a
place without complex civilization. However, this view that 16th, 17th, and 18th century Africa did not have complex civilization is ignorant of the facts, though unfortunately widely held. In actuality, many slaves were drawn from African aristocracies with thousands of years of law and justice experience. Most likely, the paucity of evidence regarding slaves’ views is due to societal disinterest at the time of enactment and now. Depending on the extent of discoveries uncovering these views, the necessary indicia of what “free” blacks of the time understood may finally be revealed.

In an effort to fill this gap, Part IV continues by taking an Afrocentric turn, exploring the concept of African cultural unity in terms of law and governance, with specific attention to taxation, and developing possible understandings an aristocratic slave may about direct taxation. This part presents historical references to pre-colonial African societies dating back thousands of years and comments on their level of legal modernity and sophistication. The conclusion argues that a slave captured from an aristocratic West African family who was enslaved and delivered to the United States, like Prince Abdur Rahman or Equiano the African, would indeed have an understanding of how the Constitution restricts the federal government by means of the prohibition on direct tax without apportionment.

II. THE DEBATE OF “DIRECT TAX WITHOUT APPORTIONMENT”

A. Current Notions

Most participants in the debate over direct taxes have not taken a jurisprudential position regarding their style of interpreting the Constitution. A popular casebook defines direct tax as “a tax demanded from the very person who is intended to pay it.” Later, the Justices authoring Helvering v. Indep. Life Ins. offer the notion that the Direct Tax Clause prevents a federal property tax. Most tax law theorists appear to assume that a direct tax under the Constitution is the placement of liability on a person solely due to their holding of some form of wealth. Similarly, Stephanie Willbanks in her casebook, Federal Taxation of central government levying taxes on states within a federation or directly taxing the people of states within a federation. Diop, supra note 16, at 176-77 (1987).


21 See generally ALFORD, supra note 18 (Born in Futa Jalloh, Prince Abdur Rahman is captured and delivered to a plantation in Natchez, Mississippi, where his training in West Africa, particularly at one of the universities of Timbuktu, brings such prosperity to the slave master’s operation that for a time said master would not sell him at any price to those who would purchase his freedom).


Wealth Transfers, declares that a tax on all property owned at death—as opposed to an excise tax of taxing transfers at death—would violate the Direct Tax Clause. Professor Erik Jensen is perhaps the leading proponent of the idea that the Direct Tax Clause seriously limits Congress’ powers to tax individuals. He presents considerable evidence suggesting that many Conventioners relied upon the understanding that the federal government would have limited taxing power. He also criticizes Professor Johnson’s theory, stating that direct tax in the Constitution meant only “requisitions” from the several States, as impermissibly rendering meaningless the Constitution’s words and phrases, especially since Congress has never requisitioned the States’ funds.

In opposition, Professor Calvin Johnson maintains that the Direct Tax Clause merely represents an illusory—though necessary—political compromise between abolitionist and pro-slavery delegates with regard to representation and taxation. The Constitutional Convention’s actual goals were to attain the power to lay import and export taxes, to pay off the Revolutionary war debts, and to continue defending the new country. In exchange for counting slaves in some proportion for purposes of representation, slaveholding states were required to count slaves in that same proportion if ever the States were called upon for funds due to a national emergency.

Representation in the House of Representatives was originally intended to mirror a state’s wealth, not necessarily its population; however, population was used as a proxy for wealth. Including slaves as a whole person for representation in the House would increase the relative strength of the South in Congress, and encourage the South to import more slaves to further strengthen their economic system and political power in the federal government. Slaveholding states were concerned that if their importation of slaves was not controlled, Congress would outlaw slavery. Northern delegates objected to counting


25 JENSEN, supra note 3; Jensen, Consumption Taxes, supra note 2, at 2384; Jensen, Taxation, supra note 2; Jensen, Interpreting the Sixteenth Amendment, supra note 1, at 357-58.

26 JENSEN, THE TAXING POWER, supra note 2, at 25-29; Jensen, Consumption Taxes, supra note 2, at 2351; Jensen, Taxation, supra note 2; Jensen, Interpreting the Sixteenth Amendment, supra note 1, at 357-58.

27 Jensen, Interpreting the Sixteenth Amendment, supra note 1, at 367-68.

28 JENSEN, THE TAXING POWER, supra note 2, at 184-86; Johnson, Fixing the Constitutional Absurdity, supra note 1, at 304.


30 JOHNSON, RIGHTEOUS ANGER, supra note 3, at 102 (“In one of the most interesting political moves in the Convention, the Federalists avoided the conflict between votes reflecting wealth and votes reflecting population by arguing that there was no need to distinguish between the two bases.”); Johnson, Fixing the Constitutional Absurdity, supra note 1, at 300.

31 See Johnson, Fixing the Constitutional Absurdity, supra note 1, at 305-06, 307.
slaves as a whole person, but agreed upon counting slaves as 3/5ths for purposes of representation so long as the same scheme applied if and when Congress requisitioned monies from the States according to population—perhaps for the purpose of fighting another war. Thus, the Direct Tax Clause presented the means to design a system of representation and taxation based on population, which was slightly discouraging towards the slave trade on its face, but particularly lenient in practice. According to Professor Johnson, “the Constitution was not perceived to be substantially pro- or anti-slavery at the time, even though by the judgment of eternal morality, the Constitution should have done better.”

B. The Road to “No Direct Tax Without Apportionment”

1. The Problem

Slavery, the Constitution, and taxation are inextricably intertwined. Robin L. Einhorn, in her book American Taxation, American Slavery, describes colonial tax systems prior to independence. She claims the degree of modernity attributable to each state tax system mirrored the modernity with which each colony treated Africans. In northern colonies, like Massachusetts where slavery was not essential to the economy and less prevalent, the government acted as an arbiter of diverse political interests, rather than an arm of the propertied. Massachusetts instituted a modern tax scheme, which respected progressivity—that the wealthy should pay more than the poor—and incorporated the valuation of personal and real property. By contrast, Virginia and South Carolina plantation owners depended heavily on slaves and had flat capitation taxes, also called poll taxes. These taxes were regressive because a disproportionate burden of state taxation was placed on poor Whites. Furthermore, they did not require any sophisticated

32 JOHNSON, RIGHTEOUS ANGER, supra note 3, at 106-08 (“the Great Compromise”).

33 Id. at 183-86 (Aside from sanctioning slavery by incorporating it in respect of taxation and representation, “[t]he new federal government was to return fugitive slaves and suppress slave insurrections, along with other internal rebellions.”).

34 Id. at 186.

35 See generally EINHORN, supra note 29, at 1.

36 Id. at 7.

37 Id. at 60-65.

38 Id. at 65-75.

39 Id. at 37-44.

40 EINHORN, supra note 29, at 37-44.
government administration to monitor personal property valuation, which would have included the valuation of individual slaves.\textsuperscript{41} The redirection of the financial burden towards poorer Whites by slave masters is inconsistent with Adam Smith’s principle that the incidence of taxes should be distributed according to wealth. Einhorn believes political conservatives propelled this tradition.\textsuperscript{42} As colonies independent of each other, these distinctions are merely interesting; however, the differing tax schemes, ethos, and interests relating to slavery had to be addressed when attempting to unite as States.

By 1787, the Articles of Confederation had proven to be a failure specifically because a viable means for the federal government to pay the revolutionary war debt was not advanced in the document. Non-payment of this war debt would leave the fledgling country vulnerable to renewed attacks.\textsuperscript{43} When the federal government demanded sums from the States to pay the debt, i.e., requisitions, the States either refused or otherwise failed to comply.\textsuperscript{44} The Articles of Confederation did not provide a means for levying upon the States’ property or alternatives to requisitions for revenue-raising.\textsuperscript{45} Even in the midst of rebellion against the British, the States poorly funded the Revolutionary War and financially ignored George Washington and his armies several times.\textsuperscript{46} When Rhode Island vetoed a federal impost tax on exports in 1781, the impotence of the Articles became too apparent to ignore and too deep-seeded to simply amend.\textsuperscript{47} In 1783, New York joined Rhode Island in vetoing the federal impost.\textsuperscript{48} For the country to survive, the federal government had to become more powerful. It needed to raise revenue directly, without the States as a conduit.\textsuperscript{49} It needed, at least, the power to tax exports and imports, and possibly

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 68-69; See generally Beverly Moran, Capitalism and the Tax System: A Search for Social Justice, 61 SMU L. REV. 337 (2008).

\textsuperscript{43} JOHNSON, RIGHTEOUS ANGER, supra note 3, at 19 (“What is there to prevent an Algerine Pirate from landing on your coast, and carrying your citizens into slavery? . . . You have not a single sloop of war,” quoting Hugh Williamson of North Carolina).

\textsuperscript{44} Id. at 15.

\textsuperscript{45} Id.; see EINHORN, supra note 29, at 119 (“When the champions of the Constitution attacked the 'imbecility' of the Articles of Confederation, they were talking about these rounds of state legislative action and the power of a single state to frustrate the rest. Mostly, they were talking about the defeat of the impost.”).

\textsuperscript{46} JOHNSON, RIGHTEOUS ANGER, supra note 3, at 32. “With the end of the Continental dollar, the Army in the field survived primarily on impressments[, which are] . . . involuntary seizures from civilians with the misfortune of living within reach of the army as it moved or camped.” Id. at 37.

\textsuperscript{47} Id. at 26-27, 29, 76-77, 79 (implying that the nature of the Articles of Confederation would have required the creation of an amendment endorsed by all thirteen states and that this requirement was its undoing with the impost proposal).

\textsuperscript{48} Id. at 28.

\textsuperscript{49} Id. at 77.
collect sin taxes on the sale of “undesirable” goods.\textsuperscript{30} Thus, the committee responsible for amending the Articles of Confederation scrapped it entirely and constructed a new document. The U.S. Constitution gave the federal government considerably more power, including the power to lay excise taxes.\textsuperscript{31}

2. The 3/5ths Compromise

The Constitution could not give the federal government the power to tax without handling the controversy over slavery.\textsuperscript{52} By 1787, slavery was considered an evil on several fronts, but persisted due to the States’ drunkenness with economic advancement.\textsuperscript{53} Slavery violated moral and religious principles of the day, including the principles of “liberte,” which had enthralled colonialists and inspired the revolt against the English.\textsuperscript{54} Yet, slave labor was cheap by definition and competed well against more expensive non-propertied White labor.\textsuperscript{55} Slave labor brought down the costs of running a tobacco farm and was also used for urban occupations, such as blacksmithing or industrial work.\textsuperscript{56} Slaves outnumbered White South Carolinians and constituted forty percent of Virginians.\textsuperscript{57} The large population of Blacks frightened the Whites and compelled them to institute numerous techniques towards squelching the enslaved Africans’ want of freedom—including maiming, whipping, lynching, killing, threatening to sell children to distant slave owners.\textsuperscript{58} Despite this dynamic, representatives from South Carolina always warned that if the

\textsuperscript{30} See id. at 225-27 (discussing Hamilton’s idea for taxing imports that were considered vices and discouraged).

\textsuperscript{31} EINHORN, supra note 29, at 166; JOHNSON, supra note 3, at 75.

\textsuperscript{52} EINHORN, supra note 29, at 118 (“Regardless of whether the apportionments rested on population or wealth, they had to include decision about how to treat slaves: how to count them as persons or how to count them as property.”).

\textsuperscript{53} JOHNSON, RIGHTEOUS ANGER supra note 3, at 184-85.

\textsuperscript{54} Id. at 183-185 (stating that the meaning of “liberty” was different for different people).

\textsuperscript{55} See EINHORN, supra note 29, at 122 (“Slavery crowded out free labor.”).

\textsuperscript{56} See id. By the mid 19th century, slave-owners assigned considerable numbers of slaves to urban occupations. See George Ruble Woolfolk, Taxes and Slavery in the Ante Bellum South, 26 J. S. Hist. 180, 184-85 (1960); JOHN HOPE FRANKLIN & LOREN SCHWENINGER, RUNAWAY SLAVES: REBELS ON THE PLANTATION 33, 36-37 (1999) (describing how working conditions in urban industries were often worse than agricultural work for hired slaves, which led to an increasing number of them escaping, which would interrupt operations due to their numbers absconding).

\textsuperscript{57} EINHORN, supra note 29, at 33, 94.

\textsuperscript{58} FRANKLIN & SCHWENINGER, supra note 56, at 34-36 (describing how poorly hired slaves were treated).
institutions of slavery was at all jeopardized, creation of the union would fail. Many northerners wanted to end slavery for various reasons, but they feared that the colonies would be unable to unite economically and militarily if slavery was challenged. South Carolina and other states refused to tolerate a prohibition on slavery and feared that a Congress controlled by the northern states would tax slavery out of business.

Framers of the U.S. Constitution had to design a federal government with more power than previously under the Articles of Confederation, but without the power to end slavery. Ultimately, the goal was achieved, after serious discussion and negotiation over the federal government’s powers generally and the power to tax specifically. The Constitution does not outlaw slavery, but offers a grace period for ending the importation of slaves. This provision was agreeable even to slave states because the number of enslaved Africans had become dangerously high. The U.S. Constitution gave the federal government the power to lay excise taxes; however, confiscatory taxes on the importation of slavery were prohibited. Additionally, the federal government’s power to tax states directly by means of requisitions was retained, but an apportionment requirement was added. The issue of whether to count slaves as people or property if the government directly taxed the States under a rule of apportionment became infamously known as the 3/5ths Clause.

59 EINHORN, supra note 29, at 120 (“If it is debated, whether their Slaves are their property . . . there is an End of the Confederation,” quoting Thomas Lynch, delegate from South Carolina).

60 Id. at 142, 144-45 (describing how the Northern states compromised with the Southern states regarding taxation).

61 JOHNSON, RIGHTEOUS ANGER, supra note 3, at 184 (“In South Carolina, Anti-Federalist Rawlins Lowndes would oppose the Constitution because ‘Negroes were our wealth, our only natural resource; yet behold how our kind friends in the north were determined soon to tie up our hands, and drain us of what we had!”).

62 Id. at 185 (describing how anti-slaves states were missing during the Philadelphia Convention, which swayed the features of the Constitution to pro-slavery).

63 EINHORN, supra note 29, at 139 (quoting the U.S. Constitution language about the 3/5ths clause).

64 JOHNSON, supra note 3, at 184 (stating James Dredell’s regret over the twenty year moratorium of slavery).

65 Id. at 185 n.157 (summarizing the percentages of slaves in different states).

66 EINHORN, supra note 29, at 149, 153.

67 Id. at 145; JOHNSON, supra note 3, at 108.

68 EINHORN, supra note 29, at 138; JOHNSON, RIGHTEOUS ANGER, supra note 3, at 107-08.
Most important to this discussion is that the Framers neglected to provide the precise definition of “direct taxes.” Imagining what slaves thought “direct tax” meant is interesting because the Constitutional prohibition of unapportioned direct taxes is possible only after determining whether slaves are property or people. Plus, if Scalian textualism is utilized to determine what direct tax meant, excluding the thoughts of thousands if not millions who were the objects of the law would be odd. The Framers of the Constitution debated over how much slaves would count towards the apportionment of taxes and representation in the House of Representatives. This article asks how much slaves count under a word in the Constitution according to the meaning given by the People of the United States. Perhaps a slave’s views are relevant, but discounted to 3/5ths of a White man’s views? Reconstructing the views and history of marginalized groups is difficult and costly; however, Adrian Vermeule reminds us that deliberation requires time and effort, which must be bounded. Hopefully, the mistake of ignoring the humanity of a specific group of people in exchange for convenience will not be made again.

C. The Discussion Over the Political Importance of the Meaning of “Direct Tax”

Recently, Beverly Moran proposed that a wealth tax is more consistent with the capitalism Adam Smith envisioned when he wrote Wealth of Nations over two hundred years ago. Her proposal follows Bruce Ackerman’s position that the Direct Tax Clause, and perhaps all Constitutional provisions remotely relating to slavery, is invalid on moral grounds. Other commentators believe that the Direct Tax Clause imposes a serious limitation on the federal government’s power to tax individuals and prohibits a wealth tax or unapportioned income tax. A third position is that the Direct Tax Clause is a valid constitutional restriction, but it poses no serious restriction on the federal government’s relationship with the United States public directly and only concerns the federal government’s relationship with state governments.

Scholars and judges debate about the scope of the Constitution’s limitations on direct taxes, specifically with respect to what constitutes as a “direct tax.” Scholars agree that the constitutional requirement demanding the apportionment of all direct taxes means that, with direct taxes, each state is mandated to raise a certain amount in proportion to its representation in the national census. Furthermore, the 3/5ths Clause ends the debate

69 Moran, supra note 42, at 339-41.

70 BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 123 (1999); Ackerman, Taxation, supra note 1, at 57-58 (commenting that the direct tax was created only for the slave compromise).

71 E.g., JENSEN, supra note 3, at 25 (describing how the direct tax apportionment rule made direct taxes and unapportioned income taxes more difficult to implement, especially after the Pollock decision).

72 Johnson, Fixing the Constitutional Absurdity, supra note 1, at 297; Francis R. Jones, Pollock v. Farmers’ Loan and Trust Company, 9 HArv. L. Rev. 198, 206, 210 (1895).

over the proper way to apportion direct taxes. Scholars also agree that apportioned direct
taxes, at least income taxes, are an irrational idea because the poorest states would be
required to tax their citizens at higher rates to satisfy the direct tax.⁷⁴ Although, the
apportionment rule can be useful politically to restrict the government’s ability to directly
tax individual wealth and income from high earners. Apportionment being a settled issue,
the controversy over the limitation relates to which taxes constitute a direct tax.⁷⁵

Over time, various commentators have argued that the Direct Tax Clause limits the
federal government’s ability to levy income tax, estate and gift tax, wealth taxes, a flat tax, or
real estate tax.⁷⁶ In the infamous Pollock opinion, the Supreme Court held 5-4 that an
income tax is a direct tax, despite the prior holding many years earlier.⁷⁷ Yet later, the
Supreme Court retreated from its tax Lochnerism by holding that estate and gift taxes were
not direct taxes subject to apportionment.⁷⁸ Thus, the Sixteenth Amendment was enacted
to reverse the Supreme Court’s decision and allow the government to tax incomes without
apportionment.⁷⁹ Recently, scholars have discussed the propriety of a tax based on held
wealth and whether such a tax would be scuttled as a direct tax in need of apportionment.⁸⁰

Bruce Ackerman of the Living or Democratic Constitution contends that a tax on
held wealth is not a direct tax because that term should be limited to the requisition of
monies directly from the States.⁸¹ The direct tax limitation was a political expedient used to
facilitate a compromise between the northern and southern states; however, the limitation
was illusory because the authority to levy direct taxes on the States was proven useless
under the Articles of Confederation due to the States’ refusal to pay and the federal
government’s lack of power to forcibly collect it. Ackerman argues that the Sixteenth

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⁷⁵ Compare Jensen, The Taxing Power supra note 2, at 5-6, with Johnson, Righteous Anger, supra note 3, at 155.

⁷⁶ Jensen, Taxation, supra note 2, at 706-07.

⁷⁷ Pollock v. Farmers' Loan & Trust Co. [hereinafter Pollock I], 157 U.S. 429, 583 (1895); Pollock v. Farmers' Loan & Trust Co. [hereinafter Pollock II], 158 U.S. 601, 618 (1895) ("[W]e are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property . . . is so different from a tax upon the property itself that it is not a direct, but an indirect, tax, in the meaning of the constitution."); Jones, supra note 72, at 198 (the Court "deliver[ed] an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one hundred years.").


⁷⁹ U.S. CONST. amend. XVI.


