DON’T DREAM IT’S OVER: ANALYZING THE POLICY, BENEFITS, AND CHALLENGES OF STATE STATUTES FOR POSTSECONDARY EDUCATION ACCESS AND FINANCIAL ASSISTANCE TO UNDOCUMENTED IMMIGRANTS AND THEIR IMPACT ON THE FEDERAL DREAM ACT

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CIVIL RIGHTS: WHO BENEFITS FROM AFFIRMATIVE ACTION AND GENDER CONSCIOUSNESS?

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ALISON PALMER*

INTRODUCTION

As “a [United States] birthright citizen, I am fully aware of the gift and accident of my nationality, conferred on me through no effort of my own.”1 With this, Professor Michael Olivas pinpoints the crucial reason why children brought to the United States by their parents or guardians during their childhood should be given the same access to education and financial aid as received by United States citizens and lawful, permanent residents. Quite simply, undocumented children are often blameless and hard-working individuals who fell upon their status as innocently as birthright citizens.2 An estimated 2.1 million undocumented minors live in the United States,3 and every year, approximately 65,000 of them graduate

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1MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 3 (Ediberto Roman ed., 2012). Michael Olivas is the William B. Bates Distinguished Chair in Law at the University of Houston Law Center; he received his J.D. from the Georgetown University Law Center. He holds a B.A. from Pontifical College Josephinum, and an M.A. and Ph.D. from Ohio State University. He has authored or co-authored fourteen books. Additionally, he teaches and writes in the areas of business, higher education, and immigration law. Olivas was the 2011 President of the Association of American Law Schools (AALS), and presently serves as the Immediate Past President of the same. He chaired the Section on Education for AALS three times and has chaired its Section on Immigration twice. Elected a member of the American Law Institute, the National Academy of Education, and the American Bar Foundation, Olivas has participated on the editorial boards of over twenty scholarly journals and received lifetime achievement awards from the Hispanic Bar Association of Houston and the Mexican American Legal Defense and Education Fund (MALDEF), of which he has served as Director since 2002. This synopsis highlights some of the accomplishments of Professor Olivas; the list is not exhaustive. See generally, Michael A. Olivas, UH Law Ctr. Faculty, Univ. of Houston Law Ctr, http://www.law.uh.edu/faculty/main.asp?PID=31.


from an American high school. With graduation looming, they face a tough
decision of whether or not to pursue higher education with little to no access to
financial aid and with little to no hope of attaining post-degree professional
employment.

Although higher education is considered a necessity rather than a luxury in
the United States today, approximately 47% of undocumented young adults do not
graduate from high school. Of the portion of undocumented young adults who do
graduate, less than half continue on to college due to lack of access to financial aid
to supplement high tuition costs and the uncertainty of whether a college degree will
generate greater job prospects without legal status. The poverty level of children of
undocumented immigrants, regardless of whether the children themselves are also
undocumented, and undocumented adults is more than double the poverty level of
children born to United States citizens. Facing few prospects for professional
employment and careers, these children are forced to accept manual labor jobs,
perpetuating their place in a low socioeconomic status. Unfortunately, this
underclass status ignites a xenophobic and nativist mentality in a portion of
permanent residents, who seek to detain and deport these individuals or worse, take

undocumented student or immigrant refers to individuals present in the United States without
legally documented status to reside in the United States. This occurs when individuals cross the
United States border deceptively or overstay a temporary, legal visa without receiving
authorization for an extension. The term “undocumented” immigrant or student will be used in
this Note, but this term is interchangeable with “illegal” and “unauthorized” alien or immigrant.
In recent years, controversy has erupted over use of the term, “illegal alien” on the premise of
being pejorative, eventually leading to a campaign by social advocacy magazine COLORLINES to
begin a campaign aptly named, “Drop the i-word.” See, Leslie Berenstein Rojas, The
‘Undocumented’ vs. ‘Illegal’ Debate Continues, on Multi-American: Immigration and Cultural
Fusion in the New Southern California, S. Cal. Pub. Radio broadcast (Sep. 6, 2011)
(corresponding report, available at http://www.scpr.org/blogs/multiamerican/2011/09/06/7279/the-undocumented-vs-illegal-debate-continues/; for an argument over which term should be used in the judicial system, see Martinez v. Regents of the Univ. of Ca., 241 P.3d 855, 863 (Cal. 2010)).

4THE IMMIGRATION POLICY CTR., supra note 3, at 1. For an overview of the correlation
between education level, unemployment, and weekly median income in the United States, see,
BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, SPOTLIGHT ON STATISTICS: BACK TO

5ROMERO, supra note 2, at 93.

6Daniel Solorzano, Introduction to WILLIAM PEREZ, WE ARE AMERICANS:
UNDocumented Students Pursuing the AMERICAN DREAM , xxxii (Stylus Publishing, 2009).

7JEFFREY PASSEL & D’VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRATION IN THE

8Id.

9ROMERO, supra note 2, at 93.

10PASSEL & COHN, supra note 7, at iv.

11See ROMERO, supra note 2 at 93.

12Solorzano, supra note 6, at xxi.
it upon themselves to commit racist, hate crimes, forcing undocumented immigrants into the shadows of American society.\textsuperscript{13}

Many controversial aspects of immigration law are beyond the scope of this Note; yet, immigration reform is clearly needed.\textsuperscript{14} Such reform must be approached practically to address the reality that undocumented immigration has existed and will continue to exist.\textsuperscript{15} In order to preserve the constitutional guarantee of equality, providing an avenue, or at least an option (vis-à-vis financial aid and opportunity for citizenship), for undocumented students to rise to a status equal to their documented peers in the nation they call home is necessary. Such equality can only be achieved through federal legislation.\textsuperscript{16} To preface and support that federal legislation, however, states can and should advance the issue by enacting state legislation to provide in-state tuition, state aid, and scholarships to these students\textsuperscript{17} and, subsequently, showcase the socioeconomic benefits stemming from enacting such legislation.

\textsuperscript{13}\textit{Olivas, supra} note 1, at 4. The fate of Luis Eduardo Ramirez Zavala (known as Luis Ramirez) details a heartbreaking example of nativist hate crime against an undocumented immigrant in the United States. In July 2008, a handful of teenage football players confronted Ramirez, an undocumented young adult of Hispanic descent who had immigrated to Pennsylvania from Mexico, in a park in the small mining town of Shenandoah, Pennsylvania. His attackers called him a “spic” and advised him, “This is Shenandoah. This is America. Go back to Mexico,” before beating him so badly while shouting racial slurs that he convulsed, foamed at the mouth; and died in a hospital two days later. Two of the five boys, Scott Piekarsky and Derrick Donchak, were tried as adults and were found guilty of committing federal hate crime under the criminal component of the Fair Housing Act, which prohibits interfering with one’s right to live where he chooses on basis of race or ethnicity through violence or threat of violence. Both were sentenced to nine-year prison terms in federal court, after first-round acquittals by an all-white state jury. Two police officers were subsequently found guilty of obstructing justice for lying to the Federal Bureau of Investigation to help cover up the teens’ crime in a separate related case. Press Release, U.S. Dept. of Justice, Two Shenandoah, Pa. Men Convicted of Hate Crime in Deadly Beating of Luis Ramirez (Oct. 14, 2010), available at http://www.justice.gov/opa/pr/2010/October/10-crt-1154.html; See Julianne Hing, Luis Ramirez’s Attackers Get Nine Years in Prison for Deadly Beating, COLORLINES, Feb. 24, 2011, http://colorlines.com/archives/2011/02/luis_ramirezs_attackers_get_nine_years_in_prison_for_deadly_hate_crime.html.\textit{See generally, Mary Bauer, S. Poverty Law Ctr., Alabama’s Shame: HB56 and the War on Immigrants, (2012), available at http://www.splcenter.org/alabamas-shame-hb56-and-the-war-on-immigrants} (describing the lives of both documented and undocumented Hispanics subjected to nativism resulting from enacting an anti-immigration law in Alabama).

\textsuperscript{14}\textit{Olivas, supra} note 1, at 73, 77.

\textsuperscript{15}Seventy-nine percent of children of undocumented immigrants are United States citizens by birthright; whereas twenty-one percent of children of undocumented immigrants are foreign-born and were unlawfully brought to the United States.gebung.\textsuperscript{15} Jeffrey Passel \& Paul Taylor, Unauthorized Immigrants and Their U.S. Born Children, Pew Hispanic Ctr., 1-2 (2010), http://www.pewhispanic.org/2010/08/11/unauthorized-immigrants-and-their-us-born-children/.

\textsuperscript{16}\textit{William Perez, We are Americans: Undocumented Students Pursuing the American Dream} 153-54 (Stylus Publishing, 2009).

\textsuperscript{17}See Elisha Barron, The Development, Relief, and Education for Alien Minors (DREAM) Act, 48 Harv. J. on Legis., 623, 653 (2011) (discussing state actions as a model for creating a successful federal DREAM Act).
This Note provides an analysis and argument in support of practical immigration reform to extend postsecondary education access and benefits, as are afforded to citizens and legal residents, to undocumented high school graduates seeking higher education and who are successful but for their inability to conquer their unlawful status. The Note begins with a brief history of pertinent immigration law, highlights the goals of the failed federal Development, Relief and Education for Alien Minors (DREAM) Act, and explores a sampling of state-enacted legislation for in-state tuition bills and financial aid, otherwise known as state DREAM Acts. This Note then analyzes economic and social benefits gained by states with pro-immigration laws for postsecondary education and compares these benefits to the detrimental effects of state legislation that excludes undocumented students from having access to postsecondary education or aid. From that comparison, it is evident that continued enactment of state DREAM statutes providing postsecondary access and aid to undocumented students is necessary to pressure Congress into enacting the long-proposed legislation that provides a pathway to legal citizenship for undocumented students.