⁸¹ Ackerman, Taxation, supra note 1, at 57.
Amendment along with the New Deal Amendments to the Constitution declare in principle that the federal government’s economic regulatory powers are not limited in any meaningful way.82 Thus, in contrast to Calvin Johnson, Ackerman would not limit the Direct Tax Clause to requisitions, capitation, and property taxes on real estate. Ackerman would disavow the direct tax situation as anachronistic on two counts: first, its strictures have been extended beyond the intended scope; and secondly, it is irreparably tainted from being entwined with slavery.83

Relying primarily on an intentionalist argument, Calvin Johnson agrees with Ackerman’s point that the Pollock Court was completely incorrect and probably overtly political by holding inconsistently with precedent that the income tax was a direct tax.84 During the Hylton case, the Justices are assumed to have been aware of the debates and compromises of the Constitutional Convention due to their proximity in time. Yet, the Hylton Supreme Court held that the Direct Tax Clause only be extended past requisitions to those taxes which could reasonably be apportioned.85 An income tax cannot be apportioned because it would be politically ridiculous and fail the constitutional requirement of uniformity. If Congress sought to raise $1 trillion under a rule of apportionment, each state would have to produce an amount based on its percentage of the national population.86 This scheme would necessarily require a low tax rate on states with high per capita income and a high tax rate on individuals from states with a low per capita income.87 During the Civil War, Congress enacted an income tax that withstood a direct tax challenge.88 Yet the Pollock Court, operating under a renewed vigor to protect against governmental deprivations of property and economic liberty, charged Congress with two options: either approve a tax that would extremely burden poorer people generally and poorer states specifically; or scrap the idea altogether.89 Professor Johnson would like the Supreme Court to find the appropriate opportunity to reverse Pollock specifically and to certify the income tax as an excise tax on all profitable activities and occurrences, requiring only uniformity and not apportionment.90

82 Id. at 3.

83 Id. at 4-5, 51.

84 Johnson, Fixing the Constitutional Absurdity, supra note 1, at 298.

85 Hylton v. United States, 3 U.S. 171, 176 (1796).

86 Johnson, Fixing the Constitutional Absurdity, supra note 1, at 322-23.

87 Id.


89 Pollock I, 157 U.S. 429, 583-84 (1895); see also Pollock II, 158 U.S. 601 (1895).

90 Johnson, Fixing the Constitutional Absurdity, supra note 1, at 298.
Nevertheless, Eric Jensen disagrees. He does not defend the *Pollock* Court, but the Direct Tax Clause itself as an important and vital restraint on federal power. This restraint would require Congress to apportion any so-called wealth tax and navigate the furor such an apportionment regime would inspire. His contention is that, even if the Framers had no concrete conception of a direct tax’s scope, and even if the Direct Tax Clause was a straw provision to facilitate political compromise, the job of current legal practitioners is to coherently read and supply meaning to the Constitution’s provisions. The Constitution prohibits capitation taxes as well as direct taxes without apportionment. Also, at least one of the Federalist papers describes direct taxes as including requisitions, poll taxes and real estate taxes. Overall, Jensen suggests that direct taxes are taxes levied on accumulated wealth, which cannot be avoided by engaging or not engaging in a particular transaction. Furthermore, Jensen argues that the Constitution establishes a base, which can reasonably be extended by analogy to newer concepts. Stephanie Willbanks makes a similar argument in her casebook, *Introduction to the Federal Transfer Tax System*, claiming that “a tax based on the value of all property owned at death . . . would be unconstitutional as a direct tax.”

### III. How the Law Thinks About Direct Tax

The debate over the U.S. Constitution’s direct tax limitation illustrates the natural indeterminacy of words and the usefulness of more precisely delineated jurisprudential decision procedures. Words are naturally vague, ambiguous, and imperfect. Adjectives

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92 Id.

93 Id.

94 Id. at 370 (2004) (“Professor Johnson is correct, of course, that the founders didn’t understand all of the consequences of the provisions they created . . . But the appropriate response to criticisms of that sort is ‘So what? . . . We do the best we can.’”).

95 U.S. Const. art. I, §9, cl. 4, 7.

96 See *The Federalist* No. 21 (Alexander Hamilton).


98 Id.

99 WILLBANKS, supra note 24.

100 Scholars debate the degree with which this is true, with some arguing that legal terminology is fairly determinate and others believing that it is almost perfectly indeterminate. For a balanced exposition, see Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in *VAGUENESS IN NORMATIVE TEXTS* 73 (Vijay Bhatia et al. eds., 2005).
are especially problematic. Invariably those open-ended clauses include an adjective that has a different meaning to each individual. What makes protection equal? What process is due? Was the search or seizure reasonable? In the context of the income tax, how direct must the tax be for the Constitution to require congressional apportionment amongst the States by population? Nouns can also be problematic, particularly nouns naming previously inconceivable phenomena. Contemporary legal practitioners are often stymied by whether the text of law provisions extends to the modern inventions inconceivable to previous legislatures, such as modern technology and freedom of speech.

Depending on the extent to which the term, “direct tax,” is generally to be used as a proper noun, determines whether the term is to be applied to taxes inconceivable in 1787. Jensen asks whether the People of the United States would approve a Constitution expressly authorizing the unlimited taxing power of Ackerman’s construction. Although, this counter-factual question has little force because no American state or federal government of the time likely had the bureaucracy necessary to levy an income tax on national citizenry. Commentators may argue that the American government still does not have the necessary bureaucracy. Yet, pondering such an argument may be appear determinative if the federal government of 1787 truly held the known concept and viable possibility called income tax.

A. Originalist Intentionalism

Whatever meanings the slaves may have attributed to the term “direct tax,” they are unexplored under an originalist intentionalism technique, which is the practice of interpreting text by discerning the intentions of its author(s). According to intentionalists, words have no meaning outside their author’s intent.


102 ELY, supra note 13, at 38.

103 See Fjeld, supra note 101, at 162-63 (explaining how adjectives are inherently vague and open to differing interpretations as well as how these contrasting readings of adjectives have lead to frequently specifying the ‘legal definitions’ of words in modern laws). Of course some adjectives like ‘thirty-five years of age’ are more determinate than others like reasonable, due, equal, necessary, substantial, etc. Id. at 162.

104 See Fjeld, supra note 101, at 157 (remarking at how “[m]ost nouns are indefinite and need specification.”).

105 Jensen, Taxation, supra note 2, at 708.

106 See generally EINHORN, supra note 29.

107 Stanley Fish, There is No Textualist Position, 42 SAN DIEGO L. REV. 629, 649 (2005).

108 Id.
Stanley Fish argues that textualism, the practice of determining the meaning readers supply to a text, is not interpreting; it is constructing a meaning independent of the text’s original purposes. Intentionalists are only concerned with the author’s intent and thus, consult the Federalist papers, federal statutes from 1787, and other original sources to discover evidence of the Framers’ intended meanings for words in the Constitution. Thus, an intentionalist judge would likely be unconcerned about slaves’ thoughts because none were drafters of the Constitution; the slaves’ views are wholly irrelevant. Intentionalists would only consider slaves’ views if the Constitution’s authors were the People or if the Framers intended to use words most plainly understood by the People.

B. Originalist Textualism

Some, but not all, originalist textualists would consider the meaning a slave may have attributed to the term “direct tax.” Textualism emphasizes the meaning people assign to text they encounter. Justice Scalia of the Supreme Court, in particular, encourages legal deliberators to select the plain meaning. If the meaning is less than plain, the legal deliberator is encouraged to consider other sources, such as textual context, indicia of intent and purpose, and modern dynamics. Although, a chauvinistic textualist would not consider other sources and instead, choose the plainest meaning of the word even if not plain in the abstract. For example, if the abstract plain meaning of a word’s construction is understood and accepted by 75% of people, a chauvinistic textualist may still reject all forms of context and choose the meaning as understood by only 51% or even 40% of people, so long as the most popular meanings receive less support.

1. Understandings of the Ratifiers

Before a determination is made over the importance of slaves’ thoughts about the meaning of “direct tax,” textualism presents a core question that must be answered: to whom must the text be plain? Different communities will often supply different meanings to the same word. For example, the definition of income differs depending on whether the person spoken to is an economist adhering to Haig-Simons or a tax lawyer relying on Glenshaw Glass v. Commissioner. Income requires realization to one of those

109 Id.

110 SCALIA, supra note 5, at 16-18.

111 Id. at 16 (“[W]hen the text of a statute is clear, that is the end of the matter.”).

112 Smith, supra note 12, at 6-7.


individuals, but not the other. The term used for these differences between groups of people is interpretive communities, and the exact number and breadth of such communities depends on the context. Thus, textualists may differ over the importance of slaves’ thoughts about the meaning of “direct tax,” because they may be from different interpretive communities; ultimately, it is a matter of discretion.

Whether a textualist is interested in the thoughts of slaves depends on whether the deliberating textualist focuses on the understanding of the Ratifiers of the Constitution or the People living and residing in the United States at the time of ratification. Consequently, a textualist that is part of an interpretive community sympathetic to the Ratifiers’ views would ignore the views of slaves, because no slaves were ratifiers.

2. Understandings of the People

On the other hand, Justice Antonin J. Scalia’s brand of textualism does concern itself with what slaves thought “direct tax” meant. His originalist textualism emphasizes the meaning the People of the United States as a whole supply to text. According to Scalia, he does not rely on the Federalist Papers to determine the intentions of the authors of the Constitution, but to discover the meaning the People of the United States attributed to the words in the Constitution. The Federalist Papers may be the best source of meaning, but they are obviously not the only real or theoretical items of evidence.

None of the Federalist Papers were written by slaves, so it is uncertain whether the Federalist Papers represent the meaning of Direct Tax, or Liberty, or Property, or Cruel and Unusual as understood by African immigrants. African slaves came from civilizations that may or may not have had understandings of terms and concepts similar to newly-immigrated Europeans; however, many captured slaves are now known to have been part of their homeland’s aristocracy and familiar with, if not experts in, governance and law. Thus, the reason African slaves’ thoughts about the meaning of “direct tax” are unknown is more likely because they were not asked, rather than because none of them knew. Furthermore, the Federalist Papers most likely did not represent the meanings of the Constitution’s words as 18th century women understood them.

116 Although not discussing constitutional deliberation specifically, Jellum & Hricik acknowledge that the plain meaning rule admits some discretion as to which interpretive community a judge should emphasize. JELLUM & HRICIK, MODERN STATUTORY INTERPRETATION 46 (2009).

117 SCALIA, supra note 5, at 38.

118 Id.

119 Implicit in Diop’s claim that the African has a distinct culture is the understanding that it differs from others, including Europe. DIOP, supra note 16, at 148-50.

120 See, e.g., ALFORD, supra note 18, at xv (“[F]rom time to time African princes and kings had wound up as slaves.”).
This article does not suggest that the meanings of words and phrases in the Constitution as understood by African slaves should trump the understandings of newly-immigrated Europeans. Whether a difference between the views existed at all is not certain. The understanding is slowly be accepted that all the world’s legal systems, if not their cultures, have been quite syncretic for some time. Instead, this article attempts to highlight that plain meaning is inherently empirical and thus, the discovery process should include all relevant sources. Plain meaning textualism’s empirical nature encourages historical research into the lives of Africans and Africa. This research is as interesting sociologically, as it is ironic politically. Yet, this research does not by itself prefer textualism over other deliberative techniques—like intentionalism, purposivism or dynamism—in a juristic sense.

According to Justice Taney, in the Dred Scott case Sanford v. Scott, slaves were not included among the People of the United States. If he is correct, then Scalian textualism would ignore the views of the slaves; however, other Justices on the same Court disputed this claim. Through social and legal understanding, Taney is acknowledged to have been wrong; African immigrants were people of the United States, even if immoral laws of the time proclaimed the contrary.

C. Realism

Realism in the context of constitutional understanding is represented most cogently by the notion of a Living Constitution. Under this style of interpretation, judges choose the meaning of the Constitution’s words that best serves modern society. Living Constitution scholars are comfortable with the reality that the meanings of words and phrases change over time. The most radical form of living constitutionalism completely ignores the understandings and intentions of 18th century persons, regardless of their status as authors, ratifiers, or mere citizens. In a milder form, living constitutionalism or constitutional realism attempts to maintain some tether between modern meanings and original text.

1. The Living Constitution

Adherents to living constitutionalism are unconcerned with the slaves’ thoughts about the meaning of “direct tax,” or any other phrase in the Constitution. Generally, their contention is that the modern United States should not be govern based on the 18th century

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121 Scott v. Sanford, 60 U.S. 393, 404-05 (1857)
122 Id. at 531, 537-38 (DeClean Dissenting); 588-89 (Curtis Dissenting).
123 Ackerman, supra note 8, at 118-12.
124 Id. at 1801.
125 Lessig, supra note 10, at 1189; see also Ely, supra note 13, at 38-41 (contending that the structure of the U.S. Constitution exemplifies a commitment to greater participatory democracy, and that non-text based commitment should be determinative in hard cases); see also BREYER, supra note 13, at 116-17.
ideals of a euro-male-dominated, slave-holding society. Even if slaves’ thoughts were considered, judges will likely continue to emphasize the meanings understood by slave-owners. Living constitutionalists advocate that judicial opinions may legitimately reconstruct the Constitution. Consequently, the supreme law of the land is more symmetrical with the ideals of a people believing in democracy and the ability to govern themselves, as opposed to the governing ideals of some higher authority of men, such as the Founders. While living constitutionalism is credited—or discredited—with expanding the notions of privacy and equality, its focus is not on the slaves’ thoughts of the Constitution’s meaning because ultimately, it is unconcerned with what anyone in the 18th century thought.

2. Translation

Lawrence Lessig believes that judges relying on modern understandings can still be faithful to text. In some commentators’ opinions, judges must depend on original understanding to be faithful to a written Constitution; otherwise the purpose of memorializing the huge social contract is defeated. On the other hand, Lessig opines that translating the original text into modern terms does not cast constitutional deliberation adrift into the sea of judicial legislation. Words are inherently imprecise representations of shared concepts. So, Lessig believes that the trick is to be faithful to the identified concept in the text, rather than the static meaning of a word or phrase. A legal decision maker is faithful to the text’s concepts just as a translator of literary works identifies the concepts of the words in one language, and reiterates those concepts using the words of another language.

In constitutional translation, a judge first imagines the concepts that are intended to be represented by the Constitution’s words and phrases, then he reiterates those concepts using a modern understanding. For example, a constitutional does not understand


127 Ackerman, Living Constitution, supra note 8, at 1812.


129 SCALIA, supra note 5, at 38.

130 Lessig, supra note 10, at 1189-92.

131 Id.

132 Id.

133 Id.
the meaning of “liberty” as the People or Framers did. Instead, this translationist identifies the word “liberty” as an imperfect representation of the concept of personal autonomy, and then translates the word “liberty” into the current meaning of personal autonomy. To translate old words into modern parlance, a judge must have evidence and an understanding of the concepts an 18th century writing is attempting to represent. Thus, a translationist may consider African conceptions of liberty, property, or direct tax. Although, a translationist—similar to an originalist textualist or intentionalist—may also restrict his focus to the Framers’ or Ratifiers’ understanding of the concepts, which does not pertain to what slaves thought.

3. Purposivism

John Hart Ely and Stephen Breyer’s kind of constitutional purposivism possibly legitimatizes the views of modern Black people regarding the Constitution’s meaning today, but the views of slaves are ignored.134 Purposivism yields to the consequences a legislature or author intended a judge to consider.135 Whereas intentionalism is concerned strictly with meaning, purposivism differs because it focuses on consequences.136 Ely and Breyer argue that the structure of the Constitution commits us to preserving and widening our participatory democracy.137 According to the deliberative technique of purposivism, the most important consequence to consider in constitutional cases is which choice better preserves or widens participation in our governmental processes.138 In this kind of determination, the views of slaves as to direct tax or anything else are irrelevant.

D. Natural Law

Natural law stands for the proposition that law is not man-made; it precedes human-kind and comes from God or nature.139 The most difficult aspect of instituting natural law as a legal system is designing techniques that identify when legal decision makers have departed from natural law. For instance, how does one determine what natural law is in order to determine whether a departure from it has occurred? This article cannot answer that question. All that can noted here is that under the natural law paradigm, law is

134 Ely, supra note 13, at 135-6; Breyer, supra note 13, at 78.


136 Smith, supra note 12, at 37-43; Jellum & Hricik, supra note 116, at 245.

137 Ely, supra note 13, at 5-9; see also Breyer, supra note 13, at 5-6.

138 Id.

universal and binds us all. Thus, African methods of discovering the divine are just as relevant as any other method.  

IV. WHAT SLAVES MAY HAVE THOUGHT

Ignorance of non-European cultures operates in the midst of this epistemological confusion. Prior to arriving in the United States, aristocratic slaves most likely had experienced income or individual wealth taxes as well as the proper degree of governmental intrusion into individual property. In the last five thousand years, multiple African civilizations have officially respected private property in the law, including the Old Kingdom Egyptians, the great West African civilizations of Ghana, Mali and Songhai, as well as the smaller states of Kilwa, Kanem, Mossi, Benin, Kuba and Kongo. Even the self-emancipated slaves and conspirators of the Haitian revolution incorporated in their 1805 Constitution legal respect for privately held property. The possibility exists that Africa was purposely ignored. For inspiration and edification, the Constitution’s principal author James Madison relied upon Scottish philosopher and historian David Hume’s writing, Of the Origin of Government. In this writing, Hume examined numerous European republics, but excluded African ones. In another work, Hume commented that Africans were not civilized and never contributed to civilization:

I am apt to suspect the Negroes, and in general all other species of men, to be naturally inferior to the whites. There never was any civilized nation of any other complexion than white, nor even any individual eminent in action or speculation. No ingenious manufactures among them, no arts, no sciences...Such a uniform and constant difference could not happen, in so many countries and ages, if nature had not made an original distinction between these breeds of men.

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144 See generally id.

In response to this attitude towards Black people, Cheikh Ante Diop, W.E.B. DuBois, Martin Bernal, and other scholars re-present Western civilization’s evidence of African and Asiatic origins. Bernal shows specifically how Eurocentric scholars created the concept of race as a means of facilitating far-flung economic domination.\textsuperscript{146} Prior to this concept’s creation, learned people understood the origins of ancient Greece and Rome to be heavily influenced by Africa and Asia.\textsuperscript{147} Though Hume was supposed to be a great historian, he was unaware of comments by Greek historians like Lucian claiming that “[e]thiopians [Nubians], ‘being in all else wiser than other men,’ invented astrology and taught it to the Egyptians.”\textsuperscript{148} Another more relevant invention was the inheritance tax, which originally was African—more specifically Egyptian.\textsuperscript{149} Contemporaneous with Hume, the Songhai Empire taxed in the style of requisitions from local governments and taxes on trade.\textsuperscript{150} Aside from revenue-raising, taxation in West Africa was a regulatory mechanism designed to maintain the price of gold high and the price of salt low, or to institute a caste system of national economic policy.\textsuperscript{151} Thus, to say that Africans had no experience with and no commentary on taxation and government is a gross misstatement.

Stating that African concepts of taxation, government, and economic liberty are irrelevant to determining the meaning of “direct tax” is regarded as correct only because the Supreme Court has deliberately deemed such views as practically or jurisprudentially out of bounds; however, this opinion does not mean these African concepts do not exist. For instance, Bruce Ackerman’s approach to the Constitution would ignore slaves’ views because his constitutional interpretive style yields to understandings of the New Deal era. By contrast, Justice Scalia’s version of text-based originalism appears to consider the views of slaves, women, and Native Americans. Yet, Adrian Vermeule and Cass Sunstein may permit judges to ignore considerations if they lack the time or expertise to analyze and evaluate. Ignoring the views of all the People may be expeditious, but certainly not excused, especially as an academic rather than jurisprudential matter.

\textsuperscript{146} See generally BERNAL, supra note 145.

\textsuperscript{147} Id.


\textsuperscript{149} WILLBANKS, supra note 24, at 3.


V. CONCLUSION

Scalian textualism is on the rise. In *United States v. Murphy*, a panel of the D.C. Circuit used Scalian textualism to hold that damages relating to mental anguish were not income within the meaning of the Sixteenth Amendment and thus, not subject to income tax. Scalian textualism stands for the idea that judges deliberating over words in the Constitution should emphasize the meaning held by the People of the United States. According to Judge Ginsburg, the author of the D.C. Circuit’s initial decision, which was reversed en banc, the People at the time of the Sixteenth Amendment’s enactment did not understand income to include mental anguish damages. Although that panel reversed itself, Judge Ginsburg’s opinion denotes the rising currency of Justice Scalia’s constitutional deliberative technique and jurisprudential teachings.

Yet, Scalian textualism is easier to describe than apply, because a determination of how the People of the United States understood a word’s meaning at the time of enactment requires research and assessment, which involves rigor, procedure, and discretion. The same word has different meanings to different people. Even if substantial symmetry exists between a word’s meanings to two people, their conceptions are unlikely to be perfectly symmetrical. Of course, the law and human cooperation generally both rely on tendencies, symmetries, and other “close-enoughs.” Thus, Scalia, the Supreme Court, and others in the practice of law examine many different types of discourse, including dictionaries, the Federalist papers, and English legal texts, to fully grasp the People’s understanding of a word’s meaning. Of course such effort would be a waste, if propertied White males with control over these discourses truly and accurately reflected the meanings understood by slaves, women, non-propertied White males, and Native Americans. This assumption is reasonable even if it is based on the uncomfortable

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153 SCALIA, supra note 5, at 23.

154 Murphy, 460 F.3d at 92.

155 Germain, supra note 152, at 187.

156 VERMEULE, supra note 15, at 178 (examining the efficiency of stopping rules in adjudicatory decision making).

157 See generally Solan, supra note 100, at 73.

158 JELLUM & HRICK, supra note 116, at 34.

159 Professor Vermeule argues that the mental and resource limitations of judges preclude their considering everything. VERMEULE, supra note 15. He does not argue specifically for privileging the views of white men.
notion that these propertied White males ultimately made the determinations as to how other people understood the words’ meanings.

Marginalized groups do not necessarily succumb to the power-brokers’ whims; they more likely inculcate within their own cultures differing meanings and understandings regarding many issues. Moreover, if a word or phrase like “direct tax” actually had no identifiably determinate meaning between propertied White males of the time, then Scalian textualism should require an exploration of the meanings held by others. To that end, this article claims that an aristocratic slave captured from a well-to-do African family would have had understood the ideas and terms of the U. S. Constitution, including the meaning of “direct tax.”

A. What a Slave Might Have Thought Direct Tax Meant

If the norm of African taxation at the time of Atlantic slavery was a system of federal requisitions with state administrations, then an aristocratic slave in the Americas would not have understood “direct tax” to include the central government’s direct levy upon an individual’s income. This proposition would support Calvin Johnson’s view that the only constitutionally required apportioned taxes are requisitions paid by state governments, which would collect the tax from their citizens in a variety of methods. Eric Jensen may view West African taxation as consistent with his argument that the People of the United States in 1791 would never have allowed the federal government such authority over individuals. This view may be true; however, the question not answered is the meaning people attributed to the idea of a “direct tax,” considering that the People of 1791 were never asked to approve federal income taxation. A look at West African taxation suggests that 18th century citizens of empires or federated states would not have been able to contemplate the idea of a federal government with a sizable enough will or administration to tax citizens individually.

In her book, American Slavery, American Taxation, Robin L. Einhorn points out that the States had varying levels of sophistication with respect to tax. Few of the States had the sophistication and manpower to implement an ad valorem property tax, with Virginia among the least modernized. The types of taxation were limited; thus, the People of the United States may not have thought an income tax levied by the federal government was even possible. In support of Johnson’s position, West African tax experiences, if deemed to be the culmination of thousands of years of African tax schemes, suggest that the term “direct tax” to an aristocratic slave could not have included income taxes levied by the

160 See generally JOHNSON, supra note 3.
161 Jensen, Interpreting the Sixteenth Amendment, supra note 1, at 372.
162 EINHORN, supra note 29, at 29.
163 Id.
federal government. Yet, a member of an interpretive community within the body of “We the People” may not have ever contemplated it.

Several reasons exist for why Professor Jensen may be unconcerned with what slaves thought “direct tax” meant. Under non-originalist constitutional jurisprudence, income tax can be considered a direct tax.\(^\text{164}\) Even some originalists would not be concerned, particularly those advocating an intentionalist approach to the Constitution.\(^\text{165}\) Moreover, even originalist textualists attempting to divine the meanings of words as the People understood them may refuse to consider the views of slaves for several reasons: slaves were not included as People of the United States at that time; slaves’ views are inadequately represented by slave masters or subsumed by the legal ethos of the day; a lack of evidence prevents a determination of what slaves thought about such matters; or the necessary time and money to investigate what slaves thought is too costly.\(^\text{166}\) Additionally, if the slaves’ views are to be considered, then such views may control in a state like South Carolina, where slaves often outnumbered Whites.\(^\text{167}\) Yet, even in that situation, a judge might discount the views of slaves by 2/5ths, in accordance with the U.S. Constitution.

The meaning slaves attributed to “direct tax” matters most under Scalia’s version of originalist textualism due to its concern with understanding of the People of the United States, which included the slave minority. In contrast, adherents to Lawrence Lessig’s translationist deliberator consider the slaves’ views to a lesser extent. A judge would identify the concepts of old texts, then translates them into modern language. Similarly, natural law theorists should be interested in the use of any style or method that identifies what Nature requires of us, including the means by which Africans recognize those duties. Neither Originalist intentionalism nor living constitutionalism considers what slaves thought “direct tax” meant at all. Neither assigns any deliberative emphasis to the understandings of the People of the United States at the time of enactment, and thus, they are unconcerned with the meanings slaves attributed to the Constitution’s words and phrases.

A failure of American history is the lack of knowledge about what slaves thought “direct tax” or any other term of the Constitution meant. This lack of knowledge is due to the collective ignorance of the American public, not the slaves. Many slaves were members of aristocratic families in the many African societies from which they were plucked. The

\(^{164}\) See generally Jensen, Interpreting the Sixteenth Amendment, supra note 1.

\(^{165}\) Jensen and Johnson’s debate mirrors Originalist Textualism versus Originalist Intentionalism, with Jensen claiming priority for what he believes are the Peoples’ understandings of the phrase Direct Tax and Johnson attempting to reconstruct the intentions of the Framers. See supra notes 1, 4, and accompanying text.

\(^{166}\) See VERMEULE, supra note 15, at 183.

\(^{167}\) EINHORN, supra note 29, at 151-52. See generally JOHNSON, RIGHTEOUS ANGER, supra note 3, at 185-86, n.157.
famous story of Equiano the African illustrates this point. Consider that African societies had been familiar with complex taxation for thousands of years, with the oldest recorded tax system have occurred in Ancient Egypt. Consider also that for several centuries the West African empires of Mali, Songhai and Ghana organized government in a quasi-federal manner. Thus, slaves captured from aristocratic environments conceivably had an understanding of taxation implementation, and direct tax specifically. If anything at all, hopefully this article inspires more investigation of and exposure to African civilizations previously and incorrectly thought to be bereft of high culture.

If historians actually discover what forcefully immigrated Africans thought of the terms and concepts in the U.S. Constitution, only the question remaining is how much these views are worth. Under Scalian textualism, these views mean something, but not necessarily much. If the Constitution is read textually, the conclusion may be that the thoughts of any particular slave about the meaning of “direct tax” would only count as 3/5ths of a White man.

In addition to illustrating judicial deliberation techniques, this article presents an interesting synthesis of legal theories with respect to formalism, realism, critical race theory, and law and economics. Scalia’s originalist textualism, the method most receptive to the views of slaves, relies on formalist justifications. However, the law is not completely autonomous and judging is not without discretion. Even the plain meaning rule requires an empirical analysis into social concepts and beliefs. Such discretion should be guided by social science, according to the early realists. Critical race theorists point out that law and the social sciences are constructed from a dominant gaze and ignore the views of the subordinated. The kind of law and economics proposed by Adrian Vermeule suggests a stopping rule against considering the views of slaves as a component of the plain meaning rule due to the time and effort required for a judge deliberate correctly—as opposed its irrelevance. With respect to slave’ views about the meaning of “direct tax,” textualism makes these view relevant, social science should inform a judge of these views, and the dominant gaze has been uninterested in such queries. Thus, the cost is too great for a judge adjudicating a case to seriously discover and consider slaves’ views.

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168 See generally CARRETTA, supra note 18.

169 See DIOP, supra note 16.

170 See generally SCALIA, supra note 5, at 25.

171 Dworkin, supra note 9, at 1249-50.

THE EXPRESSIVE PARADOX: HOW FREE SPEECH AND RACIAL MINORITY PROTEST PERPETUATE STEREOTYPES IN AMERICA

ANDREW STERNOFF*

I. INTRODUCTION

People use stereotypes to help create dominant narratives and to inform their understanding and basic principles of the functional role individual groups play within society. When individuals participate in events that deviate significantly from the traditional stereotype, people dismiss those events as atypical for the group. Active racial protest is often seen as deviating from traditional stereotypes and narratives leading observers to view the protests and protestors with skepticism. In brief, people find comfort in stereotypes because their common images are used to make sense of the world. The tragedy of this comfort is that society rejects the events and the people participating in those events that do not conform to the stereotype.

Depending on the period of American culture, African Americans have been stereotyped differently. For example, during the period of their enslavement, African Americans were portrayed as docile and obedient to allay the White society’s fears of their attempt to revolt. After emancipation, they were depicted as savages in need of domesticity and culture. Later, Blacks were characterized as passionate and talented, musically gifted and interesting. Even later still, they were stereotyped as militants, style creators, innocuous television characters, and

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1 ETHNIC NOTIONS (PBS 1987) (The film is directed by Marlon Riggs and covers the history of deep-rooted black stereotypes that were ubiquitous from the 1820’s until the Civil Rights movement).
gang members. Similarly, Mexican Americans have historically been stereotyped as banditos, greasers, lackeys, and illegal immigrants.²

The temptation is to think that countervailing texts may provide a normalizing effect on negative stereotypes because the stories and images of these texts portray characters as average or even heroic. However, this belief is simplistic; the open dialog and countervailing texts do not automatically lead to a reduction in racism. Scholars are starting to suggest that systems of free speech are positive in connection with small, clearly bounded disputes, but do not always help to correct systemic social ills such as racism.³ Furthermore, free expression may exacerbate racism because speakers are permitted to feel somewhat irresponsible for their actions.⁴ An empathic fallacy, “the belief that we can somehow control our consciousness despite limitations of time and positionality,” can easily impede efforts for reform, and create a system of free speech that ends up deepening racism, rather than correcting it.⁵

Civil rights protests have a prominent and storied past in the United States. In the first half of the 1960’s, the Supreme Court routinely and enthusiastically protected nonviolent speech particularly in the form of the “sit-in.”⁶ Tolerance of nonviolent speech fits well into the stereotype of African Americans as docile and obedient. As Derrick Bell observes, courts tend to tolerate protests if mainstream society believes that the cause is just, that the protest is relatively peaceful, that it does not occur on a sacred area, and that it does not significantly interfere with business as usual.⁷ In Letter from Birmingham Jail, Martin Luther King Jr. outlines four essential steps to an effective nonviolent demonstration: “collection of the facts to

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³ Id. at 1259.
⁴ Id. at 1258-59.
⁵ Id. at 1261.
determine whether injustices exist; negotiation; self purification; and direct action.” Bell and King put forth ideologies that fit neatly into the docile and obedient African American stereotype.

While King Jr.’s paradigm characterized demonstrations during the time of the Cox decision, the stream of race riots in the late 1960’s and other violent disturbances led to a dramatic shift in the way society viewed and treated racial protests. By the time of the Supreme Court’s 1967 decision of Walker v. City of Birmingham, protests had become more violent. A gradual shift in Supreme Court jurisprudence can be seen from tolerance of free speech to the creation of obstructions to prevent protests. Such obstructions include court rulings designating certain places as off-limits to protesters and refusing to grant review for violent protests. In Walker, the Court found that the laws used for restoring peace and order trump First Amendment protection. The stereotype of African Americans as “barbarians” returned, and the law resumed its function as a “civilizing hand” for controlling the unruly.

The tension and historical friction between permitting free speech and racial protest has resulted in the “expressive paradox.” The “expressive paradox” occurs when peaceful protests or properly filed petitions—constitutionally protected speech—do not receive any consideration, but illegal protests subjecting participants to possible legal repercussions do receive the desire attention. As a result, the notion of “interest convergence,” that Blacks only receive social advances simultaneously benefiting Whites, often necessitates active, raucous protest to convince Whites to grant concessions. This paper will demonstrate that these forces make “original

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11 See generally Cox, 379 U.S. at 559 (protesting outside a courthouse held to be off-limits).
12 Walker, 388 U.S. at 315-17.
narrative dissent” extremely difficult even in a society that ostensibly embraces and encourages free speech.

As Walker demonstrated, courts only protect speech that is nonviolent and non-disruptive.\textsuperscript{14} To be effective, civil rights leaders must risk arrest and entanglement with the legal system. As Audre Lorde once famously said, “the master’s tools will never dismantle the master’s house.”\textsuperscript{15} Consequently, protesters have been faced with the dilemma of either operating within a historically oppressive system, or demonstrating outside the system and risking arrest.

Part II of this paper examines the historically negative imagery of African Americans and Mexican Americans in society, describes a brief overview of nonviolent and disruptive civil rights protests by these racial minorities, and explains societal reaction to these protests. In addition, this part analyzes the commonly held notion that the First Amendment is a panacea for racial ills and the countervailing “realist” view that racism is indelible. Part III of this paper examines progressive tactics, such as promoting non-racist free speech and ameliorating racism and racial stereotypes through early education, legal action, lobbying, and boycotting.

Although the racial majority pays lip service to the First Amendment by encouraging minority protests, only docile and non-threatening racial protests are tolerated. When racial protests become too lively or brazen, traditional negative racial stereotypes are revealed. These stereotypes are reinforced until they ultimately guide the interpretation of the situation. This paper aims to show that active racial protests generally lead to the reinforcement of negative racial stereotypes. To resolve this predicament and maximize their effectiveness, solutions need

\textsuperscript{14} See Walker, 388 U.S. at 315-16.
\textsuperscript{15} AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES 112, 123 (2d ed. 2007).
to be subtle. Some potential tactics for resolution of this issue will be revealed in this paper, but the “expressive paradox” often frustrates any possible solutions.

II. HISTORY OF RACIAL STEREOTYPES AND DISSENT

A. African American Stereotypes

Beginning in the late 18th century, African Americans appeared in literature and theater as lazy, illiterate, and docile. Minstrel shows popularized the “comic Negro” stereotype, which depicted African Americans as utter buffoons speaking nonsense with an impossibly sanguine demeanor. Thus, the “comic Negro” stereotype vanquished any alleged Black threats invented by Whites. By the 1830’s to 1840’s, minstrel shows featuring Whites in a black face became immensely popular and further perpetuated the “comic Negro” stereotype. Characters such as Jim Crow depicted an elderly dancing Black man being impersonated by a White actor in a black face. This caricature gained increasing popularity and is potentially responsible for informing Northern White Americans about the derogatory depictions of African Americans.

By the mid-19th century, American society slightly modified the Black stereotype. In 1852, Uncle Tom’s Cabin, the abolitionist novel by Harriet Beecher Stowe was published. This book marked the beginning of the stereotype that Black men were tragic and pious, as opposed to comical and asinine. At this same time, Black women appeared as “mammies” who cooked, cleaned with alacrity, and put their white masters’ welfare above their own.

16 ETHNIC NOTIONS, supra note 1.
17 Id.
18 Id.
19 Id.
20 Delgado & Stefancic, supra note 2, at 1262-63.
21 Id.
22 Id.
23 Id.
24 Id. at 1263-64.
Americans were no longer depicted as happy-go-lucky oafs; however, they were not endowed with much substance either. During the Reconstruction era, particularly from 1860 to 1880, Black males were portrayed as bestial, sexual figures posing a risk to White women and society. During the Jim Crow era from the 1890 to 1920’s, African American stereotypes were still poor and continually depicted as threatening. D.W. Griffith’s 1915 film, Birth of a Nation, emphasizes this stereotype by portraying a feral-looking Black man chasing a White woman off a cliff.

Disheartened by racist treatment in World War I, African Americans returned home and rioted in the North. As a result, Whites resurrected the stereotype that Blacks are barbarous and uncivilized. While World War II provided a temporary respite from racism due to the need for Blacks’ service, post-World War II society produced multiple new stereotypes. African Americans involved in the civil rights movement were stereotyped as militant and impudent. Yet, other African American subsets emerged as innocuous and friendly, similar to the docile slave stereotype of the later 18th century.

Furthermore, other African Americans appeared in the media as hip, street savvy “cats,” popularized by the “Blaxploitation” film genre and characters such as Shaft. More recently,
movies such as *Menace II Society,*\(^{34}\) and television shows such as *The Wire,*\(^{35}\) portray young Black males as gang members, drug dealers, rap stars, and criminals, and their female counterparts as uneducated, teenage Black single mothers.\(^{36}\) While these stereotypes are fictitious and unfounded, they continue to pervade American media and inform people’s dominant narratives.

**B. Mexican American Stereotypes**

Mexican Americans have historically appeared in imagery as banditos, greasers, or easy-going, carefree musicians.\(^ {37}\) More recently, Mexican Americans have been stereotyped as immigrant farm workers, unable to speak English and in America illegally.\(^ {38}\) During and after the Mexican American war from 1846 to 1848, the “Western” film genre popularized the “bandito” stereotype as devious Mexican American desperados whom the white settlers heroically removed from their land.\(^ {39}\) On the heels of the “bandito” stereotype was the “greaser” and “musician-companion” stereotypes.\(^ {40}\) Similar to the stereotype of freed African American slaves in post-Civil War society, greasers were deviant thugs posing a threat to White women. In contrast, the “carefree” Mexican American was jovial and loyal, and appreciated simple things such as playing the guitar and enjoying gastronomical pleasures.

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\(^{35}\) See *The Wire* (HBO television broadcast); see also Folomi, supra note 34, at 275-76.

\(^{36}\) See *Menace II Society,* supra note 34; see *The Wire,* supra note 35.


\(^{39}\) See Pettit, supra note 37 at 26-28 (telling the story of Ned Buntline, “the most persistent early exploiter” of Mexican American images in popular fiction during the 1840’s and 1850’s).

\(^{40}\) Id. at 23-25, 39-40 (describing a stereotypical bandito and greaser in American film).
In the beginning of the 20th century, a surge of Mexicans immigrated to the United States. White Americans resented this insulation and moved to oppress these individuals. World War II brought the need for labor, which resulted in a minor reprieve of anti-Mexican American sentiment; however this negative viewpoint was not entirely abandoned. “Western” films and other media still perpetuated the “bandito,” “musician-companion,” and “greaser” stereotypes. Today, the most pervasive Mexican American stereotype is the “illegal immigrant” who fails at American societal assimilation and leaches off the system. Studies have shown that this stereotype is exceedingly pernicious because an overwhelming majority of U.S. illegal immigrants are of Mexican descent. This depiction has exacerbated racial tensions, caused the formation of anti-immigration groups—such as the Arizona Citizens Militia,—and instigated a wave of state and local anti-immigrant measures.

C. History of African American Protest

Beginning in 1955, African Americans began a series of nonviolent, “coercive” protests that took the form of organized marches, boycotts, and sit-ins. The Montgomery Bus Boycott of 1955 was an early manifestation of peaceful protest. Montgomery’s public transit system mandated segregation on their buses, with the front of the bus designated to Whites and the back

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42 See id. at 79.
43 Delgado & Stefanie, supra note 2, at 1275.
46 See BELL, supra note 7, at 541.
of the bus designated to Blacks.\textsuperscript{48} After Rosa Parks’ arrest for refusing to give up her seat to a White person, Blacks in Montgomery participated in a peaceful boycott of the local transit system for one year.\textsuperscript{49} The boycott resulted in a significant economic loss for the transit system.\textsuperscript{50} Eventually, Rosa Parks’ arrest resulted in the landmark case, \textit{Gayle v. Browder}, in which the Supreme Court upheld a district court ruling that ended segregation on city buses.\textsuperscript{51} Thus, the Montgomery Bus Boycott was an early apotheosis of effective nonviolent protest.\textsuperscript{52}

The “sit-in,” another form of effective nonviolent protest, began to take shape beginning with the Greensboro, North Carolina lunch counter sit-in of February 1960.\textsuperscript{53} Sit-ins reached the Supreme Court in \textit{Boynton v. Virginia},\textsuperscript{54} in which the Court reversed the trespassing conviction of a Black law student for peacefully refusing to leave the “Whites only” section of a restaurant.\textsuperscript{55} This decision indicated that the Court would tolerate nonviolent protest; however, racism still persisted, especially in the South.

The Court’s tolerance of nonviolent protest became more overt in the \textit{Cox v. Louisiana} decision, in which the Court overturned Reverend B. Elton Cox’s conviction of disturbing the peace, obstructing public passages, and picketing a courthouse.\textsuperscript{56} Noting that Cox had protested peacefully,\textsuperscript{57} the Court reaffirmed its prior tolerance of nonviolent protest, and expressed concern over potential violent protests.\textsuperscript{58} The Court’s strong disapproval for unruly protests continued to appear. In \textit{Brown v. Louisiana}, the Court reversed an earlier conviction of breaching the peace

\begin{footnotesize}
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\item[\textsuperscript{48}] David Garrow, \textit{Martin Luther King Jr., and the Spirit of Leadership}, 74 No. 2 J. Am. History 439 (1987).
\item[\textsuperscript{49}] FREEDMAN, supra note 47, at 86.
\item[\textsuperscript{50}] \textit{Id.} at 55.
\item[\textsuperscript{52}] Garrow, supra note 48, at 443.
\item[\textsuperscript{54}] Boynton v. Virginia, 364 U.S. 454 (1960).
\item[\textsuperscript{55}] \textit{Id.} at 463.
\item[\textsuperscript{56}] Cox v. Louisiana, 379 U.S. 536, 537, 558 (1965).
\item[\textsuperscript{57}] \textit{Id.} at 550.
\item[\textsuperscript{58}] \textit{Id.} at 554.
\end{itemize}
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for the demonstrators of a public library that forbade the entrance of African Americans. While exonerating the protesters, the Court expressed concerns that the protest occurred at a “hallowed place,” which ”bore the ugly stamp of racism“ The Court’s decisions during this period demonstrated their consideration of protesters’ tactics and venue, and their tolerance of nonviolent protest as long as a “hallowed place” was not involved.