Part I of this Note gives a brief overview of the history of immigration law relating to the education of undocumented students. Specifically, it will focus on access and availability of educational, financial aid for these minors and young adults. Part II provides a relevant history and definition of the proposed federal DREAM Act. It then compares four state-enacted DREAM statutes by addressing their benefits and drawbacks. Part III summarizes the arguments supporting the enactment of the federal and state DREAM statutes. Part IV identifies the detrimental effects on states that have enacted legislation prohibiting postsecondary access or aid to undocumented students. Finally, Part V suggests states should continue to enact DREAM statutes as a catalyst for passing a federal DREAM Act to achieve comprehensive immigration reform. Such reform is necessary to realize the “dream” of equal postsecondary education, the possibility of citizenship for all students, and social and economic benefits for the entire nation.

I. HISTORY OF IMMIGRATION LAW AND REFORM PERTAINING TO EDUCATION

State and local governments share the principal responsibility of establishing, developing, maintaining, and funding the compulsory public education system for primary and secondary schools in the United States. Thus, states have autonomy to enact laws and form education policy as long as they do not conflict with standards set by federal law. The federal government’s role has traditionally been limited to

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19 ROMERO, supra note 2, at 94.

providing a small portion of funding. More recently, the federal government has also studied and implemented success standards, attempted to maintain competitiveness with other nations, and aimed to ensure equal access to all children. Essentially, although states maintain primary responsibility for regulating public education, the federal government regulates immigration law and “often use[s] its immigration power to influence state policies affecting immigrants . . . in areas traditionally left to the states.” Federalism, the division of power between federal and state governments, punctuates the history of immigration legislation and the case law.

Such a conflict of laws arose in Plyler v. Doe, which the United States Supreme Court agreed to hear in 1981. Plyler is the landmark case regarding the education of immigrants, famously holding that undocumented children are entitled to equal protection under the Fourteenth Amendment of the Constitution and are entitled to receive the free benefit of public education through secondary school; the decision also rejected the state’s attempt to justify the denial of free education by proving an overriding, substantial state interest. The class action suit was brought on behalf of undocumented children in Texas in response to a section of the Texas Education Code, which allowed withholding of state funds to school districts that permitted undocumented students to attend and allowed school districts to deny enrollment to undocumented students.

Still valid today, Justice Brennan penned the majority opinion, explaining the Court’s rationale that “[u]ndocumented aliens cannot be treated as a suspect class . . . [o]r is education a fundamental right . . . [t]he statute, however, imposes a lifetime hardship on a discrete class of children not accountable for their disabili

\[\text{\footnotesize\cite{21}}\]
\[\text{\footnotesize\cite{22}}\]
\[\text{\footnotesize ROMERO, supra note 2, at 94.}\]
\[\text{\footnotesize\cite{25}}\] at 215, 222-23, 227-30.
\[\text{\footnotesize\cite{26}}\] at 205-06.
\[\text{\footnotesize\cite{27}}\] at 223.
\[\text{\footnotesize\cite{28}}\] at 221.
\[\text{\footnotesize\cite{29}}\] at 222.
\[\text{\footnotesize See id. at 221.}\]
\[\text{\footnotesize\cite{30}}\] at 222.
\[\text{\footnotesize\cite{31}}\] at 222.
from receiving “basic tools[,]” which enable individuals to “lead economically productive lives to the benefit of . . . all.”

Thirty years have passed since the Plyler ruling, and the holding has received much criticism and several challenges over the years at both the state and federal levels. Proposition 187, also known as the “Save Our State[!]” initiative, was a voter-passed referendum seeking to prohibit state funding of public education to undocumented school-age students in California. With the intention of rescinding the Plyler decision, preventing all public benefit from reaching undocumented residents, and forcing undocumented residents to leave the state of California, enacting such legislation would have given law enforcement mandatory authority to check the status of suspected undocumented immigrants and report their findings to federal and state agencies.

Fortunately, a trial judge enjoined implementation of most of the sections of Proposition 187, and virtually all of the propositions were eventually struck on the basis of preemption by federal law or Plyler precedent. Another failed attempt to overturn Plyler occurred in 1996 with the Gallegly Amendment to the federal Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Specifically, the Amendment sought to give states the power to regulate whether undocumented children could attend public schooling and whether they would be charged tuition, much like the overruled statute in Plyler. The failure of this Amendment was a combination of wide opposition and strong objection by then-President Bill Clinton, who advised he would veto any legislation seeking to disturb the Plyler precedent.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is controversial, active federal law enacted to deter illegal immigration through reform to heighten border control, inspections, and deportation proceedings, and to place

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32 Id. at 221.
33 Id.
35 Id. at 389-90.
36 Id.
37 Id. at 390; OLIVAS, supra note 1, at 39.
38 OLIVAS, supra note 1, at 40.
39 Id. at 40-42.
40 Id. at 42-43 (The amendment was named for its author, Elton Gallegly, a Republican House Representative from California).
42 OLIVAS, supra note 1, at 42-43.
43 Id. at 43.
the interest of citizens above that of undocumented residents.\textsuperscript{44} Section 505 of the Public Laws pertains to postsecondary education, providing undocumented residents living in a state cannot receive the benefit of in-state tuition for postsecondary institutions unless the state allows non-resident citizens of the state to receive the same tuition break.\textsuperscript{45} The deterrent effect of IIRIRA is evident considering only thirteen states, including Texas and California, enacted legislation in accordance with IIRIRA’s state-resident tuition specifications to allow in-state tuition access for undocumented students through 2011.\textsuperscript{46}

Without any supplemental congressional reports or agency regulations providing guidance to the provisions of Section 505,\textsuperscript{47} subsequent state-level lawsuits centered on how to interpret the provisions.\textsuperscript{48} Specifically, non-resident citizens, who were charged out-of-state tuition, sued colleges offering in-state tuition to undocumented residents living in those states, citing preemption of state law by Section 505.\textsuperscript{49} This allegation occurred most notably in \textit{Martinez v. Regents of the University of California}, in which California’s Supreme Court held that California’s in-state tuition statute\textsuperscript{50} did not violate Section 505 because requirements for providing in-state tuition were not based on establishing residency in the state;\textsuperscript{51} instead, the California in-state tuition statute required other, non-residency related criteria to receive the in-state tuition benefit.\textsuperscript{52} The court concluded its opinion by noting “[i]t cannot be the case that states may never give a benefit to unlawful aliens without giving the same benefit to all American citizens.”\textsuperscript{53} Although \textit{Martinez} was ultimately a win for California,\textsuperscript{54} Section 505 remains in effect and continues to discourage states from enacting in-state tuition statutes for undocumented students.\textsuperscript{55} Due to

\textsuperscript{44} These regulations illustrate the types of items regulated by IIRIRA. Pub. L. No. 104-208, 110 Stat. 3009-546 §505 (1996).

\textsuperscript{45}\textit{Id}.

\textsuperscript{46}OLIVAS, supra note 1, at 66-67.


\textsuperscript{48}See, e.g., Martinez, 241 P.3d at 855.

\textsuperscript{49}Id. at 860.

\textsuperscript{50}CAL. EDUC. CODE § 68130.5 (2002).

\textsuperscript{51}Martinez, 241 P.3d at 860.

\textsuperscript{52}CAL. EDUC. CODE § 68130.5 (2002).

\textsuperscript{53}Martinez, 241 P.3d at 870; see Day v. Bond, 500 F.3d 1127, 1131, 1139 (10th Cir. 2007) (holding that nonresident students who claimed that Kansas’s in-state tuition statute violated Section 505 of IIRIRA lacked standing to bring an equal protection claim and had no private right to sue under the Kansas statute allowing access to in-state tuition to undocumented students.)

\textsuperscript{54}See Martinez, 241 P.3d at 860.

\textsuperscript{55}JODY FEDER, CONG. RESEARCH SERV., supra note 47, at 1.
that effect, language for the repeal of Section 505 has consistently been included in all proposed versions of the federal DREAM Act.\textsuperscript{56}

In the same year as IIRIRA, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) was also enacted.\textsuperscript{57} PRWORA aimed to make undocumented aliens ineligible for certain public benefits, including postsecondary education, but to provide circumstances when states could allow undocumented aliens to receive public benefits.\textsuperscript{58} Similar to their argument regarding Section 505 of IIRIRA, non-resident plaintiffs in \textit{Martinez} claimed PRWORA invalidated the California in-state tuition statute because the statute did not provide adequate express eligibility of undocumented aliens for postsecondary tuition benefits in compliance with PRWORA.\textsuperscript{59} The Court disagreed, stating such a conclusion would require adding a requirement to eligibility that Congress did not intend.\textsuperscript{60} Based on this reasoning, the court in \textit{Martinez} concluded that California’s statute was in compliance with PRWORA by stating the in-state tuition statute applied to undocumented aliens.\textsuperscript{61} Despite the vagueness of the PRWORA language, section (d) of the PRWORA effectively makes it a state-by-state decision as to whether or not in-state tuition should be granted to undocumented aliens.\textsuperscript{62}

II. THE DREAM ACT: A NATIONAL AFFAIR

A. Proposals for a Federal DREAM Act

The DREAM Act is federal legislation which seeks to provide a pathway to citizenship and financial aid for undocumented students-turned-adults who were brought to the United States as children, successfully graduated high school or received a graduation equivalency degree (GED) and continued on to college or to the military.\textsuperscript{63} In tandem with the proposition for citizenship, proposed acts have included language to repeal Section 505 of the IIRIRA, thus restoring autonomy to the states to freely offer in-state tuition to undocumented students based on


\textsuperscript{59}\textit{Martinez}, 241 P.3d at 867-68.