In *Walker v. City of Birmingham*, the Supreme Court again demonstrated their growing discontent with disruptive protest. Martin Luther King Jr. and other demonstrators had been convicted of contempt for violating an injunction prohibiting scheduled marches on Good Friday and Easter Sunday. In reaffirming the conviction of King Jr., the majority studiously ignored the injunction’s unconstitutionality, and instead, specifically focused on the need to maintain order and peace. Moreover, the Court explicitly referred to the law as a “civilizing hand” that can help restore order.

After *Brown* and *Walker*, the Court clearly identified two primary functions of the law. First, the law was required to protect “hallowed places,” such as libraries, churches, and schools. Thus, the mere threat of a disruption at a library in *Brown* guided the Court’s decision accordingly. Secondly, the law was a “civilizing hand” in direct opposition to black barbarism. The Court’s *Walker* decision was a manifestation of its intention to use the law as a

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60 *Id.* at 142.
61 *Id.*
62 *Walker v. City of Birmingham*, 388 U.S. 307, 316 (1967) (“When protest takes the form of mass demonstrations, parades, or picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern”).
64 *Walker*, 388 U.S. at 320-21.
65 *Id.* at 316.
66 *Brown*, 383 U.S. at 142-43.
67 *Id.*
68 See generally *Walker*, 388 U.S. at 316.
force to restore order. Additionally, the Court appeared to tacitly balance the amount of disruption a protest caused against the significance of the wrong engendering the protest.

D. Reaction to African American Protest

Whites became more resentful towards Black protest as paranoia about the potential ramifications of protests became more widespread. Bell observed that society and the courts blamed the protesters regardless of their genuine culpability for disruptions. In a 1968 *N.Y Times* magazine article, *Nine Men in Black Who Think White*, NAACP attorney Lewis Steel observed, “White America . . . decided that demonstration and riots were synonymous.” Thus, Whites began interpreting any protest form as disruptive and riotous, if a particular economic or political interest was threatened. Moreover, the courts began considering Black boycotts as tantamount to violent protests, similar to their view of early labor union boycotts. This view was certainly prevalent in the South, but Whites in the North generally sympathized more with African Americans’ plight, unless the protesting disrupted “business as usual.”

Reaction to Black protest can be divided into three parts: police; White society; and the courts. Police generally responded to protests by harassing, beating, and arresting demonstrators. White society responded through economic and physical coercion. Finally, the courts would tolerate and vindicate protesters if they were advocating a legitimate cause, and not demonstrating at a “hallowed place,” disrupting “business as usual,” or protesting violently. Thus, Blacks were “damned if they did, damned if they didn’t” because Whites left very few

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69 *Id.* at 307.
70 *See id.*
71 *Bell, supra* note 7, at 553.
73 *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).
74 *Bell, supra* note 7, at 555.
75 *See United States v. Beaty*, 288 F.2d 653, 657 (6th Cir. 1961).
protesting options. Although Blacks were somewhat discouraged, if not explicitly deterred, from conducting protests, they were taken seriously only if their protests were disruptive and resulted in possible arrest. Due to their resentment of active protest, Whites deployed and relied on stereotypes to justify the incongruity. In effect, Whites’ unresponsiveness to peaceful African American civil disobedience pushed the civil rights movement to employ more disruptive protests. Subsequently, Whites were propelled to resent any form of African American protest and to stereotype Blacks as uncivilized.

**E. History and Reaction to Mexican American Protest**

The Sleepy Lagoon incident of 1942 began a wave of racial tensions between Whites and Mexican Americans. During this incident, a Mexican boy was found dead and prosecutors avidly ensured the public’s perception of the defendants as gang members. As Whites and more-established Mexican Americans accepted this gang member stereotype racial tensions flared. Tensions spread again during the 1943 “Zoot Suit” riots of Los Angeles, which involved the targeting and beatings by American servicemen of young Mexican Americans wearing flamboyant garb. White society reacted to the “Zoot Suit” riots with shock and disgust, but concentrated their blame on Mexican Americans. The media labeled the protesters as “Mexican goon squads” and “marauding Latin gangs.” According to the dominant narrative, society’s resulting depiction of Mexican Americans post-Zoot Suit riots was predictable;

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77 GREASERS AND GRINGOS, supra note 76, at 35-36.
78 A “zoot suit” refers to a style of clothing consisting of wide-legged pants and a long coat that became popular among racial minority Americans in the 1940’s.
79 GREASERS AND GRINGOS, supra note 76, at 35-36.
80 Id.
81 GREASERS AND GRINGOS, supra note 76, at 36.
Mexican Americans were commonly portrayed as gangsters, provoking and deserving beatings by American servicemen.

Two decades later, César Chávez implemented the nonviolent protest approach advocated by Martin Luther King, Jr., and accepted by White society. A prime example of Chávez’s approach was the Delano Grape Strike, beginning in 1965 and lasting over five years. The United Farm Workers (UFW), a mix of Filipino and Mexican American laborers led by César Chávez, were unhappy with unequal pay and thus, performed a series of nonviolent protests against the California table grape growers. Chávez began in 1966 with a combination of marches and boycotts, conducted his own hunger strike in 1968, and finally ended the strike with a collective bargaining agreement between the UFW and grape growers in 1970. Chávez’s nonviolent, pious tactics earned him acceptance from White society, and the support and friendship of Robert F. Kennedy and a number of Hollywood figures.

In the late 1960 and 1970’s, the “Brown Berets” formed and started to model their behavior based on the “Black Panthers” movement. The “Brown Berets” movement took shape after the 1968 East L.A. Walkouts. For this event, the Brown Berets organized the walkouts of Chicano high school and college students from their schools to protest unequal schooling conditions and violations of Chicano civil rights. The walkouts were moderately successful and provided an impetus for pursuing further political action.

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82 STEVEN W. BENDER, ONE NIGHT IN AMERICA 9-10 (2008) [hereinafter ONE NIGHT].
83 Id.
84 Id. at 10, 14-15.
85 Id. at 15, 47.
86 GREASERS AND GRINGOS, supra note 76, at 49.
88 Id.
From 1968 until 1971, the Brown Berets also organized a Chicano anti-Vietnam War movement called the Chicano Moratorium.\(^89\) The anti-war movement peaked at an East Los Angeles rally in late August of 1970, when 20,000 to 30,000 protesters began marching.\(^90\) The rally began peacefully, but soon turned chaotic when police intervened, deeming the protest to be an illegal assembly.\(^91\) Police spread canisters of tear gas, arrested over one hundred protesters, injured many, and killed three.\(^92\) Some protesters began to fight back by burning stores and defiantly resisting police.\(^93\) Although police instigated the violence against the demonstrators, the media portrayal depicted the protestors initiating the incident.\(^94\)

The student organization, MEChA, has been accused of using violent tactics to demand immigration reform and academic equality.\(^95\) In 1993, the group caused $500,000 worth of damage to the UCLA campus while protesting for the creation of a Chicano studies department.\(^96\) During a 1996 protest for immigration reform, MEChA group members were allegedly caught on videotape beating Black and White protestors.\(^97\) Such actions have caused the group to be portrayed as violent and “radical."\(^98\)

In 2006, millions gathered throughout the United States to protest proposed immigration reforms.\(^99\) The proposed reforms would have designated the crime of felony to any illegal

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\(^{90}\) Id.

\(^{91}\) Id. at 73.

\(^{92}\) Id.

\(^{93}\) Id.

\(^{94}\) Id.

\(^{95}\) FoxNews.com, Bustamante Won’t Renounce Ties To Chicano Student Group (Aug. 28, 2003), http://www.foxnews.com/story/0,2933,95871,00.html (last visited April 24, 2011).

\(^{96}\) Id.

\(^{97}\) Id.

\(^{98}\) Id.

immigrant or anyone helping an illegal immigrant remain in the U.S.\textsuperscript{100} Although the protests were mainly peaceful, many protesters were angry and brandished portraits of Che Guevera and Mexican flags,\textsuperscript{101} which prompted the predictable anti-American accusations by opposing groups. One such group called the “Border Guardians” burned a Mexican flag in front of the Mexican Consulate in Tucson, Arizona.\textsuperscript{102} Many Mexican American crowd participants protested the flag-burning by amassing thousands more. Ultimately, the protest turned violent after demonstrators witnessed police arrest a girl for throwing a water bottle at a “Border Guardian” member.\textsuperscript{103} In the aftermath, many protesters were doused with pepper spray and several were arrested.\textsuperscript{104}

An examination of societal reaction to and media portrayal of Mexican American protest is helpful when discussing the expressive paradox. Society is much more sympathetic and eager to understand the cause of Mexican American discontent when viewing depictions of nonviolent Mexican American protest or gentle interactions between Mexican Americans and Whites. An example of an acceptable method to voice opinions can be seen in Figure 1, which shows the cover of Steven W. Bender’s insightful study, \textit{One Night in America}.\textsuperscript{105} Yet, when faced with an image of active Mexican American protest, White society is likely to react differently. For example, Figure 1 also includes an image of the 2006 immigration marches, which shows Mexican American protesters gathered en masse and waving Mexican flags.\textsuperscript{106} Images such the

\begin{footnotesize}
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\item\textsuperscript{100} Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109\textsuperscript{th} Cong. § 202 (2d. Sess. 2006).
\item\textsuperscript{101} Marizco, \textit{supra} note 99.
\item\textsuperscript{102} \textit{Id.}
\item\textsuperscript{103} \textit{Id.}
\item\textsuperscript{104} \textit{Id.}
\item\textsuperscript{105} \textit{ONE NIGHT, supra} note 82, cover (Figure 1).
\end{enumerate}
\end{footnotesize}
one in Figure 1 generated criticism that the demonstrators were anti-American and dangerous.107 A juxtaposition of the two aforementioned photographs illustrates how the majority is willing to tolerate nonviolent, passive protest, but will employ stereotypes when protest becomes active and disruptive.

![Figure 1](image)

**F. Native American Stereotypes and Reaction to Protests**

Early colonists came to America with a romanticized version of Indians as innocent and friendly.109 Writings from this period portrayed Indians either as “Indian Princesses” or “loyal sidekicks.”110 However, relations turned violent when Indians refused to acquiesce to settlers’ demands and vacate their land.111 Consequently, Indians were stereotyped as savages, cannibals,

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107 Id.
108 ONE NIGHT, supra note 82, used with permission.
110 Id. at 17-41.
and uncivilized beasts in both fiction and film. The “Western” film genre particularly glorified images of Indians as drunks, raiders, and volatile natives waiting to rape White women and scalp White men. After World War II, Hollywood presented the “noble savage” image, which damaged the public’s perception further. Thus, Native Americans have been stereotyped similarly to Blacks and Mexican Americans, depending on how these groups needed to fit into the dominant narrative.

Native American protest originally began as nonviolent movements and grass roots attempts at effectuating change through traditional channels. In the early 20th century, organizations such as the Society of Americans gained support from both Indians and non-Indians due to their emphasis on nonviolent protest and focus on self-determination. Similarly, the National Congress of American Indians (NCAI) won broad acceptance largely due to their dedication to conservative avenues for change, such as political pressure, media exposure, and the legal system. Though NCAI was concerned with gaining attention for their cause, a policy of non-protest was adopted and members would carry banners reading, “Indians Don’t Demonstrate.”

Unimpressed by the progress and tired of the traditional tactics used by previous activist groups, the American Indian Movement (AIM) represented an ideological change in Native American activism by employing a more aggressive approach to protest. AIM seized the Washington D.C. Bureau of Indian Affairs in 1972 and captured the town of Wounded Knee.

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114 Common Portrayals of Aboriginal People, supra note 112.
South Dakota in 1973 for seventy-one days. When the siege was over, two were dead and two was wounded. In 2004, AIM marched on Alcatraz Island to protest the imprisonment of a Native American leader. This march occurred after the previous 1968 march on the Island to declare Native Americans’ ownership of it under the Treaty of Fort Laramie. These tactics have led to the criticism that AIM is a “social militant group.”

F. The Tea Party Movement

In contrast with ethnic minority protests, the media’s portrayal of the rise of Tea Party movement has been much more magnanimous. Spurred into action by the economic recession of 2009, the Tea Party movement consists mostly of White, upper class citizens who exalt fiscal responsibility and deplore big government. The media’s portrayal of the movement has been mixed. Liberals depict members as gun-wielding zealot nationalists concerned only with abolishing taxes and refuting liberal ideology, while conservatives support the Tea Party’s firm belief in democracy and small government. The movement has conducted numerous protests and organized a convention that was held on February 4, 2010.

By most measures, Tea Party protests have been just as disruptive as minority protests.

On August 7, 2009, a New York Times article reported that a Tea Party website explicitly

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118 Id.
119 Leonard Peltier is an active AIM member, was sentenced to two life sentences in prison for the alleged murder of two FBI agents in a shootout on the Pineridge Indian Reservation in 1975. AIM has fervently protested Peltier’s conviction due to inconsistencies in the federal government’s case.
120 Treaty With the Sioux—Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, Santee, and Arapaho, 15 Stat. 65 (Apr. 29, 1868).
advocated for the use of disruptive forms of protest over President Obama’s proposed health care overhaul. As a result of this propaganda, Tea Party protestors shouted at members of Congress and conducted noisy demonstrations that led to “fistfights, arrests, and hospitalization.”\textsuperscript{124} Other protests, such as the Taxpayer March on Washington on September 12, 2009, consisted of tens of thousands of marchers at the United States Capitol (a “hallowed place”) raucously waving flags and chanting slogans.\textsuperscript{125} Additionally, conservative commentators such as Glenn Beck have used both radio and television to vociferously denounce big government and the “liberal ideology.”\textsuperscript{126}

As the Tea Party movement has gained substantial membership, a significant change in the media’s portrayal has resulted. Although most media outlets once ignored the Tea Party movement, it is being taken more seriously now. At inception, many liberal media conduits, such as MSNBC and CNN, would either not cover the movement or would portray them negatively. Currently, 35\% of Americans view the Tea Party favorably whereas only 40\% disapprove of the movement.\textsuperscript{127} Opinions of this nature have led media sources to report on the Tea Party activities more objectively. Thus, media portrayal of the mostly White, middle class Tea Party could further explain the expressive paradox by empirically demonstrating the American public’s tolerance protesting Whites over marching Blacks or flag-waving Mexican Americans.

\textsuperscript{124} Ian Urbina, \textit{Beyond Beltway, Health Debate Turns Hostile}, N.Y. TIMES, August 7, 2009.
G. First Amendment Doctrine and Race: The Theory of Original Narrative Dissent

Narratives help people to understand reality and social situations. Often, stock narratives furnish sufficient tools for comprehending daily life.128 Moreover, these familiar narratives serve as convenient mechanisms to aid in the comprehension of aberrant storylines. In this Nation, free speech is highly touted and considered to be the primary factor that distinguishes us from more oppressive countries, where the expression of minority opinions or ideas is feared. Thus, the temptation is to believe that the cure for a bad narrative, such as racism, is a better, more egalitarian one. Indeed, our First Amendment jurisprudence presupposes such a marketplace of ideas. Plainly stated, First Amendment ideals are an integral and defining characteristic of American culture; however, a myopic view believes that these ideals can serve as an elixir for deep-rooted societal problems, such as racism.129

Theologian Reinhold Niebuhr once argued, “It is hopeless for the Negro to expect complete emancipation from the menial social and economic position into which the [W]hite man has forced him, merely by trusting in the moral sense of the [W]hite race.”130 Implicitly, Niebuhr seems to suggest that Blacks need to take charge if any significant change in social position is expected. Indeed, a logical extrapolation of Niebuhr’s remarks is that Blacks need to employ non-traditional tactics. The four steps for protest in King Jr.’s Letter From Birmingham Jail may have been desirable at the time; however its ability to affect change today is dubious. Recall that only a few years later, King Jr.’s militant successors disregarded the legal system and

130 REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 252 (1932).
peaceful protest as conduits for change due to their focus on the efficacy of their protests, rather than the potential to win a vigorously fought legal battle.\footnote{131} After conducting several studies on the efficacy of demonstrations by the poor, Frances Fox Piven and Richard A. Cloward observed that the poor were less effective in effectuating change through political or legal conduits; mass disruptions proved more effective.\footnote{132} Piven and Cloward suggested that minority groups organize en masse and create a threat of insurrection, which in turn may precipitate change.\footnote{133} Piven and Cloward’s thesis gains strength when analyzing the differences in efficacy between peaceful and active Black protest.

Arguably Piven and Coward are correct to assert that “most of the time people conform to the institutional arrangements which enmesh them, which regulate the rewards and penalties of daily life, and which appear to be the only possible reality.”\footnote{134} In other words, exigent circumstances require drastic measures. During the civil rights movement, race riots and disruptive protest were plainly more effective at garnering attention than passive approaches.

Courts and society have adopted a position in regard to racial protest that has produced a difficult conundrum for African Americans and other minority groups. These groups are free to assert their First Amendment right of free speech, but courts will only protect nonviolent and innocuous speech. Moreover, society will only justify protests that are not disruptive or violent. Bell asserts, “Coercive tactics, even peaceful ones for the most justifiable cause, are deplored. The absence of an effective alternative gains only minimum sympathy for protests with disruptive potential . . . .”\footnote{135} Consequently, if Black protest is too violent, the protesters are

\begin{footnotesize}
\begin{enumerate}
\item[131] Bell, supra note 7, at 554.
\item[132] Frances Fox Piven & Richard A. Cloward, Poor People’s Movements: Why They Succeed, How They Fail xiii (1977).
\item[133] Id. at xii-xiii
\item[134] Piven & Cloward, supra note 132, at 6.
\item[135] Bell, supra note 7, at 541.
\end{enumerate}
\end{footnotesize}
viewed as barbarous, untamed, and in need of the “civilizing hand” of the law. On the contrary, if Blacks conduct passive, orderly protests, then less is accomplished, but a lower risk of ostracism exists. Thus, Whites have created the “expressive paradox,” in which minority protesters must be disruptive or violent to be heard, but are stereotyped negatively for their actions.

In *Images of the Outsider*, Richard Delgado and Jean Stefancic posit that unfettered free speech is incapable of ameliorating racism simply because bigoted speech is never recognized at the time. True change can only be accomplished after society adopts a different narrative and general perception shifts. In the mid-20th century, smoking profusely was generally accepted by the American public; however, when medical studies revealed the dangers of smoking years later, a significant decrease in the number of smokers resulted. Overall, most people are unable to remove themselves from their current reality or narrative, and diagnose a socially accepted situation as reprehensible when it helps their understanding of the world. Consequently, regardless of how much free speech is involved with the issue of racism, only small progress can occur while the potential for exacerbating the problem still looms.

Furthermore, the assertion that traditional First Amendment doctrine can be used for racial reform encourages members of the free marketplace to consider themselves as *sui generis*, or acting without regard for other’s feelings. Stereotypes are latently encouraged and protected as free speech because they can be used with relative impunity. In his essay *Repressive Tolerance*, philosopher Herman Marcuse argues that repressive free speech should not be tolerated due to its marginalization of minorities’ voices. A logical implication of Marcuse’s

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136 Delgado & Stefancic, *supra* note 2, at 1277-78.
thesis is to revise some of the protection afforded racially-charged speech due to its ability to encourage people to act amorally and without sensitivity to racial concerns.

In addition, minorities are often depicted negatively and their speech does receive much credibility. An unfounded, persistent stereotype can potentially influence a person’s racial understanding more than hearing words directly from a person’s mouth. Absolute free speech can definitely magnify racism and thus, is not a solution to ending or mitigating racism the problem. Moreover, the expressive paradox can make “original narrative dissent” extremely difficult, if not impossible. Whites tacitly encourage unfettered free expression, but only tolerate passive, non-disruptive speech. Whites preclude ethnic minority protesters from deviating beyond the dominant narrative and making their own contribution to the primary narrative; subsequently, limited avenues of expression exist. Minorities must fit squarely into the dominant narrative or be subjected to the depiction of rabble-rousers or brutes.

III. POSSIBLE APPROACHES TO MITIGATING RACISM

Assuming Bell’s notion of racial realism138 is correct and racism is so firmly entrenched in society that complete abrogation is impossible, effective measures must be sought at least to mitigate the racism. The First Amendment prohibits state governments from censoring or restricting racist speech. Perhaps private agreements with media outlets—such as Hollywood and publishers—would mitigate the bigoted speech. Yet, these agreements would be voluntary and possibly difficult to achieve because participants would need to be convinced to censor

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138 Derrick Bell, Racial Realism, 24 CONN. L. REV. 363, 373-74 (1992) (defining racial realism as a “mind-set or philosophy [which] requires us to acknowledge the permanence of our subordinate status. That acknowledgement enables us to avoid despair, and frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.”).
themselves and possibly eliminate popular content. An active approach to counteracting racism would need to be seen as a progressive measure that is viewed favorably by the general public.

Constructing countervailing narratives could be another approach to combating racism. Producing positive images with a focus on the favorable aspects of African Americans, Mexican Americans, Native Americans, and other minorities may gradually influence society’s perceptions. Considering that unfounded, overly broad stereotypes are an extremely powerful tool to influence the majority’s opinion of minorities, perhaps deliberate, insightful depictions could also prove to be equally influential. For instance, the *Mi Familia* example in Bender’s *Greasers and Gringos* provides an eye-opening narrative to the traditional negative stereotype of Hollywood.

Finally, proactive local ordinances and statutes could be another approach to mitigating racism. A Massachusetts statute imposes a $1000 fine, one-year imprisonment, or both for racist speech. Although these measures require public consensus, the abrogation of racism is worthy of public support. The threat of a fine and possible imprisonment may be an effective deterrent to bigoted speech.

IV. CONCLUSION

In conclusion, stereotypes are convenient stock stories that form the majority’s perception of events. When unorthodox episodes transpire, such as disruptive minority protests, people default to negative stereotypes to help them understand the incidents. Furthermore, society has

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139 *Greasers and Gringos*, supra note 76, at 169 (noting that “determining an effective means to eliminate and to counteract media and societal stereotypes is daunting”).

140 *Id.* at 187-88. The film follows Jose Sanchez as he leaves Mexico on foot, works as a gardener in the U.S., marries, and raises six children. The film then documents the varying lives each of Sanchez’ children decide to lead.

created an “expressive paradox,” by encouraging minorities to exercise free expression and simultaneously tolerating only passive, nonviolent speech. Subsequently, ethnic groups such as African American, Mexican Americans, and Native Americans are unable to deviate from the normal storyline or to effectuate their original narrative dissent. Lastly, progressive measures—such as voluntary agreements, countervailing depictions, or local ordinances—need to be implemented to mitigate racism because racial realism makes the eradication of racism difficult, if not impossible. Although the expressive paradox makes the effectiveness of these measures formidable, they could be a positive step forward in the ongoing battle against racism.
THE MISMATCH HYPOTHESES IN LAW SCHOOL ADMISSIONS†

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WITH

CHIA-YI CHIU & ANN GALLAGHER

I. INTRODUCTION

To fully understand the mismatch hypotheses, proper analysis must be given in two key ways. First, one must examine the following: the strength of the evidence pertaining to the benefits and detriments of attending an elite law school; how an evaluation of student-school match can help shape a broader perspective on admission practices; and the connection between those practices. Second, one must comprehend what are the real benefits of attending an elite law school.¹ If highly qualified students truly receive an academic boost from attending an elite

† The research contained in this article partially supported by the Law School Admission Council (LSAC). The results and conclusions expressed herein are strictly those of the authors and do not represent those of LSAC.

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¹ Elite law schools are typically defined as those with the lowest selection rates, the highest average undergraduate GPA and LSAT scores, and the highest peer (e.g., law school deans, lawyers, and judges) evaluations. See Theodore P. Seto, Understanding the U.S. News Law School Rankings, 60 SMU L. REV. 493, 496-505 (2007) (discussing the variables used by U.S. News to determine rank). Such schools tend to be ranked highly in research studies in media reports. For example, the U.S. News & World Report provided an overall ranking of law schools in 2010 with the top 10 schools ranging from Yale and Harvard to the University of Michigan—Ann Arbor and the University of Virginia. Best Law Schools, U.S. NEWS & WORLD REPORT, http://gradschools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings (last visited Mar. 25, 2011). While rankings vary substantially by specialty area, the more common use of the term “elite” refers to
school, then academic admission criteria are arguably related strongly to the empirical, if not intended outcomes, of such attendance. The same results are true if marginally qualified individuals are harmed by elite school attendance. For instance, students admitted to elite law schools under affirmative action criteria have academic credentials below those of students not receiving such preferences on average. The potential boost or harm resulting from this mismatch can be used to evaluate the effects of such admission policies on student performance; while in the absence of preferential admission, the match effect assesses the value added to student outcomes by elite school attendance. Considering the significant focus on the possibility of negative match effects from affirmative action in law school and undergraduate education, whether positive effects exist is also important to evaluate.


*Mismatch refers to the degree of dissimilarity of a student’s qualifications and the average level of qualifications at a particular school. Id. According to critics of affirmative action, mismatch hurts underprepared Blacks through admittance to elite schools. Id.; see also Clyde W. Summers, Preferential Admissions: An Unreal Solution to a Real Problem, 2 U. TOL. L. REV. 377, 395-97 (1970).*

*See, e.g., 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. 1491, 1524 (2002) (arguing that there is potential for attending a selective school to hurt some students and help others, and if know, then students may attend a less selective school in order to find the best “fit” for them); Richard H. Sander, Systemic Analysis of Affirmative Action in American Law Schools, 57 STAN. L. REV. 367, 368 (2004) [hereinafter Systemic Analysis of Affirmative Action] (indicating that the reason for support of affirmative action is the perceived benefit it has on minorities, however, there has never been a “comprehensive attempt to assess the relative costs and benefits of racial preferences in any field of higher education”); Richard H. Sander, Reply: A Reply to Critics, 57 STAN. L. REV. 1963, 1964-65, 1971 (2005a) [hereinafter A Reply to Critics] (evaluating significant negative differences for black law students when compared to white law students regarding graduation and bar passage, and concluding that going to an elite school through affirmative action is “mildly negative or neutral” for the student).*

*E.g., Carol Corbett Burris, Ed Wiley, Kevin Welner & John Murphy, Accountability, Rigor, and Detracking: Achievement Effects of Embracing a Challenging Curriculum as a Universal Good for All Students, 110*
question raised in this comparison is whether students learn more effectively in separate groups that are more homogenous in ability. Issues of particular importance are: how to determine the most effective educational context for gifted students; how under-prepared individuals might perform in a gifted track; and how gifted students might perform in regular tracks. A second stream of research focuses on promotion from kindergarten to first grade. This research asks whether an underperforming student benefits from retention to complete an additional year of kindergarten. Not surprisingly, the above areas of research are hotly contended and involve issues of race, ethnicity, and educational effectiveness. Mentioning these topics is intended only to bridge the related issues in law school admissions for policymakers and researchers familiar with the tracking and retention literature.

In higher education, initial student-school match has been defined as the gap between the strength of a student’s entering credentials at a particular school (A) and that of the typical student’s credentials at that school (B). The match effect is the potential increase or decrease in developed ability attributable to the difference between A and B. According to the negative

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6 See Burris et al., supra note 5, at 577.

7 See id.

8 See, e.g., Guanglei Hong & Stephen W. Raudenbush, Effects of Kindergarten Retention Policy on Children’s Cognitive Growth in Reading and Mathematics, 27 EDUC. EVALUATION & POL’Y ANALYSIS 205, 205-06 (2005) (explaining opposing views of grade retention and social promotion with a focus on “evaluating the causal effects of the kindergarten retention policy on children’s cognitive growth in reading and mathematics”); Guanglei Hong & Bing Yu, Effects of Kindergarten Retention on Children’s Social-Emotional Development: An Application of Propensity Score Method to Multivariate Multi-Level Data, 44 DEVELOPMENTAL PSYCHIATRY 407, 407 (2008) (explaining that there is no definitive answer yet as to “whether kindergarten retention is beneficial to the retained students’ social-emotional development over their elementary years”, but there are recent studies indicating that retention of kindergartners is not as beneficial as advancing to first grade).

9 Hong & Raudenbush, Effects of Kindergarten Retention Policy on Children’s Cognitive Growth in Reading and Mathematics, supra note 8, at 206.

10 See Burris, et al., supra note 5, at 577-78 (stating that “detracking with a high-track curriculum” would solve racial and socio-economic differences associated with tracking and increase educational achievement at all levels).

11 Sander, A Reply to Critics, supra note 4, at 1966.
match hypothesis, a negative gap \((A < B)\) will result in less learning than if an underqualified student had hypothetically attended an elite school \((A \approx B)\).\(^{12}\) Under the positive match hypothesis, a good match \((A \approx B)\) will result in more learning than if a highly qualified student had hypothetically attended a less elite school \((A > B)\).\(^{13}\)

Herein, the match effects for five different student populations (Native American, Asian, Black, Hispanic, and White)\(^{14}\) are gathered and analyzed to determine whether these effects provide support for the match hypotheses above with respect to law school grades, graduation, and bar passage. In conclusion, the implications of the match effects when choosing admission criteria are evaluated.

Other classifications of students could also be used to investigate the match hypotheses. If the negative match hypothesis is true, then the resulting harm is not limited to students of color, but to any student who is mismatched for any reason. The match hypotheses are not fundamentally about race or ethnicity, nor do they require explicit preferential selection.\(^{15}\)

Match hypotheses are most accurately described as expectations about the prerequisites for, and contexts of, student achievement.\(^{16}\) A number of plausible scenarios have been offered about


\(^{13}\) See, e.g., id.

\(^{14}\) See Lisa Anthony Stilwell, Lynda M. Reese & Peter J. Pashley, *Analysis of Differential Prediction of Law School Performance by Racial/Ethnic Subgroups*, LSAC RESEARCH REPORT SERIES, March 1998 at 2, available at http://www.lasc.org/LSACResources/Research/TR/tech-reports.asp. Racial/ethnic grouping is based on self-report and is used solely for the analytic purpose of examining the match hypotheses, and the unconditional existence of this grouping is neither assumed nor implied. In this paper, the adjectives Asian, Black, Hispanic, and White are used to describe student groups. Though many students are American citizens, this paper declines to make that presumption.


\(^{16}\) See id. (explaining that “[a]ny preference based on something other than student credentials can potentially lead to mismatch”).
how mismatch might translate into diminished student outcomes. Yet, preferential admissions based on race and ethnicity from affirmative action programs have been implicitly assumed to be the only way minority students can be mismatched. Clearly, affirmative action policies have led to a more diverse population of lawyers. Plus, studying the effects of racial or ethical preference is important because colorblind admissions policies may reduce this diversity. To estimate value added effects, this study will compare match effects on minorities to the prevalent category of the White race.

The following discussion begins with a description of the potential outcomes model. This model is used as methodological framework, providing a context for both the ensuing literature synthesis and the statistical methods section. Researchers examining match effects in both law school and undergraduate admissions have adopted the potential outcomes model. When applying this model to law school admissions, the core element is the counterfactual question: would a student attending an elite law school via preferential admission have learned more at a non-elite law school? Furthermore, would a student with adequate academic credentials for an elite law school have learned less at a non-elite law school? The former

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17 See, E.g., Rothstein & Yoon, What Do Racial Preferences Do?, supra note 12, at 651-52 (summarizing methods in the article used to determine how the mismatch hypothesis affects Black students’ admission to law school).
18 Barnes, supra note 15, at 1767.
19 Id. at 1769.
21 Wilkins, supra note 20, at 1960-61.
23 Id.
24 E.g., Rothstein & Yoon, What Do Racial Preferences Do?, supra note 12, at 677-79 (discussing Black-White gaps in average outcomes and the importance of focusing on “the causal effects of schools of different types on their students”); Sigal Alon & Marta Tienda, Assessing the “Mismatch” Hypothesis: Differences in College Graduate Rates by Institutional Selectivity, 78 SOC. EDUC. 294, 296-300 (2005) (... probably need a parenthetical here – I have no idea what to say though ...).
question has attained prominence in legal education research, but a number of other studies address the negative match hypothesis more broadly. Our research has not found any studies focusing on the positive match effect and the associated implications for admission criteria.

Two law school admissions studies are purported to decisively refute the negative match hypothesis. Ho carried out an exact multivariate matching analysis to estimate match effects.\textsuperscript{25} The current analysis differs in three important ways. First, Ho reported match effects solely for Black and White students.\textsuperscript{26} The following study also considers match effects on Hispanic and Asian students. Second, Ho obtained match effects only for adjacent tiers of law schools.\textsuperscript{27} This methodological choice results in a severe restriction of range for quantitative variables, law school eliteness (measured by tier), and a reduced sample size.\textsuperscript{28} Third, Ho matched students within each category of race, using three variables: sex, law school admission test (LSAT) score, and undergraduate grade point average (GPA).\textsuperscript{29} In the following paper, nonequivalence is controlled by using at least ten matching variables. In addition, the full elite-school sample size is retained through multiple imputations for missing data.\textsuperscript{30} As noted by Sander, Rothstein and Yoon also performed an analysis of mismatch, but they estimated the treatment effect using only

\begin{footnotesize}
\textsuperscript{26} \textit{Id.} at 2003.
\textsuperscript{27} \textit{Id.} at 2003 (Ho did not report full sample sizes, but instead reported the sizes of overlapping sets, for example law school tier 1 v. 2, or tier 2 v. 3, etc.).
\textsuperscript{28} \textit{Id.} at 2001. “An extension of my analysis that controls for a wider range of variables, thereby making this assumption more believable, further indicates that there is no evidence for the Sander hypothesis.” \textit{Id.}
\textsuperscript{29} \textit{Id.} at 2002.
\textsuperscript{30} Contra Daniel E., \textit{Evaluating Affirmative Action in American Law Schools: Does Attending a Better Law School Cause Black Students to Fail the Bar?} (Mar. 9, 2005), available at http://people.iq.harvard.edu/~dho/research/sander.pdf [hereinafter \textit{Evaluating Affirmative Action}]. The analysis in this paper was performed on a single imputed data set in two steps, taking into account missing data. First, Ho obtained a matched data set with propensity scores, estimated using 180 covariates (Table 2 at 11). Next, Ho performed a logistic regression analysis, (at 9-10) carried out within each tier for determining the ATT tier effect. Only results for the Black students were provided. Estimated effects are graphed with confidence intervals, rather than reported, and causal effects are only reported for a single bar passage outcome (final bar passage). The effectiveness of matching was shown for all students, rather than Black students only. In Ho’s report, \textit{Why Affirmative Action does not Cause Black Students to Fail the Bar}, the matching analysis is reported in just two pages. Consequently, it provides few details of the analysis. 114 YALE L.J. 1997, 2003-04 (2005).
\end{footnotesize}
the upper four quintiles of students on the academic index, which is combination of LSAT scores and undergraduate GPA.\textsuperscript{31} This choice had the effect of retaining only about 25\% of the Black sample.\textsuperscript{32} For purposes of the following study, elite-school students within all racial or ethnic groups were retained, which substantially improves the problems raised above.

The following discussion maintains an important semantic distinction between a ‘match hypothesis’ and a ‘match effect.’ The phrase ‘mismatch effect’ is avoided because it encourages the presumption that the negative match hypothesis is correct. Following the presentation of the methodological framework and a brief literature review, new analyses (the positive match hypothesis) using propensity score matching are reported.

II. METHODOLOGICAL FRAMEWORK

How would a legal education be viewed, if affirmative action policies were abrogated nationwide? More specifically, “What would have happened to minorities receiving racial preferences had the preferences not existed?”\textsuperscript{33} This counterfactual question has been posed in a number of different variations and generates implications for admission practices.\textsuperscript{34} An example of a negative match hypothesis is: “If one is at risk of not doing well academically at a particular school, one is better off attending a less elite school and getting decent grades.”\textsuperscript{35} This statement, a form of the negative match hypothesis, fits well into the framework of the potential


\textsuperscript{32} Sander, Do Elite Schools Avoid the Mismatch Effect (Sept. 24, 2006), supra note 31.

\textsuperscript{33} Sander, Systemic Analysis of Affirmative Action, supra note 4, at 368.

\textsuperscript{34} Id. at 445.

\textsuperscript{35} Id.
outcomes model. The potential outcomes model, a description of which is to follow, is a well-accepted methodology for obtaining a causal effect and in this case, the match effect.

Law school performance partially depends on entering credentials. However, once a student enters law school, the proposed match effect is determined by the net gain or loss, relative to her hypothetical performance, had she attended a less elite institution. This notion is similar to a value-added or subtracted effect. A simple or naïve comparison of statistics across more elite and less elite schools is distorted by differences in incoming credentials. Students at elite schools generally have higher incoming credentials, which creates tougher competition for grades and results in a selection bias. The term, ‘selection bias,’ means the initial difference in qualifications between students enrolling in higher and lower tier schools. Whereas the term, ‘selectivity effect,’ means the net gain resulting from attending a more selective school. The following study refers to the ‘selective effect’ as the ‘elite-non-elite effect.’ This distinction is a practical way, as opposed to an ideal way, of describing the effect of attending a school with a more, as opposed to less, stringent admission criteria. When the elite-non-elite effect is estimated for students with qualifications well below their particular schools’ average student, the effect can also be interpreted as a measure of student-school match.

In any situation with a treatment group (T) and a control group (C), two potentially different outcomes exist for each individual depending on whether she receives the treatment or is part of the control group. In this study, attending an elite law school is akin to the treatment condition, and attending a non- or less-elite school is akin to the control condition. Let outcomes

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36 See id. at 423.
37 See Wilkins, supra note 20, at 1916 (explaining that bad grades are only important if they produce bad outcomes).
38 See id. at 424 (noting that “blacks tend to underperform in law school relative to their numbers”); Wilkins, supra note 20, at 1916 (the value of how well a student does depends on that student’s ultimate outcome).
40 Id.
for individual $i$ in these two cases be denoted as $Y^T$ for T and $Y^C$ for C, so the treatment effect can be expressed as $\Delta_i = Y^T_i - Y^C_i$. The average treatment effect ($ATE$)\textsuperscript{41} is then defined as the average $\Delta_i$ in the population of students in question.

The fundamental problem with estimating the $ATE$ is that for individual $i$, the only possibility is to measure the effect under one condition, either the treatment or the control condition, but not both. The $ATE$ is the “expected what-if difference in achievement that would be observed if we could educate a randomly selected student” in both an elite and non-elite school.\textsuperscript{42} In the context of this study, the $ATE$ is the average effect defined with respect to the population of students similar to those in the sample.\textsuperscript{43} In addition, as a result of observing individuals in only one group, an approximation of the treatment effect (i.e., the elite-non-elite effect) might be calculated as the simple difference in group means, which will be referred to as the naïve or uncontrolled estimate ($NTE$).\textsuperscript{44} In the context of this study, $NTE$ is the unadjusted achievement between students at elite and non-elite schools, which is strongly affected by the differential qualifications of these students. Without random assignment to comparison conditions, different kinds of systematic bias can affect the $NTE$. This systemic bias must be eliminated or reduced by using a set of matching or conditioning variables to control for initial differences between the compared groups. When conditioning is successfully accomplished, the

\textsuperscript{41} James J. Heckman, The Scientific Model of Causality, 35 SOC. METHODOLOGY 1, 18 (2006) (“The conventional parameter of interest, and the focus of many investigations in economics and statistics, is the average treatment effect (ATE).”)

\textsuperscript{42} STEPHEN L. MORGAN & CHRISTOPHER WINSHIP, COUNTERFACTUALS AND CAUSAL INFERENCE 43 (2007).

\textsuperscript{43} An important assumption of the potential outcomes model is known as the stable unit treatment value assumption (SUTVA), which posits that the treatment effect for any given individual is independent of the treatment assignment of other individuals. The SUTVA is also known as the assumption of no macro or system-level effect. See Heckman, supra note 41.

\textsuperscript{44} MORGAN & WINSHIP, supra note 42, at 46-47 (discussing how the naïve estimator can relate to the $ATE$).
ceteris paribus\textsuperscript{45} qualification for creating a valid comparison across treatment and control is satisfied. Recognizing that estimators of treatment effects require regions of common support is critical. For conditioning to be done successfully, individuals from both the treatment and control groups with similar values of the control variables must be present. The theoretical ideal is a truly randomized experiment, which occurs only when common support is built in by design. This standard is approximated more or less closely in observational studies, depending on the quality of control variables.

A second, more relevant estimator from the potential outcomes model is the \textit{average treatment effect} for the treated or \textit{ATT}.\textsuperscript{46} In this study, the \textit{ATT} estimate represents the expected impact of the treatment on a student actually assigned to the treatment group, as opposed to a randomly selected student. The corresponding counterfactual question is the “what-if difference” in achievement, which would be observed if an elite school attending student had attended a non-elite school instead. For this component, the \textit{ATT} is interpreted relative to the incoming academic qualifications of students relative to the admitting school. If the students are under qualified, the \textit{ATT} addresses what would have been the difference in performance if a less qualified student had attended a less elite law school. If the students are adequately qualified, the \textit{ATT} addresses what would have been the difference in performance if a highly qualified student had attended a less elite law school. The counterfactual represented by the \textit{ATT} is more closely related to these above questions than the \textit{ATE}. Consequently, the \textit{ATT} is the parameter of interest in this present study.

\textsuperscript{45} Heckman, \textit{supra} note 41, at 28-29 (explaining \textit{ceteris paribus} as the need to rule out variants which could otherwise interfere with a scientific or statistical formula).