\textsuperscript{60}Id. at 868.

\textsuperscript{61}Id. at 867-68.


\textsuperscript{63}THE IMMIGRATION POLICY CTR., \textit{supra} note 3, at 2.
residency, without requiring in-state tuition to be offered to out-of-state citizens.\textsuperscript{64} First proposed in 2001, the DREAM Act has taken multiple forms in both Congressional houses, being proposed as both “a stand-alone bill and as part of major comprehensive immigration reform bills.”\textsuperscript{65} The act, however, has not passed both houses to date.\textsuperscript{66} Through its numerous versions, the act generally has maintained the core objective of providing a path to citizenship for undocumented students who meet certain criteria.\textsuperscript{67} The DREAM Act would not grant outright citizenship; rather, it would provide conditional lawful permanent resident (LPR) status to undocumented young adults who: (1) received either a high school diploma or GED; (2) entered the United States before age sixteen; and (3) have lived in the United States at least five years, remaining in good, moral character the entire time.\textsuperscript{68} The six-year long conditional LPR status would grant these individuals the opportunity to legally work, attend postsecondary education, and join the military.\textsuperscript{69} At the conclusion of that period, if the individual has either completed at least two years of college towards a bachelor’s degree (or higher degree) or completed at least two years of military service with honorable discharge, he or she would become eligible to remove his or her conditional status to LPR status.\textsuperscript{70}

In 2010, the DREAM Act had its greatest success, passing the House by a vote of 216-198 on December, 8, 2010, before being defeated by a Republican filibuster in the Senate on December 18, 2010, falling five votes short of the sixty votes necessary for cloture.\textsuperscript{71} The devastating defeat in the Senate was attributed to bad timing, falling in between the midterm elections, and becoming a casualty of “extremely partisan politics.”\textsuperscript{72} The DREAM Act enjoyed bipartisan support for many of the years proposed before Congress, yet its eventual demise was ironically theorized as the result of being both “too much (for conservative legislators who

\textsuperscript{64}BARRON, supra note 17, at 632-33, nn.76-78.

\textsuperscript{65}Jeanne Batalova & Margie McHugh, DREAM vs. Reality: An Analysis of Potential Dream Act Beneficiaries, INSIGHT (Migration Policy Inst./Nat’l Ctr. on Immigrant Integration Policy, Wash. D.C.), July 2010, at 1, available at http://www.migrationpolicy.org/pubs/DREAM-Insight-July2010.pdf. The DREAM Act was first introduced as bipartisan legislation in the House of Representatives in May 2001 as the Student Adjustment Act, by Representative Chris Cannon (Republican-Utah) and Representative Howard Berman (Democrat-California). It was then introduced again as the DREAM Act in the Senate in August, 2001, by Senator Orrin Hatch (Republican- from Utah) and Senator Richard Durbin (Democrat- from Illinois). H.R. 1918, 107th Cong. (2001); S.1291, 107th Cong. (2001). Originally anticipated to be enacted quickly, the terrorist attacks in the United States on September 11th, 2001, prevented any chance for immediate immigration reform, due to overarching concerns for national security. OLIVAS, supra note 1, at 66.

\textsuperscript{66}OLIVAS, supra note 1, at 66.

\textsuperscript{67}THE IMMIGRATION POLICY CTR., supra note 3, at 2.

\textsuperscript{68}Id.

\textsuperscript{69}Id.

\textsuperscript{70}Id.

\textsuperscript{71}Id. at 5.

\textsuperscript{72}OLIVAS, supra note 1, at 81.
feared being tarred as supporting an ‘amnesty’) and too little [for liberals who feared] (enacting it would torpedo the larger strategy of reforming overall immigration problems).” Despite the defeat in the Senate and the looming uncertainty for the DREAM Act in 2011, President Barack Obama, Democrat and longtime supporter of the DREAM Act, reaffirmed his commitment and signaled that the DREAM Act would continue to be a priority for his administration in the upcoming year.

On May 11, 2011, another version of the DREAM Act was introduced in both congressional houses. These bills provided undocumented young adults, referred to as “aliens” in the Act, who were brought into the country prior to the age of fifteen and who were under the age of thirty-two or thirty-five upon the date of enactment, could be eligible to apply for conditional permanent resident status upon meeting requisite conditions. Under the Act, undocumented students and undocumented military recruits must have a history of “good moral character” during his or her time living in the United States and must not have been convicted of any crimes. In addition, each alien must elicit proof of graduating from a high school in the United States or attaining a GED, submit biometric and biographic data, undergo background checks and medical examinations and register for

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73 Id. at 78-79.


76 The Senate bill had an age limit of thirty-five for eligibility, whereas the House bill’s cutoff age was thirty-two. H.R. 1842 § 3(a)(1)(E) (2011); S. 952 § 3(b)(1)(F) (2011).

77 “Good moral character” is not defined in the DREAM Act itself; however, the revocation of conditional residency status for committing a felony, fraudulent voting, abuse of student visas, or likelihood of being a public charge or threat, may imply such character would not fulfill the “good moral character” requirement. The DREAM Act, On the Floor, Democratic Leader Nancy Pelosi, http://www.democraticleader.gov/floor?id=0414. See also U.S.C.A. § 1101(f) (2012) (defining what “good moral character” is not within the immigration laws).

78 The bills slightly differed here; the Senate went into greater detail of defining crimes rising to the level of tarnishing one’s moral character. H.R. 1842 § 3(a)(1)(B) (2011); S. 952 § 3(b)(1)(C) and (D) (2011).


80 Biometric data refers to objective, physical identification information or traits, such as fingerprints and facial recognition information to be stored in an electronic database and used to conduct background checks and comparisons. The use of biometrics is required for anyone entering the United States on a visa under the Enhanced Border Security and Visa Entry Reform Act of 2002, the intent of which is to facilitate legitimate visitors to the United States and protect the sanctity of the United States and its borders. For example, in accordance with the Department of Homeland Security, all U.S. embassies must administer an electronic scan of all ten fingerprints of any individual applying for a visa in the U.S., which remains in a database held by the U.S. Department of State for access and use by Homeland Security officials at all U.S. security and border checkpoints as verification for entrance into the country. Safety and Security of U.S. Borders: Biometrics, U.S. DEPT. OF STATE, http://travel.state.gov/visa/immigrants/info/info_1336 html (last visited Feb. 11, 2013).
military selective service as required by law.\(^8\) In the alternative, the Secretary of State has the authority to grant conditional permanent resident status by waiver of the above requirements for humanitarian, family unity, or public interest purposes.\(^9\)

If all of the requirements are met and an application is timely filed, conditional permanent residency is established for a general period of six years but may be extended.\(^10\) During the conditional residency period, the Act provides for protection from deportation and allows aliens to work, to attend postsecondary educational institutes, and to serve in the military; such protection and privileges remain in effect until expiration of the conditional residency period or commission of an act inconsistent with the requirements for residency (i.e. committing a felony or dishonorable discharge from military).\(^11\) During this period, aliens are also ineligible for most types of federal financial aid; however, they gain eligibility if and when their conditional status is transferred to permanent resident or naturalized citizen.\(^12\)

In order to successfully petition for permanent residency and naturalized citizenship, an alien must complete his or her bachelor’s degree or complete at least two years of postsecondary education or serve at least two years of military service during the conditional residency period.\(^13\) In the event the foregoing requirements are not met, the Secretary of State may confer permanent resident status under a hardship exception—compelling circumstances where the alien or alien’s family has demonstrated an extreme hardship if permanent residency is not granted.\(^14\) Finally, the DREAM Act of 2011 proposed to repeal Section 505 of the Immigration Reform and Immigrant Responsibility Act of 1996 and to restore power to the individual state to determine whether a state would provide postsecondary educational benefits by in-state residency.\(^15\) Although ten years transpired between the introduction of the first DREAM Act and the version proposed in 2011, the 2011 version is virtually the same as the original.\(^16\)

Due to the political climate, both bills were referred to subcommittees on immigration and silently expired there.\(^17\) Despite their stagnancy, the issue remains highly controversial and one in which further action seems imminent. Pending passage of a federal DREAM Act, states have met concerns of their constituents in several instances by passing state-level DREAM Acts, which grant in-state tuition to

\(^{81}\) H.R. 1842 § 3(a)(3-6) (2011); S.952 § 3(b)(3-6) (2011).


\(^{83}\) H.R. 1842 § 3(e)(2), §4(a); S. 952 § 3(d)(2), § 4(a).

\(^{84}\) H.R. 1842 § 4(b); S. 952 § 5(a).

\(^{85}\) H.R. 1842 § 8(a); S. 952 § 9(a).

\(^{86}\) H.R. 1842 § 5(a)(1); S. 952 § 5(a)(1).

\(^{87}\) H.R. 1842 § 5(a)(2); S. 952 § 5(a)(2).

\(^{88}\) H.R. 1842 § 8(b)(1); S. 952 § 9(b)(1).

\(^{89}\) OLIVAS, supra note 1, at 67.

\(^{90}\) Id.
undocumented students. Though states lack the power to adjust the legality of one’s residency status, these state-level acts are important for two reasons. First, the acts provide current aid to undocumented students for postsecondary education, thereby making them more likely to succeed and to contribute to the economy rather than live in poverty. Second, it is likely that some type of federal DREAM Act will be enacted due to the globalization of economies and the need for immigrants in the United States. “When [such] a DREAM Act becomes law, the structural features of federal immigration legislation and state college-tuition policies will still necessitate coordinated and integrated state legislation for full implementation at the institutional level...” If state law already exists at that time, full implementation may occur more efficiently.

B. States Take Action

State statutes that provide access and financial aid for postsecondary education to undocumented students by allowing them to establish residency through criteria other than traditional means have come to be known informally as DREAM Acts. Primarily, these statutes provide that undocumented students may receive in-state tuition at public colleges in that state upon meeting certain criteria such as attending a high school of the state for a minimum number of years, graduating from a state high school, and being accepted at an in-state college or university. Some states, like California and Illinois, have gone even further and provide that state or private financial aid and scholarships are available to undocumented students. Through 2011, thirteen states have active, DREAM statutes and at least nine other states were considering similar legislation in 2011.

91WOLGIN & EDELSTEIN, supra note 18, at 1.
92Id. at 2.
93See ROMERO, supra note 2, at 105.
94OLIVAS, supra note 1, at 86.
95Id.
96See id. at 84-86 (commenting on the complexity of comprehensive immigration reform and applying the state’s role in this process).
98Id. at 3-4.
100OLIVAS, supra note 1, at 66-67. Wisconsin had an in-state tuition program for undocumented students, but it was repealed, June 26, 2011. Maryland passed a similar statute in 2011, but it is suspended pending state referendum. Wis. STAT. § 36.27 [repealed by AB 40, June 26, 2011]; Md. CODE ANN. §15-106.8 [suspended, pending state referendum: M.D. Const. XVI, Sec. 2].
101IMMIGRATION POLICY CTR, supra note 3, at 7.
These statutes cannot be the final solution, as they are incapable of adjusting the legal status of undocumented students, but they do keep the issue at the forefront.\textsuperscript{102} Equally important, state statutes demonstrate the economic and social benefits that can be reaped from this type of legislation and the harmless effect on legal residents.\textsuperscript{103} Below, a sampling of state DREAM statutes, including the statutes of Texas, California, Illinois, and Maryland will be discussed.

\textit{The Lone Star State}\textsuperscript{104}

In 2001, Texas became the first state to enact a statute providing in-state tuition rates for undocumented students meeting certain residency criteria.\textsuperscript{105} The current statute allows would-be college students to establish Texas residency by any one of three ways: (1) by maintaining a domicile in the state for at least one year prior to the last census of the academic term in which the student is enrolled in an institution of higher education; (2) by being the dependent of a parent who satisfies the aforementioned criterion; or (3) by graduating from a public or private high school in Texas, or receiving the equivalent diploma in Texas.\textsuperscript{106} Students in the third category also have to maintain a domicile for one year prior to enrollment under the same constraints mentioned above and are required to maintain a continuous residence in Texas for the three years preceding the date they graduated or received their diploma equivalent.\textsuperscript{107} In addition, if undocumented, such students must file an affidavit with their chosen institution of higher learning, stating that they will apply to become a permanent resident as soon as they become eligible.\textsuperscript{108}

A 2006 report from the Texas comptroller assessed the economic impact of undocumented immigration on Texas, which had the third highest population of foreign-born residents in the nation at the time.\textsuperscript{109} Of that population, an estimated 1.4 to 1.6 million were undocumented immigrants.\textsuperscript{110} Over the period surveyed, an estimated 135,000 to 225,000 undocumented children passed through Texas’s public school system per school year.\textsuperscript{111} The comptroller’s report concluded in fiscal year

\textsuperscript{102}OLIVAS, \textit{supra} note 1, at 82.  
\textsuperscript{103}Solorzano, \textit{supra} note 6, at xxvi-xxxiii.  
\textsuperscript{105}OLIVAS, \textit{supra} note 1, at 66.  
\textsuperscript{106}TEX. EDUC. CODE ANN. §54.052 (Vernon 2005).  
\textsuperscript{107}\textit{Id}.  
\textsuperscript{108}TEX. EDUC. CODE ANN. §54.053 (Vernon 2005).  
\textsuperscript{110}\textit{Id}. at 3.  
\textsuperscript{111}\textit{Id}. at 4.
2005 that the state, as a distinct governmental entity, derived an estimated net benefit of $424.7 million from the economic activity of undocumented immigrants as a whole but candidly admitted local governments and hospitals suffered an estimated net loss of $928.9 million.\textsuperscript{112} Nevertheless, when asked about the policy of allowing undocumented residents to receive in-state tuition rates for higher education, Texas Governor Rick Perry reiterated that it was in the best interest of Texas, “economically and otherwise, to have those young people in our institutions of higher learning and becoming educated as part of our skilled workforce.”\textsuperscript{113}

“\textit{California Dreamin’}\textsuperscript{114}

With the highest immigrant population in the United States at 9.8 million, including 2.45 million undocumented immigrants,\textsuperscript{115} California has been struggling for years with how to best deal with undocumented immigrants in the higher education arena. California, following Texas, became the second state to enact an in-state tuition statute.\textsuperscript{116} The original in-state tuition bill was met with controversy but was passed in October 2001.\textsuperscript{117} The statute granted in-state tuition to undocumented students who are registered to attend an accredited postsecondary education institute.\textsuperscript{118} To be eligible, the student must have completed at least three years of high school in California and graduated or received an equivalent diploma at the high school level, in conjunction with signing an affidavit agreeing to apply for legal status as soon as eligible to do so.\textsuperscript{119}

As previously discussed, disgruntled, non-resident students sued both the state and certain institutions, claiming the statute violated Section 505 of IIRIRA.\textsuperscript{120} The California Supreme Court upheld the state law, noting federal law did not preempt it.\textsuperscript{121} That decision helped forge the way to greater availability of student aid for undocumented immigrants with the recently enacted Assembly Bills (“A.B.”) 130

\begin{thebibliography}{99}
\bibitem{112} Id. at 20.
\bibitem{114} The Mama’s and the Papa’s, \textit{California Dreamin}, \textit{on If You Can Believe Your Eyes And Ears} (Dunhill Records 1966).
\bibitem{116} Olivas, \textit{supra} note 1, at 67.
\bibitem{118} Id.
\bibitem{119} Id.
\bibitem{120} Martinez, 241 P.3d at 862-63.
\bibitem{121} Id. at 860.
\end{thebibliography}
and 131 by current, Democrat California Governor, Edmund “Jerry” Brown. Known as the “California Dream Act of 2011,” A.B.130 was the first of the two-part bill series introduced and successfully enacted in July 2011. A pioneer in its own right, the adoption of A.B.130 amended the existing section 68130.7 of the California Education Code and added a new section, 66021.7, to enable undocumented students, who already qualified for in-state tuition in California, to be eligible for privately funded scholarships for postsecondary education attendance at a California state or community college. The more controversial part of the two-part Californian DREAM bill, A.B. 131, was enacted by Governor Brown in October of 2011. A.B.131 is controversial because it enables undocumented students’ access to public funds during an economic slump, which has already forced the state to cut back on its education expenditures. The adoption of the two bills both completed the DREAM Act envisioned by its drafters and made a mark in immigration history as the state with the largest population of undocumented immigrants made both state and private funding available to qualifying, undocumented students.

Specifically, A.B. 131 added sections 66021.6, 69508.5 and 76300.5 to the California Education Code, extending all state-funded financial aid already available to citizens and permanent residents of California to any undocumented students who qualify for in-state tuition under the existing state law. This extended access to funding includes any state-funded financial aid benefits available for postsecondary education, such as “Cal Grants,” fee waivers for community college to those demonstrating financial need, and postsecondary institutional state-aid. Essentially, the legislation makes undocumented students equivalent to their documented peers as far as qualifying for state-level financial aid in California.


124 Assem. B. 130, supra note 123.

125 Id.; Noelle de la Paz, California’s DREAM Act is Finally a Reality—But Will Momentum Spread?, COLORLINES (October 11, 2011, 10:01 AM), http://colorlines.com/archives/2011/10/california_dream_act_finlly_a_reality.html (last visited March 6, 2013).

126 Id.


128 Id.

129 Id.

130 Assem. B. 131, 2011-12 Reg. Sess. (Cal. 2011)(however, Cal Grants, granting aid to public universities in California, are first distributed to qualifying legal citizens and residents; after those are disbursed, undocumented students’ applications are considered).
Governor Brown noted the importance of the legislation when he remarked, “[the California Dream Act] benefits us all by giving top students a chance to improve their lives and the lives of all of us.”131 The California Dream Act creates a fairer playing field, by allowing undocumented students to receive scholarships and aid from the funds they and their parents pay into but had previously not been eligible to access. 132 Additionally, California previously anticipated a shortage of college graduates to fulfill as many as one million jobs requiring a college degree by the year 2025; 133 that shortage will be circumvented to some extent, as the California DREAM Act is expected to increase undocumented students’ enrollment at postsecondary institutions by making higher education more affordable.134

Land of Lincoln135

Illinois is another state that has provided support to undocumented students to attain postsecondary education. 136 Considering its high undocumented population—sixth highest in the country at 525,000137—Illinois passed its initial in-state tuition bill via House Bill 60 in 2003.138 The bill granted in-state tuition to undocumented students who had graduated or received an equivalent diploma from an Illinois high school.139 Potentially eligible undocumented students also had to meet the specified requirements for the minimum amount of years spent attending an Illinois school and had to sign a waiver to apply for citizenship when, and if, the option became available.140 This provision remained active but stagnant until 2011, when Senate Bill 2085 was proposed to grant additional financial assistance via


134 Id. at 16.

135 Land of Lincoln” is the official state slogan of Illinois. Chosen by Illinois in recognition of former President Abraham Lincoln, Lincoln lived in Illinois from age twenty-one until becoming the sixteenth President of the United States and was a member of both the federal and state legislature while there. The slogan was adopted by the state in 1954. The slogan has graced Illinois license plates since that time. State Symbols USA, Illinois State Slogan, http://www.statesymbolsusa.org/Illinois/state-slogan-Illinois.html.