\textsuperscript{46} \textit{Morgan} \& \textit{Winship}, \textit{supra} note 42, at 42 (explaining that \textit{ATT} “signif[ies] the average treatment effect for the treated”).
III. Literature Review

Within the framework of the potential outcomes model, a number of researchers have studied the effect on minority students of attending elite versus non-elite schools. The general, common theme of these studies is that outcomes for less qualified minority students who attended elite postsecondary institutions were compared to similar students who attended institutions where their credentials were closer to those of the typical student (i.e., students at less elite institutions). The match effect in these studies has been operationalized according to the potential outcomes model.

In the following discussion, the terms ‘match effect’ and ‘elite-non-elite effect’ are used interchangeably. However, a negative elite-non-elite effect can only be taken as evidence in support of the negative match hypothesis if the average student in a particular group falls below the institutional average on qualification criteria. If the examined student population is adequately qualified, the match effect can be described as a value added effect of elite law schools.

A. Undergraduate Studies of Student-School Match

Some skepticism regarding the negative match hypothesis in law school may be justified on the basis of findings from undergraduate education. Fischer and Massey found small positive student-school match effects at the individual level for Black and Hispanic undergraduates in a

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47 See infra note 24.
48 Id.
sample of students attending elite colleges and universities in terms of GPA, leaving school, and perception of college success.\textsuperscript{49} Using the same data set with a broader student sample, Massey and Mooney found no student-school match effects for retention or hours studied.\textsuperscript{50} However, they did find a small negative effect for GPA in a group of legacy students.\textsuperscript{51} Brand and Halaby determined that elite college attendance yielded occupational status benefits in terms of the ATE, but not the ATT estimator.\textsuperscript{52} Alon and Tienda estimated the elite-non-elite effect for Asian, Black, Hispanic and White students on a six-year graduation rate.\textsuperscript{53} Using an econometric modeling approach, their study found that all students tended to benefit from attending elite schools.\textsuperscript{54} Specifically, most estimated match effects were significantly positive with a few near-zero, depending on grouping and modeling variations.\textsuperscript{55} In sum, no support for the mismatch hypothesis was found.\textsuperscript{56}

In a widely cited and influential study, Dale and Krueger compared life outcomes for students who were accepted and rejected by comparable schools.\textsuperscript{57} Some of these students eventually attended more or less elite schools; thus, Dale and Krueger argued that their methodology controls for variables that may be observable to admission committees, but not statisticians.\textsuperscript{58} No effect was found for increasing eliteness for the general population of students. Students scoring relatively lower on the Scholastic Aptitude Test (SAT), compared to

\textsuperscript{51} \textit{Id.}
\textsuperscript{53} Alon & Tienda, \textit{supra} note 24, at 302.
\textsuperscript{54} \textit{Id.} at 301-03.
\textsuperscript{55} \textit{Id.} at 307.
\textsuperscript{56} \textit{Id.} at 303.
\textsuperscript{57} Dale & Krueger, \textit{supra} note 3 at 1492.
\textsuperscript{58} \textit{Id.} at 1492-93, 1495.
students with higher SATs, appeared to do no worse in salary over the course of their careers.\textsuperscript{59} With the relatively small sample of Black students, the study also concluded that Black students benefited from attending elite schools just as much as other students in terms of subsequent earnings. Dale and Krueger reported a small negative match effect for GPA, but noted that GPA is not comparable across schools.\textsuperscript{60}

Generally, none of studies found compelling evidence in favor of the negative match hypothesis. However, Alon and Tienda reported some evidence suggesting the positive match hypothesis.\textsuperscript{61} Regardless, extrapolating the lack of negative match effects to law school admissions would be unpersuasive due to the lack of comparability in the economic, social, and cognitive pressures faced by law and undergraduate students as well as the contentious nature of affirmative action research. The following studies address the negative match hypothesis in law school more directly.

B. Law School Studies of the Negative Match Hypothesis

Richard Sander brought the implications of affirmative action into clear focus. In his article, \textit{A Systemic Analysis of Affirmative Action in American Law Schools}, he conducted an extensive investigation of the negative match hypothesis in law school.\textsuperscript{62} He found that Black applicants to law school had the same probability of admission as White students with much lower admission credentials.\textsuperscript{63} Furthermore, he argued that if academic qualifications are the strongest determinants of law school grades, and if law school grades are the strongest

\begin{thebibliography}{99}

\item See id. at 1511-12.
\item See id. at 1512.
\item Alon & Tienda, \textit{supra} note 24, at 307.
\item Id. at 414, 416-17 (stating that the Black-White credentials gap lessens from top tiered to low tiered law schools. Thus, Blacks get more of a boost at the top law schools than at the lower tiered law schools because the credentials level between Whites and Black get smaller).
\end{thebibliography}
determinants of bar passage, then preferential admission—concurrent with lower qualifications—to more elite schools translates into lower bar passage rates.64

The model in Figure 1 illustrates the reasoning impliedly suggested by Rothstein and Yoon in path diagram.65 This model provides only two qualification covariates (UGPA66 and LSAT) for the sake of simplicity. The coefficients are interpreted as follows: \( \alpha \) is the increase to a Black student’s probability of acceptance—relative to Whites—due to admission preference; \( \gamma \) is the influence of the elite schools’ standards on grades; \( \beta \) is the elite schools’ effect on bar passage; and \( \delta \) is the elite schools’ effect on LGPA, which is arguably related to student learning or achievement.

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64 Id. at 447 (explaining that black have lower BAR passage rates because they have lower law school GPAs, which is because they got into more elite schools via racial preferences rather than academic qualifications).  
66 Undergraduate Grade Point Average
Figure 1

An illustration of multiple effects in the negative match hypothesis.

Note: In this conceptual diagram, a positive effect is denoted green and a negative effect red. Other effects are not considered. Racial preference (green) multiples through a positive path for the effect of Tier on bar passage (green), which results in a combined positive effect (the product $\alpha\beta$). Racial preference has a negative effect when multiplied through the Tier effect on LGPA (red) and the ensuing LGPA effect on bar passage, which results in a negative combined effect (the product $\alpha\gamma\delta$). Note that the product of two positive numbers is positive, and the product of two positives and a negative is negative.\(^{67}\)

The overall total effect also includes terms that are due to the exogenous association of race with qualifications. The coefficient $\alpha$ can be interpreted generally as the degree of preference independent of student qualifications. The original version of the negative match hypothesis

\(^{67}\) See, e.g., Richard H. Sander, Mismeasuring the Mismatch: A Response to Ho, 114 Yale L. J. 2005, 2008 (2005) [hereinafter Mismeasuring the Mismatch] (for an example of the original path diagram illustrating the negative match hypothesis).
offered by Sander is implied in this above model. In fact, this model’s argument takes the rudimentary form that if $\delta > \beta$ and $\delta > \lambda$, then lower grades dominate both qualifications and academic learning, which is reflected in the LSAT in determining bar passage.

According to Ho, this argument conflates the total effect of tier on bar passage $\beta + \gamma \delta$ with the coefficient $\beta$, as shown in Figure 1 above. To illustrate using Sander’s reported standardized coefficients, the indirect causal effect ($\gamma \delta$) of tier on bar passage (through LGPA) is -.195, while the direct effect $\beta$ is .122; so that $\beta + \gamma \delta = .073$. As Ho noted, the direct and indirect effects of tier generally appear to cancel. Ho found no evidence of a negative match effect for either White or Black students in a propensity score analysis—with the limitations noted above. In addition, Ho observed that Sander did not appear to have a control group consistent with the potential outcomes model, or his stated counterfactuals. Instead, the comparison was between “‘treatment’ Blacks (who generally receive preferences) and ‘control’ Whites (who generally do not).”

Ayers and Brooks followed a strategy similar to Dale and Krueger’s approach and

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68 See e.g., id.
69 The fourth component of Sander’s argument against affirmative action in Systemic Analysis, which is not considered herein, was that admission policies based solely on credentials (i.e., “colorblind” admission procedures) would substantially reduce mismatch and would therefore result in a greater flow of minority lawyers from American law schools. Note that a negative match effect is necessary, but not sufficient, for this argument to be true. See Sander, Systemic Analysis of Affirmative Action, supra note 4, at 367.
70 Ho, Why Affirmative Action, supra note 25, at 2000-01.
71 See Sander, Mismeasuring the Mismatch, supra note 67, at 2008; see also Otis Dudley Duncan, INTRODUCTION TO STRUCTURAL EQUATION MODELS 31-43 (1975) (Sewell Wright’s multiplication rules provide more information on direct, indirect, and total effects).
73 Id.
74 Sander, Mismeasuring the Mismatch, supra note 67, at 2006; Sander, A Reply to Critics, supra note 3, at 2005.
75 Sander, Mismeasuring the Mismatch, supra note 67, at 2006; see Rothstein & Yoon, What Do Racial Preferences Do?, supra note 12 (the idea of “control Whites” is also used).
76 Dale & Krueger, supra note 3, at 1492, 1500.
found mixed support for the negative match hypothesis. In their most compelling analysis, two groups of students were identified: students who attended their first-choice school; and students who were accepted into their first choice school, but chose to attend a presumably more lower-tiered school. This strategy was motivated by Dale and Krueger’s method and assumes that using only students accepted by their first-choice school helps control for unobserved variables contributing to student success, thus decreasing selection bias. They concluded that results for first year grades and first-attempt bar passage rates lent marginal support for the negative match hypothesis; however, their analyses of other outcomes with farther reaching significance—ultimate bar passage and graduation rates—did not. Ayres and Brooks were the first researchers to use a statistical model to estimate a parameter representing the match effect, but this effect was not the \textit{ATT}.

Rothstein and Yoon proposed the following methodology: the parameters for estimating match effects were constructed with two different statistical models—ordinary least square (OLS) regression, and instrumental variables (IV)—that would likely “understate” and “overstate” the match effect, respectively. Under both models, the match effects for law school

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78 Ayres and Brooks, \textit{supra} note 77, at 1831.
79 \textit{Id.} (noting that “Dale and Krueger matched students who reported that they were accepted by similar-quality schools”). Dale and Krueger, \textit{supra} note 3, at 1492-93, 1498.
80 \textit{See} Ayres and Brooks, \textit{supra} note 77, at 1831-32.
81 \textit{Id.} at 1837-38.
82 \textit{See generally}, Ayres and Brooks, \textit{supra} note 77. Ayres and Brooks made two separate statistical arguments. The results mentioned in this paper derive from a logistic regression model with control variables.
83 Rothstein & Yoon, \textit{Mismatch in Law School}, \textit{supra} note 31, at 2. The two models employed were ordinary least squares (OLS) regression, and instrumental variables (IV) using race as the instrument. According to Rothstein and Yoon, the OLS estimates (argued to be an \textit{ATTs}) of effect should be biased positively, while the IV effects (argued to be \textit{LATEs}) should be biased negatively. The full mathematical complexity of this argument is beyond the scope of this paper. However, the \textit{LATE} is based on a comparison of Black students who comply with affirmative action preference by attending selective schools, and White students with the same credentials who do not. Because these White students are taken as the counterfactuals, the \textit{LATE} in this case is not consistent with the potential outcomes model. \textit{Id.} at 2, 20-21.
graduation and bar passage were not significantly different from zero. 84 Similarly, the effects for post-graduation employment outcomes were positive under both models. 85 Although evidence for positive match effects was found, no discussion described how these results related to the elite law schools’ missions or the articulation of admission criteria and academic outcomes. Disconfirmation of the negative match hypothesis was the sole focus. 86

Rothstein and Yoon argued that the consistent effect for both models helps prove the disconfirmation of the negative match hypothesis. 87 Significant negative effects were initially found for one model for law school outcomes. 88 Yet, these effects diminished to near zero only after eliminating about 75% of the Black sample, to avoid potential “sample selection bias” effects. 89 Rothstein and Yoon acknowledged substantial negative effect for graduation and bar passage of Black students in the academic index’s bottom quintile; however, they also observed that the ability for this group to distinguish match effects from sample selection biases is not possible. 90

Barnes carried out a logistic regression analysis in which the logit of graduation was not assumed to be linearly related to credentials as represented by LSAT and UGPA. 91 Independent variables were limited to “student credentials, type of school, race, race by school type interactions, and student credentials school type interactions.” 92 According to Barnes, the

84 Id. at 20.
85 Id. at 22.
86 Id.
87 See id. at 2.
88 Id. at 17.
89 See id. at 3-4. Rothstein and Yoon were concerned that without preferential admission policies, many low-scoring Black students would not be admitted to any law school. They noted that such students might have lower unobserved qualifications than White students with similar observed qualifications. Id. at 23. In order to eliminate this potential source of selection bias, they reanalyzed the top four quintiles of students based on the academic index, which in turn eliminated 80% of the Black Bar Passage student sample. Id. at 20; see Rothstein and Yoon, What Do Racial Preferences Do?, supra note 12, at 674-75, 705.
90 Rothstein and Yoon, Mismatch in Law School, supra note 31, at 23.
91 Barnes, supra note 15, at 1774.
92 Barnes, supra note 15, at 1776, n. 60.
mismatch degree can be determined by comparing Black and Hispanic students to similar White students at mid-range law schools.\textsuperscript{93} She found positive match effects for elite schools ranging from 4-5\% for graduation rate\textsuperscript{94} and 1-3\% for bar passage.\textsuperscript{95}

Though no evidence for the negative match hypothesis was found,\textsuperscript{96} Barnes’ analysis clearly does not conform to the potential outcomes model, similar to the OLS regressions of Rothstein and Yoon, Sander, and Ayres and Brooks.\textsuperscript{97} In these studies, Black students are compared to similar White students, and race is considered a treatment. To the contrary, Holland argued that “causes are only those things that could, in principle, be treatments in experiments.”\textsuperscript{98} In theory, students cannot be assigned to race categories; thus, the effects derived from a comparison among racial categories cannot usefully be described as causes. In other words, “[a]n attribute cannot be a cause in an experiment, because the notion of potential exposability does not apply to it. The only way for an attribute to change its value is for the unit to change in some way and no longer be the same unit.”\textsuperscript{99} Moreover, the limited set of independent variables used by Barnes\textsuperscript{100} and the studies cited above are highly unlikely to be adequate for estimating an effect when selectivity factors—such as motivation—play a significant role in ultimate success.

\textsuperscript{93} See Tables 1A, 2A, and 3A in Barnes, \textit{supra} note 6, at 1777, 1781, 1783.
\textsuperscript{94} Barnes, \textit{supra} note 15, at 1778.
\textsuperscript{95} Barnes, \textit{supra} note 15, at 1781 (Table 2A).
\textsuperscript{96} Barnes, \textit{supra} note 15, at 1807.
\textsuperscript{97} \textit{See generally} Barnes, \textit{supra} note 15 (all the tables in the entire article refer to her use of “logistic regression” analysis); \textit{see also} Rothstein & Yoon, \textit{What Do Racial Preferences Do?}, \textit{supra} note 12, at 694-95; Sander, \textit{Systemic Analysis of Affirmative Action}, \textit{supra} note 4, at 373; Sander, \textit{A Reply to Critics}, \textit{supra} note 4, at 1971; Ayers & Brooks, \textit{supra} note 37, at 1810 (discussing how Sander used regression analysis comparable to their own use of regression analysis).
\textsuperscript{98} Holland, \textit{supra} note 22, at 954.
\textsuperscript{99} \textit{Id.} at 955.
\textsuperscript{100} Barnes, \textit{supra} note 15, at 1775. Barnes uses three variables: race, school type, and credentials.
Williams provided a ‘distance’ framework for understanding mismatch similar to that of Fischer and Massey and Massey and Mooney. Additionally, he reviewed the methodology of Rothstein and Yoon, Barnes, and Ayres and Brooks, which were all conducted with the Bar Passage data. Williams carried out an OLS and IV analysis—roughly similar to the analyses of Rothstein and Yoon—for law school graduation and ultimate bar passage. However, he also constructed new outcome measures targeted to learning. A number of statistically significant and negative match effects were found, though only after omitting the middle two tiers from the analysis. In particular, an 8-12% mismatch effect was found for first bar passage, and a 5-10% mismatch effect for final bar passage. Williams also implemented analyses comparable to Ayres and Books with a similar result—no effect for ultimate bar passage was found. However, he found that the results of Barnes analysis could not be

101 Doug Williams, Does Affirmative Action Create Educational Mismatches in Law Schools, at 10, April 13, 2009, available at http://econ.duke.edu/~hf14/ERID/Williams.pdf; see Fischer & Massey, supra note 49, at 544 (the authors used the mismatch and stereotype threat hypothesis); Massey & Mooney, supra note 50, at 102-05 (the authors examined affirmative action, mismatch and stereotype theories).
102 Rothstein & Yoon, What Do Racial Preferences Do?, supra note 12, at 650-51 (discussing the mismatch hypothesis); Barnes, supra note 15, at 1765 (using the mismatch theory and race-based barriers theory); Ayers & Brooks, supra note 36, at 1853 (analyzing the mismatch theory).
103 Williams, supra note 101, at 24, 36, 38.
104 Williams, supra, note 101, at 6-7.
105 Id. at 30. The rationale for this methodological choice was that classifying the first four tiers as non-elite creates measurement error, which reduces the size of estimates. By eliminating the two middle tiers, this problem is ameliorated. Yet the middle two tiers most likely provide the closest-matching counterfactual controls for elite school attendance. Thus, it could be argued that this choice is just as likely to create bias as it is to reduce the effects of measurement error. Williams also carried out a “binary selective IV” analysis similar to that of Rothstein and Yoon. Williams, supra note 101, at 20; Rothstein and Yoon, Mismatch in Law School, supra note 31, at 23. It appears that the matching analysis is intended to parallel this procedure, but it is not clear which groups were matched together. There does not appear to be an analysis similar to Rothstein and Yoon’s IV analysis with latent selectivity. Williams also carried out other analyses. He used a matching procedure using region of bar examination, UGPA, and LSAT to control to corroborate the results of the IV analysis. Williams, supra note 101, at 14. Williams computed effects only for those students who attempted the bar examination.
106 Williams, supra note 101, at 30.
107 See Ayers & Brooks, supra note 36, at 1853 (stating that “ending affirmative action will not cure the bar passage deficit”).
replicated. Finally, Williams concluded that evidence from the Bar Passage data mostly likely supports the negative match hypothesis.

C. Summary and conclusions

Currently, minimal support exists in the literature for the negative match hypothesis in law school admission. However, several studies purporting to estimate the match effects described above are not consistent with the potential outcomes model. This inconsistency has somewhat resulted in reports of match effects that are of an incommensurate scale and that estimate different parameters. To address some gaps in the literature pertaining to initial student-school match, an extended set of match effects is reported below that was obtained with multivariate matching and that maintains a counterfactual consistent with the ATT estimator. In addition, various other studies are only critiques of Sander and do not address estimation issues. No attempt was made to review the material provided by critique studies that did not provide original analyses.

The review by Williams is a different matter. His review offers empirical criticism of several previous studies, and presents a number of negative match effects based on OLS regression that are consistent with the negative match hypothesis. In particular, several new constructs of outcome were developed, motivated by the desire to assess the human capital

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108 Williams, supra note 101, at 9; see Barnes, supra note 15, at 1807. Barnes concluded that “ending affirmative action would result in a 22.6% decrease in the number of new black law graduates, a 13.4% decrease in the number of new black lawyers and a 23% decrease in the number of black law graduates who obtain well paying jobs.” Id.

109 Williams, supra note 101, at 40.


111 Williams, supra note 101, at 3-9.
acquisition potential rather than labor market access.\textsuperscript{112} Three main methodological arguments were made. First, the study asserted that for bar passage outcomes, an analysis should be conducted only for students attempting the bar examination.\textsuperscript{113} Presumably, the concern behind this assertion is that the unconditional approach makes no distinction between students not taking the bar examination. For example, some students not taking the bar may be in good standing whereas others may have had low academic performance. A new learning measure was also constructed in which the bar examination was coded as zero for failing students and \(1/n\) for passing students (where \(n\) is the number of attempts).\textsuperscript{114} Third, an attempt was made to control for the region where the bar examination was taken due to differential passing standards.\textsuperscript{115} Finally, Williams observed that the match estimators based on the \textit{Bar Passage} data may be biased due to minority students who are not mismatched at elite law schools.\textsuperscript{116} Each of these innovations is considered in this study.