136 See Nat’l Conference of State Legislatures, supra note 130.

137 Patler & Applebaum, supra note 132, at 3.


139 Id.

140 Id.
private scholarships and to provide access to state-created college savings plans and prepaid tuition plans for undocumented students.\textsuperscript{141} Adopted in August 2011, the bill most notably created a DREAM Fund Commission, which was to be a voluntary board comprised of nine members with diverse backgrounds, whom the state governor, with the advice and consent of the state senate, would appoint.\textsuperscript{142} The DREAM Fund Commission aimed to establish and administer a non-profit entity to raise funds from private resources for a scholarship fund, which would benefit undocumented students in their dreams to attain postsecondary education.\textsuperscript{143} In addition to creating, administering, and raising funds, the commissioners would also be responsible for publicizing the availability of such scholarships, accepting and reviewing applications for the scholarships, and eventually selecting the recipients of such scholarships.\textsuperscript{144} To qualify for such a scholarship, a student must (1) prove residence with a parent or guardian in Illinois, (2) attend an Illinois high school for at least three years prior to graduation from an Illinois high school or its equivalent, as well as provide proof of receiving a high school diploma from an Illinois school or its equivalent, and (3) have at least one parent who immigrated to the United States.\textsuperscript{145}

Besides providing for private scholarships to aid undocumented students, Senate Bill 2085 also revised existing statutes for college savings and prepaid tuition plans by opening them up to all residents of Illinois.\textsuperscript{146} A college savings plan allows parents to invest up to $2,000.00 annually towards supplementing a college fund for their children.\textsuperscript{147} Specifically, the bill’s language made such a plan available to anyone with or on the behalf of anyone with a social security number or taxpayer identification number.\textsuperscript{148} Senate Bill 2085 also contained provisions requiring counselors to identify and advise undocumented students on higher education opportunities.\textsuperscript{149}

The bill made similar revisions to Illinois’ prepaid tuition contracts.\textsuperscript{150} The original statute permitted only Illinois citizens to purchase prepaid tuition plans for the benefit of other United States citizens.\textsuperscript{151} The law was revised to extend availability to undocumented immigrants wanting to purchase tuition contracts by allowing the interested individual to use a taxpayer identification number in lieu of a

\textsuperscript{142} 110 ILL. COMP. STAT. 947-67 (2011).
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} 110 ILL. COMP. STAT. 947-75 (2011).
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} 105 ILL. COMP. STAT. 5/21-25 (2011).
\textsuperscript{150} 110 ILL. COMP. STAT. 979/45 (2011).
\textsuperscript{151} 1997 Ill. Legis. Serv. 90-546 (West).
social security number.\textsuperscript{152} Thus, the tuition plan became available to most Illinois residents.

Shortly after the passage of the Illinois’ DREAM Fund Commission Act in 2011, Chicago Governor Rahm Emanuel noted, “Immigrants are a driving force in our city’s cultural and economic life, and opening the way for all Chicago students to earn an excellent higher education will make our city even stronger.”\textsuperscript{153} He later added, “I am proud that families and students across Illinois will now have a better shot at the American Dream—which starts with a great education.”\textsuperscript{154} Although there are not yet any studies available on the impact this legislation has had on the state, there is hope and expectation that the legislation will provide greater opportunities for undocumented students living in Illinois to attend postsecondary education and to reap its benefits.

\textit{The Old-Line State}\textsuperscript{155}

Maryland, which has the tenth highest undocumented population in the country,\textsuperscript{156} passed a state DREAM statute in April of 2011.\textsuperscript{157} In the wake of the federal DREAM Act’s failure to pass the Senate vote in 2010,\textsuperscript{158} Maryland’s General Assembly was presented with a DREAM Act that would provide in-state tuition at state community colleges to undocumented students who met certain requirements.\textsuperscript{159} The Maryland statute provides a two-tiered system for accessing in-state tuition rates, where in-state tuition is provided for state community college

\begin{footnotesize}
\textsuperscript{152} 110 ILL. COMP. STAT. 979/45 (e) (2011).


\textsuperscript{154} \textit{Id}.

\textsuperscript{155} State Nicknames, Maryland, http://www.50states.com/nickname.html. This nickname pays tribute to the “Maryland line,” the regiment of regulars who fought to protect the Continental Army during the Revolutionary War. Specifically, the first regiment is recognized for its heroic defense of the Continental Army as the Army retreated from the Battle of Long Island, the first battle of the Revolutionary War. George Washington is credited with coining the name in his personal writings, for recognition of the regiment’s reverence, organization and unwavering discipline in fighting the British Army, a feat not accepted by many. Official recognition of the name, “Old Line” is traced to a letter Washington wrote to Alexander Hamilton, dated December 14, 1799, shortly before Washington’s death. From that period, the name grew in usage and eventually became a nickname for the state of Maryland. Ryan Polk, \textit{Holding the Line: The Origins of ‘The Old Line State’}, 1 ARCHIVES OF MD., index (2005), available at http://www.aomol.net/html/oldline.html.

\textsuperscript{156} Patler & Appelbaum, \textit{supra} note 132, at 3.


\end{footnotesize}
attendance upon completion of the requisite criteria. It further provides opportunities for in-state tuition at public, state colleges and universities upon successful completion of an associate’s degree or sixty credits at a community college.\textsuperscript{160} It does not provide for private scholarships or state-aid outside of the reduced in-state tuition rate as is afforded in Texas, California, and Illinois.\textsuperscript{161}

The Maryland statute provides that any individuals, including undocumented students, are exempt from the out-of-state tuition rate for state community colleges if they attended a Maryland high school for at least three years, beginning with the 2005-06 school year, and graduated from a Maryland high school or received an equivalent diploma, beginning with the 2007-08 school year.\textsuperscript{162} In addition, applicants must register as a student at the community college in the state, not earlier than the 2011 school year, and provide documentation to the community college proving they or their parent or guardian filed a Maryland income tax return during the three years of documented attendance in high school, any interim period between high school and college, as well as each year of college attendance.\textsuperscript{163} Like many other states, Maryland also requires undocumented students to file an affidavit with the community college they will be attending, stating that the individual will file to become a permanent resident within thirty days of becoming eligible for this benefit and will register with the Selective Service System for the military, as required by federal law.\textsuperscript{164} If the student does not register for in-state tuition with the appropriate documentation within four years of high school graduation or receipt of an equivalent diploma, the reduced tuition benefit will lapse.\textsuperscript{165}

If a student is enrolled in a community college program and successfully achieves an associate’s degree or sixty credits, the student becomes eligible for in-state tuition rates at four year state colleges as long as all of the requirements of the community college level are met, including providing income tax receipts and an affidavit agreeing to petition for permanent residency when eligible.\textsuperscript{166} To receive this additional opportunity for in-state tuition, students must apply within four years of graduating from a Maryland high school or within four years of achieving sixty credits in a Maryland community college.\textsuperscript{167} Additionally, undocumented students may be afforded the same in-county tuition rates as permanent county residents.\textsuperscript{168} To qualify, applicants must satisfy the requirements for qualifying for in-state tuition at the community college level, provide an affidavit stating that the individual will file

\textsuperscript{160}Id. § 1 (c)(1) & (2).


\textsuperscript{162}MD. CODE ANN., EDUC. § 15-106.8 (2011).

\textsuperscript{163}Id.

\textsuperscript{164}Id.

\textsuperscript{165}Id.

\textsuperscript{166}Id.

\textsuperscript{167}MD. CODE ANN., EDUC. § 15-106.8 (2011).

\textsuperscript{168}Id.
an application to become a permanent resident within thirty days after the individual becomes eligible to do so and be able to prove he or she attended a high school within the county where the community college is located.\textsuperscript{169}

Soon after the Maryland statute passed, opponents of the act gathered the minimum required number of signatures on a referendum petition to suspend the newly adopted statute, preventing the statute from going into effect as planned on July 1, 2011.\textsuperscript{170} The referendum survived a legal challenge in August, leaving the statute in suspension pending the general election in November 2012.\textsuperscript{171} In spite of the controversy, proponents of the act maintain its passage would be fair and provide long-term economical benefits to Maryland by offering undocumented students an opportunity to receive the education they need to qualify for better jobs and give more back to the state.\textsuperscript{172} Furthermore, proponents argue undocumented taxpayers already contribute an estimated $270 million in taxes to Maryland each fiscal year.\textsuperscript{173} It is only fair to provide in-state tuition rates to undocumented immigrants because undocumented immigrants pay into the system via income taxes; providing proof of having filed one’s Maryland income tax is mandatory to receive the in-state tuition benefits.\textsuperscript{174}

Although a review of the state DREAM Acts reveals some variances amongst their requirements, there are notable similarities. Each of the four reviewed states is receptive of the potential economic benefits to be realized from extending a humane and fair benefit to undocumented students.\textsuperscript{175} Eligible students are required to “1) attend a school in the state for a certain number of years; 2) graduate from high school in the state; and 3) sign an affidavit stating . . . they will apply to legalize their status as soon as they are eligible to do so.”\textsuperscript{176} The expectancy of greater college enrollment leading to higher earning power and successful, educated residents capable of giving back to the community are common threads of support for passing such acts.\textsuperscript{177} The notion of justice in extending benefits is also present because undocumented students, permanent residents, and citizens all pay taxes.\textsuperscript{178}

\textsuperscript{169}Id.
\textsuperscript{171}Id.
\textsuperscript{173}Id. at 3.
\textsuperscript{174}Id.
\textsuperscript{175}See \textit{THE IMMIGRATION POLICY CTR.}, supra note 3, at 6-7; \textit{see also} Nat’l Conference of State Legislatures, supra note 130.
\textsuperscript{176}\textit{THE IMMIGRATION POLICY CTR.}, supra note 3, at 7.
\textsuperscript{177}See Md. State Educ. Ass’n supra note 172.
\textsuperscript{178}Solorzano, supra note 6, at xxi-xxii.
Frequently, these members of society, who lack “permanent” legal status, are full-fledged participants to the greatest extent of their ability; yet, they will be destined to remain poverty-stricken if they do not receive the benefit of lower tuition rates or financial aid via other means.\(^\text{179}\) Individual states recognize the existing significant reliance of their economies on the contributions and expenditures of the undocumented portion of the population as well as the need for a more highly educated and professional workforce in the future.\(^\text{180}\) This recognition is evident when considering four of the six largest immigrant-receiver states have enacted some version of a DREAM statute for the undocumented population.\(^\text{181}\)

Although there is little research to support a conclusion of the cost-benefit debate on providing in-state tuition to undocumented students, a recent study published by Rogers Williams University confirmed in-state tuition acts increase college enrollment amongst undocumented students by about 31%, decrease high school dropouts by about 14%, and most importantly, demonstrate no financial cost to states; in fact, these states appear to slightly benefit from such policies.\(^\text{182}\) Conversely, one primary drawback exists for all state DREAM Acts: states cannot grant citizenship to their undocumented residents.\(^\text{183}\) Until there is a change in federal legislation, undocumented students will not fully benefit from receiving post-secondary education because they will not have the ability to gain professional employment legally upon graduation.\(^\text{184}\)

Section 505 of IIRIRA is another drawback to all state DREAM Acts, preventing states from granting in-state tuition or financial benefits based upon residency. Though states with in-state tuition policies have avoided challenges to their statutes against federal preemption by Section 505 of IIRIRA, the issue of whether a state should have tuition residency requirements should be decided by state actors rather than federal ones. Keep in mind that the Federal government is the sole authority for immigration law and reform. Perhaps the success of the states over these preemption challenges demonstrates that the Federal government agrees that states should have the choice to provide this specific aid to the undocumented population.

\(^{179}\text{See id.}\)

\(^{180}\text{Id.}\)

\(^{181}\text{Jeffrey Passel & D’Vera Cohn, Unauthorized Immigrant Population: National and State Trends, 2010, Pew Hispanic Ctr. 1 tbl. 4 (2011), www.pewhispanic.org/files/reports/133.pdf (California, Texas, New York and Illinois are four of the six states with the highest undocumented populations. All of these states offer in-state tuition (or more) to qualifying students); see also OLIVAS, supra note 1, at 67, tbl.1. Passel & Cohn, supra note 7 (Florida and New Jersey are the two states in the top six without DREAM Acts of any kind); THE IMMIGRATION POLICY CTR., supra note 3, at 6-7; Nat’l Conference of State Legislatures, supra note 129.}\)


\(^{183}\text{ROMERO, supra note 2, at 94 (the Federal Congress reserves the power to manage the laws of naturalizing citizens); U.S. CONST., art. I, § 8.}\)

\(^{184}\text{ROMERO, supra note 2, at 93; Solorzano, supra note 6, at xxxi.}\)
Specific drawbacks of the sampled state DREAM statutes are de minimis compared to the challenges all state DREAM statutes face in the absence of a Federal DREAM Act’s enactment. Obviously, the greater amount of aid and types of aid available to undocumented students presents a more affordable and clear financial situation for undocumented students. Therefore, states with statutes that provide in-state tuition, in addition to further aid, are more beneficial for actual undocumented students seeking aid. California, which provides the most amount of private and public aid to qualifying undocumented students, is a prime example of this.\footnote{See discussion supra.}

Despite the fact that some state DREAM Acts are more beneficial to undocumented immigrants than others, all state DREAM Acts bring undocumented students closer to the goal of attaining postsecondary education to the extent such education is available to and accessible by documented citizens. The ultimate benefit and beauty of individual state DREAM Acts reflects the ability of states to fashion their own respective versions.\footnote{Professor Olivas likens the varying approaches of states in legislating for in-state tuition policies to each state utilizing different “playbooks” for strategy, even though the same common tools may be available for each state. OLIVAS, supra note 1, at 84. See id., at 84 for a brief comparison of state-tailored legislation to broader, complex federal legislation.}

Keeping the history of the various DREAM Act statutes in mind, Part III turns to the general arguments for and against the DREAM Act at both the federal and state levels.

III. ARGUMENTS FOR AND AGAINST THE DREAM ACT

Support for and against the DREAM Act can be divided into two categories: (1) the economic benefits or detriments of the DREAM Act, and (2) the moral decency and adherence to constitutional ideals of equality and fairness.\footnote{ROMERO, supra note 2, at 101-02; Solorzano, supra note 6, at xxxi-xxxvii.} While these arguments are typically made in conjunction with the movement for and against a Federal DREAM Act, intuitively, they are substantially the same arguments for and against state DREAM statutes, only differing in proportionality.

Economically speaking, supporters of the DREAM Act suggest that providing financial assistance to undocumented students increases their likelihood of attending college and subsequently getting better jobs.\footnote{Solorzano, supra note 6, at xxxii.} Receiving a post-secondary degree provides greater career opportunities and the ability to rise above poverty and have greater earning power, including giving back to our society.\footnote{Patler & Appelbaum, supra note 132 at 5-7.} States and the nation alike benefit when their inhabitants become lawful employees who are skilled and educated; such inhabitants are subsequently more able to contribute to their
The types of contributions range from increased consumption of goods and services and increased support of local businesses to the creation of local job markets and the generation of greater tax revenue. Thus, it can be argued that the initial cost a state invests to educate undocumented students will be returned by the students’ increased participation in the tax system and their increased ability to purchase consumer goods, which will ultimately increase the national gross domestic product percentage.

Another economic argument in support of the DREAM Act stems from a cost-benefit analysis of the Act. In Plyer v. Doe, the Supreme Court held that states are required to provide free education to students through the twelfth grade, including those students who are undocumented. Under a cost-benefit analysis, the aforementioned evidence and the ability to avoid future stress on government resources justifies providing aid to provide a post-secondary education to undocumented students. Failure to provide the necessary tools to enable students to search for jobs and permanent residency or citizenship will result in these same students remaining in the country unlawfully and potentially being subject to costly deportation procedures. Additionally, these students may be forced to utilize already limited government-funded social service resources due to their inability to obtain a job, which requires proof of legal residency or citizenship.

America suffers financially and in other manners when it deports undocumented students. In financial terms, “the sum of funding required to apprehend, detain, legally process, and expel [the] 8.64 million [undocumented] individuals out of the United States is $200 billion.” In addition to the financial cost of deportation, America also loses intangible benefits by deporting undocumented students, since the deported, arguably smart and law-abiding students, would be forced to take their talent and twelve years of “free” education with them. In 2011, a new policy relating to deportation was implemented by the

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190 Id. at 6.
191 Id. at 7.
192 Solorzano, supra note 6, at xxviii.
194 ROMERO, supra note 2, at 101 (establishing that Plyer was meant “to establish a constitutional floor, not a ceiling”).
195 See Solorzano, supra note 6, at xxvii.
196 Id.; Patler & Appelbaum, supra note 132, at 6-7; See Passel & Cohn, supra note 7 (for a review of social and economic characteristics of undocumented families in the United States).
197 See Solorzano, supra note 6, at xxvii.
199 Id. at 14.
200 Plyer, 457 U.S. at 230 (holding that all students, including those without proper documentation, were entitled to a free education through twelfth grade).
Obama Administration and supports the idea that the deportation of undocumented youths should cease. 202 The change in policy de-emphasized deportation of undocumented immigrants who are in good moral standing and shifts the focus to deporting individuals who pose a potential threat. 203

The economic argument made by opponents of the DREAM Act counters that undocumented students are using American tax dollars that should favor and benefit citizens and permanent residents. 204 Opponents argue that allowing undocumented students to access financial aid for post-secondary education may take school seats as well as jobs away from lawful citizens and permanent residents. 205 Critics of the DREAM Act also claim that giving financial assistance to children of undocumented immigrants provides greater incentive for more undocumented immigrants to enter the country, and the United States simply cannot afford the cost of providing financial aid to an unrelenting cycle of undocumented students. 206 These arguments fall short, as undocumented immigrants are required to pay income taxes just as if they were permanent residents or citizens; therefore, they pay into the system for benefits currently only afforded to citizens and permanent residents in the majority of states. 207 States with large undocumented populations actually rely and benefit from the existing undocumented population and their contributions via taxes and expenditures, as well as the value of their labor. 208

The opportunity for education does not seem to be a chief incentive for the undocumented to immigrate to the United States, as immigration rates have remained static even though some states are now offering tuition assistance and other forms of financial aid to undocumented students. 209 Alternatively, the reality for those who unlawfully immigrate to the United States entails laboring in low-skilled jobs to receive a higher wage than they would have earned in their native country. 210

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201 See Fitz, supra note 198, at i.
203 Id. (the Obama Administrations new policy assess threat levels by looking at factors such as security risks, threats to public policy or criminal history).
205 See OLIVAS, supra note 1, at 94.
206 ROMERO, supra note 2, at 102.
207 Lipman, supra, note 204, at 4-5.
209 ROMERO, supra note 2, at 102; OLIVAS, supra note 1, at 94.
The globalization of economies encourages those from developing nations to immigrate to developed nations, like the United States, where illegal immigration ebbs and flows with the status of the economy, rising and fulfilling a growing market for low-skilled labor in times of economic growth while decreasing in times of economic downturn.\textsuperscript{211} Even though the United States immigration system is not set up legally to admit the number of workers who desire to immigrate here, the undocumented population is needed to fill jobs, creating an unofficial tolerance for unlawful immigration until about a decade ago.\textsuperscript{212}