However, attention must be paid to the fact that student-school mismatch is only an initial description of the outcome of an admissions process. Consequently, match effects should not be interpreted as an average attribute of students, but as the interaction of initial student qualities with enduring institutional qualities. If mismatch occurs, it arises from both the characteristics of students and schools. Similarly, if affirmative action is utilized, it may also be an enduring operational aspect of law school rather than an opportunity limited to an admissions decision. Thus, the terms racial preference and affirmation action should not be conflated.

\begin{itemize}
\item \textsuperscript{112} \textit{Id.} at 3.
\item \textsuperscript{113} \textit{Id.} at 14.
\item \textsuperscript{114} \textit{Id.} at 14.
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.} at 39-40.
\end{itemize}
III. **Data**

Using the National Bar Passage Data, Wightman created the *LSAC National Longitudinal Bar Passage Study* for understanding the student-school match effect in law school.\(^{117}\) To protect anonymity and safeguard against sensitivity issues pertaining to the data’s use, the identity of individual law schools was omitted in the public-use data set, and cumulative grades were reported after standardization within school.\(^{118}\) To allow other researchers to study the relationship between school characteristics and student outcomes, the law schools were empirically clustered into the following seven variables: median Law School Admission Test (LSAT) score, median undergraduate grade point average (UGPA), tuition and fees, total enrollment, selectivity, minority percentage, and faculty to student ratio.\(^{119}\)

The study also conducted a cluster analysis, which “identified six naturally occurring clusters or groups of law schools, numbered 1 to 6.”\(^{120}\) Barnes described the six clusters as the following: (1) “Small Top 30 law schools;” (2) “Large Top 30 law schools,” (3) “Mid-range Public law school,” (4) “Mid-range Private law schools,” (5) “Lower Ranked law schools,” and (6) “Historically Black law schools.”\(^{121}\) The *Bar Passage Study* data was also used to estimate match effects in the studies of Sander, Ayres and Brooks, Ho, Barnes, and Rothstein and Yoon.\(^{122}\) Although this data set is over a decade old, it remains the only national data set for examining the match hypotheses.

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\(^{118}\) *Id.* at 5 (anonymity of the schools is implied).

\(^{119}\) WIGHTMAN, *supra* note 117, at 5.

\(^{120}\) *Id.* at 9.

\(^{121}\) Barnes, *supra* note 15, at 1772-73; *see supra* note 117, at 9 n.20 (the illustration shows how each cluster rates with each variable); *see also supra* note 117, at 33-34 (describing the differences between the clusters of schools).

A. Outcome Variables

Law school GPA (LGPA) provides a potential proxy means for achievement in law school, but these measures are not comparable across schools. Grades are assigned normatively within a school—such as students being graded on curve—rather than on a criterion-based scale. The model grade assigned within a school is likely to be strongly influenced by the school’s academic standards. However, raw LGPAs are not available in the Bar Passage data because these measures were standardized within schools. Due to this limitation, these measures are useful only for describing relative class rank; they do not provide measures of achievement. Nonetheless, examining the impact of elite schools on class rank is useful; thus, these variables are retained in this current study.

Other outcomes examined in this study include three dichotomous variables: graduation from law school; success on the first bar examination attempt; and success on the final bar examination attempt. Both of the bar passage variables indicated whether a student passed the bar or not. All students in the sample, not the subgroup of students who attempted the bar examination, were the basis of the determination. In addition, a new variable, adjusted final bar passage, is derived. Adjusted final bar passage takes on the values 0 and 1/n, where 0 indicates bar examination failure and n indicates the number of times required for passing. The results for LGPA variables are reported in the effect size ($d_\sigma$) or standard deviation metric.

Although working rules for the interpretation of this metric vary by field and topic, many researchers use the starting points provided by Cohen: the values $d_\sigma = .2$ is small; $d_\sigma = .5$ is

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123 See generally WIGHTMAN, supra note 117, at 5.
124 See Williams, supra note 101, at 14 (stating that “‘[a]djusted pass bar ever’ incorporates information about the number of attempts required to pass the bar; this variable takes on the value ‘$1/n$’ if the test taker passed the bar on the nth try and ‘0’ if the test taker never passed”).
Results for the bar passage variables are interpreted in the proportion difference metric with a maximum and minimum of -1.0 and 1.0, respectively. This effect size is interpreted as the difference between the proportion of elite-school students and the proportion of nonelite-school students passing the bar examination. A starting point for interpreting effect in this metric is especially challenging. However, the working rule is that an absolute value greater than $d_p = .05$ puts an effect on the radar, while $d_p = .10$ and $d_p = .15$ could be interpreted as cut-off values for moderate and large effects. In addition, effect size in any metric should be interpreted relative to its standard error and its substantive context. Thus, the above guidelines are not rigid.

B. Matching variables

In this study, the matching variables include the following: sex; LSAT score; UGPA; age; socio-economic status; the number of lawyers in a student’s family; the number of law school applications; and the student-reported importance of loans, housing, and the minority students’ presence at a law school. Once these variables were considered, additional variables did not practically contribute to group differences—such as the family’s social capital; the number of children; and the children’s gender. In fact, some of the eleven matching variables did not predict group differences at all, but were still included to describe the quality of the match.

Square and cubic terms for UGPA, LSAT, and their interactions, also did not contribute significantly to group differences. Except for the sex and socio-economic status (SES) variables, each of the primary covariates was statistically significant for at least one demographic group. Several of these covariates may be understood as proxies for unobserved variables. For instance, the number of applications a student makes (Napps) may reflect motivation as well as savvy in

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navigating a complex institutional process. The number of lawyers in the family (LawFam) may reflect unmeasured cultural capital for supporting law school study. Other variables representing proxies for unobserved variables may be the following: the importance of school reputation (ImpRep); housing (ImpHousing); and the number of minority students at a school (ImpMin).

The fact that admissions committees have access to variables unobservable to researchers is a key issue in determining match estimates. Thus, these unobservable, success-related variables are more likely to be available to students admitted to elite schools. If these variables cannot be controlled, the performance of elite school students will probably be overestimated, which leads to positive bias and a lower likelihood of discovering the possible existence of negative match effects.

C. Missing data

The Bar Passage Study data set contains some incomplete student records. The study may provide a student’s first-year LGPA, but no cumulative LGPA for that student. Rather than deleting these individual cases as all previous studies had, a value was imputed for the missing value to retain the maximum possible sample size. Missing values in this study were imputed using the EMB, an EM algorithm, method as implemented in the R software module Amelia II. Statistical estimates and standard errors were obtained using five imputations. An examination of the results revealed that the imputation process increased the error variance by about 30%.

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126 WIGHTMAN, supra note 117, at 5.
127 Id. at 8.
When studying admissions, missing data is a complex issue with respect to measuring initial or final bar passage because not all students attempt the examination. Thus, the “missing” value is missing structurally as oppose to the inability to collect information not in existence. Students not attempting the bar examination may differ in qualities, and may differ from students who take the examination and fail.\footnote{Williams, supra note 101, at 13 (stating that students who choose not to take the bar examination and those who fail the bar examination are often grouped together, but “it is doubtful that these two [groups of] individuals have achieved the same amount of learning”).} For a dichotomous indicator, all of the previous scenarios are treated as a “zero;” however, with missing value imputation, both structural and nonstructural zeros are predicted by the other background variables present for a student with missing values.

Distinctions can be made between imputations. The structural bar passage zeros for low performing students are likely to be nearer to zero based on entering credentials, the need for loans, and other variables. The corresponding zeros for students leaving law school in good standing are likely to be nearer to one. While distinctions should be made, simply deleting students not attempting the bar examination ignores the possibility that an indicator may be missing, that of whether a student attempted the bar examination. This study analyzes the possibly missing data of students known to be law school graduates and to have attempted the bar examination. Imputation is also performed in this study, but much fewer values are missing: on average less than .5 values per case are missing. Given the imputation procedure, conditional pass rates are not examined. Instead, the full available sample of students in each race category is included.
V. METHODS

A number of matching algorithms are available including exact, nearest neighbor, optimal, kernel, and genetic algorithms for matching. These algorithms are used to find control individuals closely resembling a set of treatment individuals. In propensity score matching, logistic regression is typically used to estimate the probability—or propensity—that individual $i$, with a set of controls—or matching variables,—attends an elite school, where tiers 1-2 are elite and tiers 3-6 nonelite. Students with nearly identical a priori propensity of attending an elite school are considered to be comparable in the potential outcomes model framework.

In the present study, genetic matching was performed using a single match with replacement as implemented in the function `match` of the `Matching` package. According to Sekhon, genetic matching employs an automatic search technique to find a set of weights for

\[
P(D = 1 | x_i, x_{i1}, ..., x_{iK}) = \frac{\exp(\theta)}{1 + \exp(\theta)}
\]

where the linear propensity is obtained as

\[
\theta_i = \beta_0 + \beta_1 x_{i1} + \beta_2 x_{i2} + ... + \beta_K x_{iK}
\]

In the present study, Mahalanobis distance was the similarity measure based on a combination of the covariates and the linear propensity. As noted by a number of authors, propensity score matching minimizes group differences on a general factor described by a propensity score while Mahalanobis matching is effective at minimizing group differences on individual covariates orthogonal to the propensity score. Paul R. Rosenbaum & Donald B. Rubin, *Constructing a Control Group Using Multivariate Matched Sampling Methods that Incorporate the Propensity Score*, 39 AM. STATISTICIAN 33, 37 (1985). Both types of bias reduction are obtained by using the combination.


131 Paul R. Rosenbaum & Donald B. Rubin, *Constructing a Control Group Using Multivariate Matched Sampling Methods that Incorporate the Propensity Score*, 39 AM. STATISTICIAN 33, 37 (1985) (providing an example of how regressions are used in propensity score matching).

132 This approach reduces the dimensionality to a single matching criterion, which efficiently balances—albeit indirectly—on the $K$ individual $x$ variables. Given a dichotomous measure of eliteness ($D = 0, 1$), the logistic propensity is given by

133 Sekhon, supra note 130, at 6-7 (discussing how genetic matching is used in the R package Matching software).
matching variables.\textsuperscript{134} When this technique is applied to Mahalanobis distance, genetic matching provides an optimal balance between treatment and control by minimizing distributional differences.\textsuperscript{135} This study did not employ different matching techniques for theoretical reasons. Instead, the methodological choice for an algorithm was guided pragmatically by the goal of achieving the best match. The genetic matching technique was clearly superior when compared to the standard propensity technique.

\textbf{A. Estimating the Match Effect}

\textit{ATT}s were estimated within race/ethnic groups according to the potential outcomes model. In addition, \textit{ATT} estimates were obtained for elite students within a race/ethnic group with $\theta < P75(\theta) \text{ and } \theta > P75(\theta)$, where \textit{P75} designates the linear propensity $\theta$ of the overall sample, within the race category, at the 75th percentile. The matching analysis was repeated for students in each of these propensity regions. Regions of common support at low propensity values are especially interesting because the negative match hypothesis reflects students who are unlikely to be admitted to elite schools without preferences.\textsuperscript{136}

\textbf{VI. Results}

This section sets forth three aspects of the analysis used to obtain \textit{ATT} estimates. First, logistic regression coefficients are given for each group from a single imputation. Second, balance statistics are given for each group of students in the lower propensity regions. Third, the

\textsuperscript{134} \textit{Id.} at 1.

\textsuperscript{135} \textit{Id.} at 6. A number of matching algorithms are available including exact, nearest neighbor, optimal, and kernel matching. These methods use different algorithms to find a control individual that is close to a treatment individual. All methods can be used with or without replacement. Use of replacement tends to decrease bias in the treatment effect, while no replacement tends to increase precision. \textsc{Morgan & Winship, supra} note 42. We used nearest neighbor matching with a single match (with replacement) as implemented in \textsc{Matching}.

\textsuperscript{136} According to the negative match hypothesis, a negative gap ($A < B$) will result in less learning than if an under-qualified student had hypothetically attended a less elite school ($A \approx B$).
estimated $ATT$s are given for each racial/ethnic group and for each of the three propensity regions. The lower propensity region is especially relevant to the negative match hypothesis. This region was designated by the rule $\theta < P75(\theta)$ because the 75th percentile on the linear propensity roughly balanced the elite students within the four groups studied across lower and upper propensity categories. All estimates were based on combining statistics across imputations.

A. Logit Regression Propensity Scores

Logit coefficients and standard errors are provided in Table 1 below. The two strongest predictors of elite enrollment were $LSAT$ and $UGPA$, as illustrated by a comparison of estimates to their standard errors. The importance of loans, the number of applications a student submitted, and the number of lawyers in the student’s family were weaker predictors of elite enrollment and had coefficients that changed signs across racial/ethnic groups. The reported importance of loans was highest for Black students, but was slightly negative for White and Asian students. The number of applications a student submitted was most strongly related to elite school admission for Black students, and the number of lawyers in the family was surprisingly negative for all groups, except Asian students, for whom it was slightly positive.
Table 1
Logistic Regression Coefficients

<table>
<thead>
<tr>
<th>Variable</th>
<th>Asian</th>
<th>Black</th>
<th>Hispanic</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercept</td>
<td>-12.714a</td>
<td>-14.686a</td>
<td>-12.938a</td>
<td>-16.197a</td>
</tr>
<tr>
<td>Sex</td>
<td>.112</td>
<td>-.064</td>
<td>-.091</td>
<td>.056</td>
</tr>
<tr>
<td>LSAT</td>
<td>.120a</td>
<td>.178a</td>
<td>.145a</td>
<td>.169a</td>
</tr>
<tr>
<td>UGPA4</td>
<td>1.332a</td>
<td>1.338a</td>
<td>1.136a</td>
<td>1.238a</td>
</tr>
<tr>
<td>Age</td>
<td>.029</td>
<td>0.048b</td>
<td>.010</td>
<td>.038a</td>
</tr>
<tr>
<td>SES</td>
<td>.015</td>
<td>-.025</td>
<td>-.030</td>
<td>.032a</td>
</tr>
<tr>
<td>LawFam1</td>
<td>.058</td>
<td>-.106</td>
<td>-0.124</td>
<td>-.112a</td>
</tr>
<tr>
<td>Loans2</td>
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<td>.141c</td>
<td>0.080</td>
<td>-.011</td>
</tr>
<tr>
<td>Napps3</td>
<td>.113a</td>
<td>.189a</td>
<td>0.086a</td>
<td>.130a</td>
</tr>
<tr>
<td>ImpRep4</td>
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<td>.576a</td>
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<td>.595a</td>
</tr>
<tr>
<td>ImpHousing5</td>
<td>-.294c</td>
<td>-.011</td>
<td>0.077</td>
<td>-.210a</td>
</tr>
<tr>
<td>ImpMin6</td>
<td>.294b</td>
<td>-.111</td>
<td>0.233b</td>
<td>.350a</td>
</tr>
</tbody>
</table>

Notes:
1 Number of lawyers in the family, 2 Law school paid for with loans, 3 Number of law schools to which a student applied, 4 Importance of a school’s academic reputation, 5 Importance of housing availability, 6 Importance of the number of minority students at a school.

Logistic regression coefficients obtained for one imputation:
a p<.001, b p<.01, c p<.05

Across all groups, the coefficients for LSAT, UGPA, age, number of applications, and importance of school reputation were consistently positive. Other covariates, except for SES, had at least one negative value across groups. Generally, the same pattern of coefficients was evident for all groups. As shown in Table 1, the linear correlations of the 11 covariate slopes for Asian, Black, and Hispanic students were r = .98, .93, and .96, respectively. This finding suggests that the same factors tend to affect admission to elite schools in each of the four demographic groupings examined. Furthermore, this finding demonstrates that the empirical...
selection rule involves more than \textit{LSAT} and \textit{UGPA}. Thus, statistical procedures may result in biased estimates of potential match effects if the complexity of the rule is not explained.

These results indicate that little, if any, bias reduction is obtained by balancing on sex. Thus, Ho essentially matched on only two variables (\textit{LSAT} and \textit{UGPA})\textsuperscript{137} and Williams on three variables (bar examination region, \textit{LSAT}, and \textit{UGPA}).\textsuperscript{138} Both ignored the role of other potentially predictive variables, including age, the importance of loans, law school reputation, and the number of law school applications. These other variables are important because they serve as proxies for unmeasurable variables, such as maturity, motivation, commitment to social justice, and financial stability, which may relate to success in law school.

\textbf{B. Balance}

Overall, the post-matching means for elite and matched nonelite students were similar. In Table 2, \textit{empirical CDF} differences—standardized quantile-quantile differences—are reported for students identified as $\theta < P75(\theta)$ . These eCDF statistics measure the dissimilarity of the elite and nonelite distributions on the matching variables and can be interpreted as $z$-score or effect size differences. For \textit{LSAT}, the average difference was no more than .033 in standard deviation units for Asian, Black and Hispanic students. The balance for White students was notably better on most variables due to the large pool of students attending nonelite schools. Still, none of the observed covariate differences yielded an average significance level below the nominal .05 level. The results in Table 2 demonstrate that the matching process was generally successful within each group. White students obtained low $p$-values for socio-economic status (\textit{SES}), and the importance of reputation and housing. This measure of statistical significance can be attributed


\textsuperscript{138} Williams, \textit{supra} note 101, at 14, 16. Williams’ matching analysis was intended to provide additional support for his IV estimates.
to the large sample size. A more practical measure of significance is given by the $z$-like eCDF statistic. As Table 2 shows, the eCDF statistics are generally much smaller for White students than for other groups.

Table 2

<table>
<thead>
<tr>
<th>Variable</th>
<th>Group</th>
<th>Asian</th>
<th>White</th>
<th>Hispanic</th>
<th>Black</th>
</tr>
</thead>
<tbody>
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<td>.004</td>
<td>.001</td>
<td>.010</td>
<td>.007</td>
</tr>
<tr>
<td>LSAT</td>
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<td>.028</td>
<td>.015</td>
<td>.010</td>
<td>.019</td>
</tr>
<tr>
<td>UGPA</td>
<td></td>
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<td></td>
<td>.017</td>
<td>.018</td>
<td>.018</td>
<td>.018</td>
</tr>
<tr>
<td>SES</td>
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<td>.019</td>
<td>.015</td>
<td>.028</td>
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<tr>
<td>LawFam</td>
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<td>.010</td>
<td>.010</td>
<td>.009</td>
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<tr>
<td>Loans</td>
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<td>.007</td>
<td>.007</td>
<td>.007</td>
<td>.009</td>
</tr>
<tr>
<td>ImpHousing</td>
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<td>.023</td>
<td>.019</td>
<td>.023</td>
</tr>
<tr>
<td>ImpMin</td>
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<tr>
<td>Propensity</td>
<td></td>
<td>.033</td>
<td>.022</td>
<td>.024</td>
<td>.024</td>
</tr>
</tbody>
</table>

Notes:
1 eCDF = empirical Cumulative Distribution Function (or standardized eQQ). All statistics averaged across 10 imputed data sets.
2 For the variable SEX, the average raw eQQ difference is given along with the approximate $t$ probability for equality of means.
3 $p$-values in parentheses are Kolmogorov-Smirnov bootstrapped probabilities describing the equivalence of group distributions. The idea is not to reject the hypothesis that the distributions of matching variables are the same for elite and nonelite groups. Thus, large probabilities are desirable.

One concern in the matching procedures pertains to the small size of the matched group differences, and that despite this small size, a consistent average effect exists of more lawyers in the families of students attending elite schools.
B. Match Estimates

Table 3 reports the match estimates for Asian, Black, Hispanic, and White student groups given the total number of students, the students with $\theta > P75(\theta)$, and the students with $\theta < P75(\theta)$. Parallel results are provided in Table 4 based on the sample of students attempting the bar examination. Additionally, Table 4 reports the new adjusted measure advanced by Williams, and an additional new measure based on the difference between first and final grade point average. Both of these measures are targeted to learning.

According to the match estimates provided in Table 3, Asian students have very small negative effects for first-year and cumulative LGPA. This finding indicates that Asian students tend to maintain about the same class rank in elite and nonelite schools. The overall effects for bar passage are nonsignificant and generally close to zero. However, in the lower propensity range a negative effect exists for the first bar result (-6.3%). In the upper propensity range, all estimates are close to zero. Effects classified by gender were nonsignificant. Yet, negative match effects of less than 2% were observed for males, whereas negative match effects of about 5% were observed for females. In addition, 46% of students in the upper propensity range attended elite schools, while 54% in the lower propensity range attended elite schools.

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139 The validity of matching estimates may be affected by hidden variables, and evaluating their potential impact is useful. One approach for determining how a hidden variable may change the magnitude of match estimates is to alter the set of covariates and rerun the analysis. Sometimes this approach is accomplished by adding interaction terms or, alternatively, by deleting covariates and examining the resultant change in match estimates. For this reason, sensitivity analyses were conducted by adding four select dummy indicators of region where final bar examinations were taken (Far West, Great Lakes, Northeast, and South Central). This approach had a negligible effect on match estimates.

140 Williams, supra note 101, at 48.
Table 3

Full Sample Match Estimates with Elite Group ns. LGPA results are reported as effect sizes.