Due to a shift in policy to reduce unlawful immigration, especially in regard to the employment of undocumented workers, the government has developed employment verification procedures to overcome falsification of working papers.\textsuperscript{213} Such verification procedures have slowed unlawful immigration to the United States.\textsuperscript{214}

The second main category relied upon in support of or against the DREAM Act is whether there is a moral obligation to provide equal assistance and a pathway to citizenship for undocumented students.\textsuperscript{215} Proponents of the DREAM Act argue that these students should not be faulted for the sins of their parents who brought them here as children; consequently, the government must find a way to provide financial assistance and a pathway to citizenship for those blameless individuals in accordance with the notions of equality under the Constitution.\textsuperscript{216} An “acculturation”\textsuperscript{217} argument also exists: undocumented students have grown up in the United States and only know a life in this country; therefore, they are de-facto Americans deserving of the same treatment as citizens and permanent residents.\textsuperscript{218} Essentially, many undocumented immigrants have invested their lives in the United States with “family bonds, economic involvement, or cultural participation,” so formal exclusion and threat of deportation emphasizes a division between undocumented students and students of citizens or permanent residents that

\begin{itemize}
  \item \textsuperscript{211}Hanson, supra note 208, at 1.
  \item \textsuperscript{212}Id. at 4.
  \item \textsuperscript{213}Id.
  \item \textsuperscript{214}Id.; see also E-Verify, History and Milestones, U.S. Citizen & Immigration Svs., available at http://www.uscis.gov/portal/site/uscis/menuitem (follow, “Employment Verification,” “About the Program” and “History and Milestones” links) (the implementation of the E-Verify system brought the employers’ duty to verify the legal status of its workers in check. The computerized E-Verify Program was developed over the past decade through a partnership between the Immigration Naturalization Service and the Social Security Administration to create an electronic, internet-accessible database where United States’ employers can log-in nationwide to verify the legal work eligibility of newly hired employees through Social Security information).
  \item \textsuperscript{215}Solorzano, supra note 6, at xxxiv.
  \item \textsuperscript{216}ROMERO, supra note 2, at 102.
  \item \textsuperscript{217}Solorzano, supra note 6, at xxix-xxx.
  \item \textsuperscript{218}Id.
\end{itemize}
facilitates unwarranted discrimination against the undocumented. Finally, the Plyler precedent implies that more tolerant access to post-secondary education should be extended to all persons in the United States. At the time Plyler was decided, one could thrive in society without post-secondary education, but the need for post-secondary education has become more of a necessity to live comfortably; consequently, Plyler ought to be extended beyond primary and secondary education to cover post-secondary education.

The counter moral arguments to the DREAM Act parallel the counter economic arguments. Opponents argue that granting aid and citizenship to undocumented immigrants rewards and promotes the continuance of unlawfully entering and remaining in the United States. There has been, however, virtually no evidence suggesting individuals immigrate to the United States for free or subsidized education; even if that phenomenon was true, the “sins of the parents” should not be imputed to the children who were simply brought along to the United States. Although the arguments have some merit, it is a difficult position to argue that a child brought to the United States by another is morally wrong and should be deported or left to live in the United States without the same opportunities provided to other lawfully present children. The DREAM Act itself requires undocumented students have “good moral character” in order to be granted conditional permanent residency. Thus, to conform to the ideals of our Constitution, it is imperative to provide a pathway to citizenship for these students; one way to initiate this process is to provide affordable post-secondary education to undocumented students.

The foregoing arguments leveled against both state and federal DREAM Acts sometimes echo the loudest by states that have opted to discourage undocumented immigrants from residing in their states through anti-immigration statutes. Part IV addresses states that have passed anti-immigration statutes and the impact such statutes have had on an undocumented individual’s access to post-secondary education.

IV. THE CASE AGAINST ANTI-IMMIGRATION STATE STATUTES

219 Id. at xxxv-xxxvi.
220 See discussion supra, pp. 49-51.
222 ROMERO, supra note 2, at 102.
223 Id.
224 Id. at 102, 105.
225 Id.
226 See discussion supra, Part III.
227 See discussion infra, Part IV.
228 For the purpose of this Note, emphasis will be placed on the provisions which exclude undocumented students from in-state tuition rates and access to enroll at post-secondary schools.
Each state-enacted anti-immigration statute discussed in this section broadly attempts to provide law enforcement with greater authority to regulate and take punitive actions against undocumented immigrants. To date, six states have enacted anti-immigration statutes, which directly affect post-secondary educational access by prohibiting undocumented students from receiving the benefit of in-state tuition rates at the post-secondary level. Two of the six states, Alabama and South Carolina, went even further by barring undocumented students from enrolling at public state universities altogether.

In 2008, South Carolina became the first state to ban post-secondary access to undocumented students and also prohibited undocumented students from receiving any financial aid, scholarships, or in-state tuition rates for private colleges and universities. Georgia followed South Carolina’s lead in 2010, becoming the second state to prevent undocumented students from enrolling at public colleges and universities. Initially, a group of Senators in Georgia suggested that post-secondary institutes check and enforce the immigration status of enrolled students. As opposition arose, it paved the way to a compromise in the law-making process and led to an in-state tuition ban by the state legislature and a partial ban of access to undocumented students by Georgia’s Board of Regents. The new policy required public colleges, which turned away academically qualified applicants in the past two years, to ban enrollment of undocumented students from their schools. For undocumented students in Georgia, this policy created inaccessibility to the five most competitive state universities. In 2011, Georgia’s anti-immigration Senate Bill 458 included a provision to expand the enrollment ban of undocumented


230See Nat’l Conference of State Legislatures, supra note 130 (the six states banning in-state post-secondary tuition to undocumented students are South Carolina, Georgia, Alabama, Arizona, Colorado, and Indiana).

231Id.


234Russell, supra note 233, at 8.

235Id.

236Id.

237See id. (including the University of Georgia, the Georgia Institute of Technology, Georgia State University, Georgia College and State University and the Medical College of Georgia).
students to all public post-secondary institutions;\textsuperscript{238} it failed to pass, however, before the expiration of the legislative session.\textsuperscript{239} Doubt remains as to what will happen next in Georgia as the bill gained ground quickly and easily passed both the House and Senate panels before the legislative session expired.\textsuperscript{240}

In 2011, Alabama became the third state to enact anti-immigration legislation targeting undocumented students with the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, otherwise known as House Bill 56 (H.B. 56).\textsuperscript{241} Widely considered the harshest anti-immigration statute in the United States on all accounts, it exemplifies the truth in the assessment of the law’s character.\textsuperscript{242} On its face, H.B. 56 prohibits undocumented students from enrolling at any state college or university and further prohibits access to financial aid, scholarships, or in-state tuition rates of any kind.\textsuperscript{243}

The caustic nature of Section 28 of H.B. 56 put H.B. 56 at the forefront of the immigration reform debate by mandating all public elementary and secondary schools to check immigration status at the time of student enrollment.\textsuperscript{244} Specifically, Section 28 mandates school officials to obtain proof of a new student’s lawful residence in the United States by requiring an original birth certificate or a certified copy of lawful immigration paperwork in addition to an attestation by a parent or guardian that the identity of the student is true and matches the birth certificate or immigration papers.\textsuperscript{245} Students whose parents cannot produce the required paperwork are presumed as having undocumented status.\textsuperscript{246} Once the information is collected, schools report the information to the State Board of Education,\textsuperscript{247} which is then responsible for providing a report to the state legislature detailing the population breakdown of documented versus undocumented students by school, the fiscal implications of all costs incurred by educating the undocumented population, and a report on both the short and long term impacts to the educational experience of lawful resident students learning side-by-side with undocumented students.\textsuperscript{248}

\begin{thebibliography}{99}
\bibitem{239} Julianne Hing, \textit{Georgia’s Statewide Undocumented Students College Ban Fails}, \textit{COLOR LINES} (Mar. 30, 2012, 3:18 PM), available at \url{http://www.colorlines.com/archives/2012/03/georgias_statewide_undocumented_students_college_ban_fails.html}.
\bibitem{240} \textit{Id}.
\bibitem{242} Tom Baxter, \textit{Alabama’s Immigration Disaster: The Harshest Law in the Land Harms the State’s Economy and Society, 1}, Ctr. for Am. Progress (Feb. 2012), available at \url{http://www.americanprogress.org/issues/2012/02/pdf/alabama_immigration_disaster.pdf}.
\bibitem{243} H.B. 56, \textit{supra} note 241, at § 18.
\bibitem{244} \textit{Id}. at § 28(a)(1-3).
\bibitem{245} \textit{Id}. at § 28(a)(4).
\bibitem{246} \textit{Id}. at § 28(a)(5).
\bibitem{247} \textit{Id}. at §28(c).
\end{thebibliography}
Lastly, the bill prohibits disclosure of any information identifying a student by name unless a valid legal waiver is produced.\textsuperscript{249} Despite that privacy measure, studies and news reports detailing the chilling effect the law has had on school attendance and flight of undocumented families from Alabama indicate the severe unsuitability of this provision.\textsuperscript{250}