<table>
<thead>
<tr>
<th>Group</th>
<th>Outcomes</th>
<th>Effects&lt;sup&gt;a&lt;/sup&gt;</th>
<th>Total</th>
<th>$\theta &gt; P_{75}(\theta)$</th>
<th>$\theta &lt; P_{75}(\theta)$</th>
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</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>$ATT$ $SE$</td>
<td>$ATT$ $SE$</td>
<td>$ATT$ $SE$</td>
<td>$ATT$ $SE$</td>
</tr>
<tr>
<td>Asian</td>
<td>1st yr LGPA</td>
<td>-.056 .103</td>
<td>.017 .170</td>
<td>-.149&lt;sup&gt;b&lt;/sup&gt; .097</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3rd yr LGPA</td>
<td>-.068 .113</td>
<td>.015 .188</td>
<td>-.151&lt;sup&gt;b&lt;/sup&gt; .092</td>
<td></td>
</tr>
<tr>
<td></td>
<td>First bar result&lt;sup&gt;d&lt;/sup&gt;</td>
<td>-.037 .041</td>
<td>.002 .055</td>
<td>-.063 .048</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Final bar result&lt;sup&gt;d&lt;/sup&gt;</td>
<td>-.010 .027</td>
<td>-.008 .030</td>
<td>-.010 .031</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Graduation&lt;sup&gt;d&lt;/sup&gt;</td>
<td>.020 .025</td>
<td>.020 .034</td>
<td>.004 .037</td>
<td></td>
</tr>
<tr>
<td>Elite n</td>
<td>477</td>
<td>221</td>
<td>256</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black</td>
<td>1st yr LGPA</td>
<td>-.365&lt;sup&gt;c&lt;/sup&gt; .089</td>
<td>-.609&lt;sup&gt;c&lt;/sup&gt; .147</td>
<td>-.223&lt;sup&gt;b&lt;/sup&gt; .121</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3rd yr LGPA</td>
<td>-.432&lt;sup&gt;c&lt;/sup&gt; .089</td>
<td>-.669&lt;sup&gt;c&lt;/sup&gt; .141</td>
<td>-.286&lt;sup&gt;b&lt;/sup&gt; .116</td>
<td></td>
</tr>
<tr>
<td></td>
<td>First bar result&lt;sup&gt;d&lt;/sup&gt;</td>
<td>-.039 .044</td>
<td>-.046 .058</td>
<td>-.063 .072</td>
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</tr>
<tr>
<td></td>
<td>Final bar result&lt;sup&gt;d&lt;/sup&gt;</td>
<td>-.012 .042</td>
<td>.014 .051</td>
<td>-.050 .077</td>
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<tr>
<td></td>
<td>Graduation</td>
<td>.023 .029</td>
<td>-.008 .039</td>
<td>.085 .056</td>
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</tr>
<tr>
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<td>263</td>
<td>165</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hispanic</td>
<td>1st yr LGPA</td>
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<td>-.143 .159</td>
<td>-.197 .109</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3rd yr LGPA</td>
<td>-.104 .099</td>
<td>-.147 .140</td>
<td>-.049 .103</td>
<td></td>
</tr>
<tr>
<td></td>
<td>First bar result&lt;sup&gt;d&lt;/sup&gt;</td>
<td>.061 .048</td>
<td>.048 .075</td>
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<tr>
<td></td>
<td>Final bar result&lt;sup&gt;d&lt;/sup&gt;</td>
<td>.004 .028</td>
<td>.019 .048</td>
<td>-.014 .037</td>
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</tr>
<tr>
<td></td>
<td>Graduation</td>
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<td>.020 .044</td>
<td>-.036 .042</td>
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</tr>
<tr>
<td>Elite n</td>
<td>428</td>
<td>211</td>
<td>217</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>1st yr LGPA</td>
<td>-.164&lt;sup&gt;c&lt;/sup&gt; .032</td>
<td>-.231&lt;sup&gt;c&lt;/sup&gt; .023</td>
<td>-.119&lt;sup&gt;c&lt;/sup&gt; .017</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3rd yr LGPA</td>
<td>-.159&lt;sup&gt;c&lt;/sup&gt; .030</td>
<td>-.241&lt;sup&gt;c&lt;/sup&gt; .023</td>
<td>-.123&lt;sup&gt;c&lt;/sup&gt; .016</td>
<td></td>
</tr>
<tr>
<td></td>
<td>First bar result&lt;sup&gt;d&lt;/sup&gt;</td>
<td>-.014&lt;sup&gt;c&lt;/sup&gt; .005</td>
<td>-.012&lt;sup&gt;c&lt;/sup&gt; .004</td>
<td>-.026&lt;sup&gt;c&lt;/sup&gt; .007</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Final bar result&lt;sup&gt;d&lt;/sup&gt;</td>
<td>-.009&lt;sup&gt;c&lt;/sup&gt; .003</td>
<td>.005 .003</td>
<td>-.019&lt;sup&gt;c&lt;/sup&gt; .005</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Graduation</td>
<td>.002 .004</td>
<td>-.005 .004</td>
<td>.015&lt;sup&gt;b&lt;/sup&gt; .006</td>
<td></td>
</tr>
<tr>
<td>Elite n</td>
<td>5479</td>
<td>3088</td>
<td>2391</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notes:

<sup>a</sup> Positive effect sizes signal an advantage to elite-school attendance. Negative effect sizes, which are predicted by the mismatch hypothesis, signal a disadvantage.

<sup>b</sup> $p < .05$

<sup>c</sup> $p < .01$
Results for dichotomous variables at the individual level are shaded. The effect size is interpreted as a difference between proportions. The effect sizes for grades are interpreted in the standard deviation metric.

For the upper propensity group of Black students in the second segment of Table 3, moderate ($d = -.61, -.67$) significant negative effects exist for first-year and cumulative LGPA. This effect indicates that Black students tend to have lower class ranks at elite schools as compared to nonelite schools. This result could be interpreted as the degree of affirmative action in admission, rather than as a consequence of affirmative action. In the lower propensity group however, a smaller effect on class ranking exists. Also in the lower region, negative effects for bar passage and a positive effect for graduation both exist, which is consistent with the OLS results of Rothstein and Yoon.\textsuperscript{141} For both the upper and lower propensity regions, negative effects for first bar results exist (-4.6% and -5%).

When broken down by gender, positive match effects were observed of about 6.5% for females in the upper propensity range, and negative effects of about 5% for females in the lower range. For males, negative effects were observed of 7-10% for those in the upper propensity range, and negative effects of about 1-2% in the lower range. All of the latter effects were insignificant.

Another mild indication that a negative match effect exists for students in the low propensity range is that the effect increases from first-year LGPA to cumulative LGPA. Though these elite-school students are approximately .22 standard deviations lower than their non-elite peers at the end of the first year, they are approximately .29 standard deviations lower at the end of law school. For Black students, 61% of students in the upper propensity range attended elite schools, while only 39% in the lower range attended elite schools.

\textsuperscript{141} Rothstein & Yoon, supra note 12, at 689-90.
In the third segment of Table 3, no significant effects exist for Hispanic students other than \( LGPA \). However, both upper and lower propensity groups show positive effects on first bar attempts. In addition, students in the lower propensity range appear to make increases, as compared to their non-elite peers, in class rank from the first to the last year of law school. These results suggest a positive match effect for Hispanic students. Also, 49\% of students in the upper propensity range attended elite schools, while 51\% in the lower range attended elite schools. For Hispanic females, a positive effect of about 10\% is observed in the upper propensity range, and mixed results were observed in the lower range. For Hispanic males, negative effects of 2-4\% were observed in the upper propensity range, and positive effects of 7-13\% were observed in the lower range. Only the effect for adjusted final pass rate of 13\% is significant (\( \alpha = .05 \)).

In the last segment of Table 3, statistically significant effects were observed for White students. For the lower propensity group, a negative effect was evident for first bar results, and a positive effect for graduation. Similar to Asian students, but in contrast to Black students, these \( ATTs \) for White students provide less of a measure of match, and more of a measure of the value added by elite law schools for these outcomes. These short-term effects are very small in absolute terms; however, evidence exists of a negative match effect for white students in the lower propensity range. For White students, 56\% in the upper propensity range attended elite schools, while 44\% in the lower range attended elite schools. When broken down by gender, small nonsignificant negative effects of approximately 1.5\% were observed for females in the lower propensity range and males in the upper propensity range.
Table 4

Match Estimates with Elite Group ns for Students Who Attempted the Bar Examination.

<table>
<thead>
<tr>
<th>Group</th>
<th>Outcomes</th>
<th>Effects</th>
<th>Total</th>
<th>$\theta &gt; P75(\theta)$</th>
<th>$\theta &lt; P75(\theta)$</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>ATT</td>
<td>SE</td>
<td>ATT</td>
<td>SE</td>
</tr>
<tr>
<td>Asian</td>
<td>1st yr LGPA</td>
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<td>.109</td>
<td>- .169</td>
<td>.192</td>
</tr>
<tr>
<td></td>
<td>3rd yr LGPA</td>
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<td>.111</td>
<td>- .161</td>
<td>.193</td>
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<td></td>
<td>Difference</td>
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<td>.008</td>
<td>.128</td>
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<td></td>
<td>First bar result</td>
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<td>.041</td>
<td>.006</td>
<td>.048</td>
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<tr>
<td></td>
<td>Final bar result</td>
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<td>.006</td>
<td>.022</td>
</tr>
<tr>
<td></td>
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<td>.031</td>
<td>.001</td>
<td>.033</td>
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<tr>
<td>Elite n</td>
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<td>234</td>
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<td></td>
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<td>.180</td>
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<td></td>
<td>Difference</td>
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<td>.053</td>
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<tr>
<td></td>
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<td>.039</td>
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<td>.056</td>
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<td>.098</td>
<td>-.200</td>
<td>.203</td>
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<tr>
<td></td>
<td>3rd yr LGPA</td>
<td>-.141</td>
<td>.106</td>
<td>-.144</td>
<td>.176</td>
</tr>
<tr>
<td></td>
<td>Difference</td>
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<td>.060</td>
<td>.056</td>
<td>.113</td>
</tr>
<tr>
<td></td>
<td>First bar result</td>
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<tr>
<td></td>
<td>Final bar result</td>
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<td>.032</td>
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<td>179</td>
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<td>White</td>
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<td>.045</td>
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<td>-.271 c</td>
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<tr>
<td></td>
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<td>.015</td>
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<td>.023</td>
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<td>Final bar result</td>
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<td>.004</td>
<td>.003</td>
<td>.006</td>
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<td>Adjusted Final</td>
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<td>2705</td>
<td>2116</td>
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Notes:
The Table 4 results are based on students who attempted the bar examination and differ from the Table 3 results in several respects. First, the results of Table 4 indicate the presence of stronger negative match effects only in the lower propensity range for Asian and Black students. Of the student in those groups, approximately 50% are at risk of passing the bar examination at about a 5% lower rate than similar students in less elite schools. Yet, this conclusion does not hold for Hispanic students; in both propensity regions, marginal support exists for the positive match hypothesis. Plus, very little change is demonstrated between the first and third year LGPA, even though small positive effects exist for all students in the lower propensity range. The results for White students are similar in both tables, but the standard errors are smaller in Table 3. Consequently, the small negative effects register at a higher level of significance. Finally, the adjusted final bar result in Table 4 shows very little practical difference from the unadjusted result.

VII. DISCUSSION

Some evidence was found supporting the negative match hypothesis for Black and Asian law school students in the lower propensity range. Yet, the match effects for bar passage in the upper range were much lower than Sander’s reports, and did not approach statistical significance at $\alpha = .05$.\textsuperscript{142} For first and second bar passage rates for Black students, Sander reported estimates of $d_p = -14.9\%$ and $d_p = -3.5\%$.\textsuperscript{143} The comparable results from this study were -5% and -1.4%, respectively. For students in the low propensity regions, the comparable figures were

\textsuperscript{142} Sander, Systemic Analysis of Affirmative Action, supra note 4, at 374, 473.
\textsuperscript{143} See id. at 473-74.
-7.8 and -8.1%. This latter result is similar to Rothstein and Yoon’s results, which suggested that a negative effect existed only for the lowest 20% of Black students as determined by the academic index.\footnote{Rothstein & Yoon, supra note 12, at 675 (Figure 3).} Estimating effects for Black students below the 75th percentile of the propensity score was not possible because of inadequate sample size. Yet, Black students fell below this threshold by at most 40%, even though Rothstein and Yoon suggested that of 20%.\footnote{Id.} Given the White students’ larger sample size, estimating match effects for the lowest quintile on the propensity score was possible. For the 333 students in the lowest quintile attending elite law schools, the pass rates for first and final bar attempt were about 1.5% lower than similar students attending non-elite law schools. From this baseline and using the adjusted bar passage outcome, Black and Asian students in the lower propensity range appear to have about a 5% lower chance of passing the bar examination. No negative match effects for graduation are apparent. Thus, the bar passage rates difference seems very modest relative to the substantial social networking advantages of elite school attendance.

Regarding this study’s estimated propensity function, a high degree of student mixing between elite and non-elite schools within each race category is present. Only about 50% of students in each upper propensity range category actually attend elite schools. The implication is that elite schools admit about 50% of students in the lower propensity range. As a case in point, 333 White students in the lowest propensity quintile attended elite schools. Thus, there is a substantial amount of mixing in student propensity within elite schools, independent of preferential admission. To some degree, this outcome is due to the variability of schools within tiers and is a weakness of Wightman’s crude classification of law schools into six categories.\footnote{Wightman, supra note 117, at 25.}
Yet, the preponderance of the mixing is unlikely to be the result of measurement error inherent in the classification scheme. Wightman’s cluster dendrogram shows a high degree of separation between elite and non-elite school.\textsuperscript{147}

Considering the large sample size and the relatively high quality of matching, the White student results suggest that the value added by elite law schools should be examined for the effects on law school graduation and bar passage. The match effects of this study are largely unfounded with preferential admission. The effects in Table 3 for White students may not be practically significant; attending an elite school, as opposed to a lower tier, makes virtually no difference in terms of graduation or bar passage. The single exception is that low propensity elite school students had slightly lower chances of bar passage than their nonelite peers. Overall, elite schools do not add value in these outcome domains. This latter result is consistent with Dale and Krueger’s findings for elite undergraduate institutions.\textsuperscript{148}

The value of elite school access extends vastly beyond these early career outcomes. Based on a survey of 874 Rhodes scholars, Youn and Arnold examined correlates of public leadership.\textsuperscript{149} The variables most strongly associated with higher levels of leadership were in following order: attainment of a bachelor’s (B.A.) degree at Harvard, Yale, and Princeton; attainment of a law degree; and attainment of a B.A. degree in one of the Cartter Classification A of universities.\textsuperscript{150} Even amongst this highly select group of individuals, a law degree was a statistically significant predictor of public leadership. Therefore, the fact that 77\% of the

\textsuperscript{147} Id. at 29 (Figure 4).
\textsuperscript{148} Dale and Krueger, supra note 4, at 1491, 1512, 1523.
\textsuperscript{150} Id. at 7-8.
eventual lawyers in the sample of Rhodes Scholars attended Harvard, Yale, or Stanford should not be surprising.\(^{151}\)

Consistent with the purpose of the Rhodes scholarship program, Gray and LeBlanc recognized an additional role of elite law schools to train students beyond blackletter law and doctrine.\(^{152}\)

The goal of an elite law school education is . . . to train future lawyers to confront the tough normative questions about law and to challenge the bounds of law so that it is more equitable, administrable, useful, and just. Accordingly, a law school could not meet its public mission by accepting students solely on the basis of their past achievements; it also needs to consider their future potential to contribute to the advancement of law and society.\(^{153}\)

The implication is that leadership potential, which may fall outside the bounds of traditional admission criteria, is more suitably described as a benefit to society.\(^{154}\) In addition, the potential for elite school graduates to fulfill the cultural capital prerequisites for careers in politics, industry, and public sector leadership is obtainable beyond short-term outcomes.\(^{155}\) According to Youn and Arnold, “[a]ttending Harvard or Yale law school mean[s] acceptance into a status group opening rich peer networks and access to influential institutions and individuals.”\(^{156}\) Elite law school attendance brought students into contact with top legal scholars and government officials.\(^{157}\) For example, “[c]lerking for eminent judges, interning in the U.S. Department of Justice, and working in political campaigns were reported as career-defining experiences by Rhodes Scholars.”\(^{158}\) Moreover, Wilkins and Gulati found that about 70% of the partners at five

\(^{151}\) Id. at 14.


\(^{153}\) Id.

\(^{154}\) See id.

\(^{155}\) Wilkins, supra note 20, at 1932.

\(^{156}\) Youn & Arnold, supra note 149, at 15.

\(^{157}\) Id.

\(^{158}\) Id.
large firms in top legal markets had graduated from elite law schools, whereas only 30% came from non-elite schools.\textsuperscript{159} Even Sander noted that he did not consider “perhaps the single greatest benefit of affirmative action in law school: its role in building the long-term careers of [B]lack lawyers and giving them a place in the most elite ranks of the profession and American society.”\textsuperscript{160}

Several methodological comments should be addressed prior to closing. First, inferences about the elite/non-elite effect are based on tiers as reported in the \textit{Bar Passage Study} data, rather than on individual schools.\textsuperscript{161} A number of researchers have pointed out the limitations of this indicator for assessing match effects. While the match effect plausibly may vary across schools or types of schools, no evidence is currently available for fine-tuning such intuitions. In addition, an analysis incorporating a school identifier would possibly alter this study’s central findings; however, the current research literature does not contain any probable cause for such speculation. Future research would be recommended about whether the identity of law schools is a necessity for understanding admission preferences. This present study suggests that anonymity risks associated with such a data collection may not outweigh its potential benefits.

Second, this study has shown that regression analyses of the kind conducted by Sander are incapable of producing credible estimates of causal effects.\textsuperscript{162} Aside from the strong assumptions of linearity, no account is given to selectivity effects.\textsuperscript{163} Rothstein and Yoon

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{159} David B. Wilkins & Mitu G. Gulati, \textit{Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis}, 84 CALIF. L. REV. 493, 741 (1996) (see Table 5); see Wilkins, \textit{supra} note 20, at 1933. For additional quantitative estimates of the effect of elite law school attendance see Tables 7.3 and 7.4 of Sander’s article, \textit{A Systemic Analysis of Affirmative Action in American Law Schools}. Sander, \textit{supra} note 4, at 463-464.
\item\textsuperscript{160} Sander, \textit{A Reply to Critics}, \textit{supra} note 3, at 2004-05.
\item\textsuperscript{161} WIGHTMAN, \textit{supra} note 117, at 28 (discussing law school cluster comparisons).
\item\textsuperscript{162} Sander, \textit{Systemic Analysis of Affirmative Action}, \textit{supra} note 4, at 372-74; Sander, \textit{A Reply to Critics}, \textit{supra} note 4, at 1967-68 (explaining what his regressions show in his opinion).
\item\textsuperscript{163} See Sander, \textit{A Systemic Analysis of Affirmative Action}, \textit{supra} note 4, at 460 (Sander only mentions selectivity in Table 7.2, but this table does not address selectivity effects specifically).
\end{enumerate}
\end{footnotesize}
demonstrated a more credible approach in terms of parametric modeling, and their results are consistent with the current results based on nonparametric modeling.\textsuperscript{164}

Third, the risk of reporting biased estimates can occur when studies do not utilize techniques for missing data imputation. When uncertainty due to missing values is addressed directly, the precision of estimates decreases. In particular, the interpretation of effects suggesting mismatch for Black students is limited by the corresponding high standard errors.

Fourth, a threshold appears to exist, below which students suffer from mismatch; however, estimating this threshold adequately is difficult given the small sample sizes.\textsuperscript{165} Several variables are necessary for bias adjustment, and studies that fail to collect an adequate set of matching variables risk reporting biased estimates of match effects. Future studies not adequately addressing these methodological issues risk producing misinformation and inaccurate guidance for admission policies.

Fifth, match effects can vary by gender and propensity range. Moreover, negative match effects were unexpectedly more frequent in the upper propensity range. Given the small sample sizes and the limitations of the \textit{Bar Passage} data, these results should be regarded as tentative. Yet, they indicate that substantial uncertainty exists about the individuals at risk of negative match effects, and the processes contributing to the positive or negative match outcomes for students and their institutions.

Finally, analyses have identified three variables related to \textit{LGPA} improvement from the first to final year of law school. The strongest indicator was undergraduate \textit{GPA}, followed by age (older was better) and gender (female was better). Further examination of students who

\textsuperscript{164} See Rothstein & Yoon, \textit{supra} note 12, at 710-14 (discussing the results of their study).

\textsuperscript{165} See Sander, \textit{A Reply to Critics}, \textit{supra} note 4, at 1993 (explaining that “[s]maller sample sizes make it more likely that real performance differences will not show up as statistically significant”).
improved their class rank over the course of law school may be helpful to identify additional predictors of success for all students.