The United States Department of Justice sued the state of Alabama in August 2011, seeking declaratory and injunctive relief to various provisions in H.B. 56, including the provision requiring schools to check and report on the immigration status of its students on grounds of federal law preemption.\textsuperscript{251} The district court denied all such relief,\textsuperscript{252} revealing the ill effect of the legislation. Nearly 2,000 Hispanic students were marked absent in the week following H.B. 56’s upholding,\textsuperscript{253} as parents forced their children to miss or withdraw from school out of fear of drawing attention to their undocumented status.\textsuperscript{254} Concurrently, an influx of over 1,000 calls poured in over the opening weekend for a hotline established by the Southern Poverty Law Center to provide an outlet for immigrants to talk about the effects they were experiencing from the enactment of H.B. 56, solidifying the reality of fear and unrest felt amongst the undocumented population in Alabama.\textsuperscript{255}

Within weeks of the district court’s decision, the Eleventh Circuit Court of Appeals heard an expedited appeal and granted preliminary injunctions against two of H.B.56’s provisions.\textsuperscript{256} The injunctions stayed the provisions’ implementation into law pending resolution of the appeal in 2012.\textsuperscript{257} The temporary status of the school immigrant-checking status provision\textsuperscript{258} troubled its opponents who feared its ultimate enactment would chill the right of undocumented children to pursue primary and secondary education under \textit{Plyler}.\textsuperscript{259} The National Education Association (“NEA”) passionately expressed its support to overturn H.B. 56 and submitted a joint amicus brief to the Eleventh Circuit to that effect.\textsuperscript{260} The brief concluded that, by way of fear and intimidation and in an effort to drive undocumented families out of the state of Alabama, the law would chill an undocumented child’s right to receive a public education under \textit{Plyler}.\textsuperscript{261} According

\begin{footnotesize}
\begin{itemize}
\item[249] Id. § 28(e) and (f).
\item[252] Id. at 1311.
\item[253] Lacayo, \textit{supra} note 229, at 17.
\item[254] Nat’l Educ. Ass’n, \textit{supra} note 250.
\item[255] Bauer, \textit{supra} note 13, at 4.
\item[256] United States v. Alabama, 443 Fed. App’x 411, 420 (11th Cir. 2011).
\item[257] Id.
\item[258] Id.
\item[259] Nat’l Educ. Ass’n, \textit{supra} note 250.
\item[260] Id.
\end{itemize}
\end{footnotesize}
to NEA President, Dennis Van Roekel, “[n]obody wins when a state law pushes children out of our public schools and into the shadows of society.”262

As Alabama’s anti-immigration law awaits its fate, two specific detriments of the law surfaced: an economic detriment and a social justice detriment.263 A recent study conducted by Professor Samuel Addy of the University of Alabama estimated Alabama will lose as much as 6.2% of its gross domestic product, 140,000 jobs, and $264.5 million in revenue as a result of the anti-immigration law.264 Such losses are attributable to undocumented immigrants fleeing from Alabama, leaving their jobs in agriculture behind in search of a more immigrant-friendly state in which to send their children to school.265

In addition to the sharp economic detriment that has resulted from the enactment of the Alabama law, a social loss exists and continues to grow as undocumented immigrants and their children feel threatened that their families may be torn apart if they remain in the state.266 Under Alabama’s harsh law, lawfully documented Hispanics residing in Alabama have received the same hateful message demanding they return to Mexico.267 Regardless of legal status, such racial hatred is perilous and confirms Professor Olivas’s warning about the negative impacts of rising nativism and xenophobia towards undocumented immigrants.268

In-depth studies aimed at analyzing immigration laws have begun in a few states such as Alabama, demonstrating the economic impact of anti-immigration laws via a reduction in tax revenue and the number of available workers, as well a shrinkage in consumption.269 State anti-immigration statutes are destined to cause economic hardship to their respective state economies, which, in turn, discourages states from passing similar bills.270 Such statutes have also produced unanticipated costs in legal fees, loss of tourism, tax and business revenue, and losses in the work force.271 These economic hardships and social inequities, as manifested in Alabama,272 are likely to deter other states from creating such draconian laws.273

261 Id.
262 Id.
263 See discussion supra.
265 See Baxter, supra note 242, at 1.
266 Id. at 2.
267 See Bauer, supra note 13, at 3.
268 See sources & discussion supra note 1.
270 Lacayo, supra note 229, at 11-12.
271 Id. at 7-8.
272 See Addy, supra note 264, at 8-9; see also Baxter, supra note 241, at 1-2.
With regard to education, tampering with the mandate that requires all children in the United States to have an equal right to access a free public education will deter undocumented children from attending school. This result is even more likely if no option exists for affordable post-secondary education, as undocumented children will perceive the laws to mean that they do not belong in public schools and are prohibited from receiving a public post-secondary education.

If such laws are not repealed, xenophobia may build and lead to the intended consequence of undocumented immigrant flight, which will have severe social and economic impacts on both documented and undocumented families as well as broader implications for the state implementing the law.

V. PROPOSED SOLUTIONS

Immigration reform is needed for a plethora of reasons, but one issue of great importance is addressing the needs of undocumented students who were brought to United States as children. As previously demonstrated, providing undocumented students with an equal opportunity to post-secondary education and financial aid as is afforded to citizens and permanent residents is necessary to conform to the constitutional and moral ideals of equality. Additionally, providing equal opportunities will likely positively impact both individual state and national economies. Many of the major immigration states, excluding Florida and Arizona, have passed legislation granting post-secondary access and some type of financial assistance to undocumented students. A strong moral argument also exists for providing access and financial aid to post-secondary education and a pathway to citizenship for undocumented students. Even those who do not accept this argument cannot deny that states with these statutes have benefited economically while states which have passed anti-immigration statutes are expected to experience economic setbacks.

While the constitutionality of anti-immigration statutes has not yet been determined, states with pro-immigration statutes specifically tailored to in-state

273See Nat’l Conference on State Legislatures, supra note 130. (failing to aid undocumented students to attend postsecondary institutions results in higher costs to state prisons and welfare systems).


275See id.

276Baxter, supra note 242, at 1-2; see also Addy, supra note 264, at 8-9.

277See Passel & Taylor, supra note 15, at 1-2.

278See text supra, pp. 48-50.

279See discussion supra, Part II.

280OLIVAS, supra note 1, at 93.

281Laura Vazquez, With SB 1070 on Deck, Supreme Court Decision Will Be a Game Changer, Huffington Post- Latino Voices, Apr. 3, 2012, available at
tuition and/or financial assistance for undocumented students are yielding positive results and have helped increase enrollment of undocumented students in colleges and universities. As federal legislation, however, is still ultimately needed to work in tandem with these state statutes.

Only federal legislation can change the legal status or grant citizenship to undocumented immigrants who need that change in legal status to attain lucrative, professional employment. As various versions of the DREAM Act have failed, some argue the DREAM Act is more likely to be passed as part of a larger and comprehensive package coupled with other interrelated issues, such as energy and health care. Due to the interrelation and complexity of these issues and increasingly partisan politics over such issues, truly comprehensive reform is only possible at the federal level.

To facilitate the passage of such federal legislation, it is pivotal for states to enact and further refine their DREAM statutes. To make this “dream” a reality, all states ought to quantitatively assess the impact of the undocumented population in their state economies, including the revenue realized by having undocumented residents living and working in their state and the impact of losing that revenue if the undocumented population were to suddenly vanish. States should then use this information to support the drafting and enacting of statutes that create or expand financial benefits and access for the undocumented population to post-secondary educational facilities. The more states that extend the idea of Plyler to post-secondary schooling, the more likely Congress will act and pass a federal DREAM statute.

State legislation is also necessary to continue building an infrastructure of post-secondary access and aid to undocumented students. With an established infrastructure, the transition period of interweaving federal and state law will be less difficult. Even if federal immigration reform is forthcoming, states will likely remain responsible for making individual decisions regarding the availability of in-state tuition rates, scholarships, and aid for their residents. States are capable of enacting such legislation regardless of demographics, political affiliations, and existing opinions on immigration if the issue is framed in terms that appeal to the senses of the local population, such as a positive cost-benefit analysis of what the community could gain with such legislation.

CONCLUSION


282 Solorzano, supra note 6, at xxvi.
283 Id.
284 OLIVAS, supra note 1, at 81.
285 Id. at 82.
286 Id.
287 Id. at 83.
The time to pass a federal DREAM Act is now. All students, documented or undocumented, are created equal and deserve equal educational opportunities. If we choose to value equal opportunity for all, it naturally follows that children brought to the United States as minors deserve equal educational opportunities. States that have enacted state DREAM statutes have made greater strides toward making that dream a reality for undocumented students. State DREAM statutes offer lasting economic and social benefits at the local, state, and national levels, whereas anti-immigration statutes have had the opposite effect. With such positive results, state DREAM legislation may inspire Congress to pass a federal DREAM statute and/or comprehensive immigration reform measures. Even if federal legislation is not immediately forthcoming, states should continue their endeavors to support their undocumented students because having a pre-existing system of financial aid will benefit these students and the state economies currently and in the future. Providing equal benefits to children whose parents broke the law seems unfair to some, but one should remember that any of us could have been placed in this situation as innocently as the undocumented students. These students are seeking this aid to live happily, freely and productively as citizens in the country they call home.
INTEREST-CONVERGENCE AND THE DISABILITY PARADOX:
AN ACCOUNT OF THE RACIAL DISPARITIES IN DISABILITY DETERMINATIONS
UNDER THE SSA AND IDEA

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INTRODUCTION

Under the Social Security Act (SSA), Americans with medically determinable impairments who are unable to engage in substantial gainful employment as a consequence of their impairment are entitled to Social Security Disability (SSD) benefits or Supplemental Security Income (SSI) depending on their earnings record and income level.1 There are, of course, no racial qualifiers on eligibility.2 Nonetheless, a growing body of evidence suggests a significant racial disparity in the award of disability benefits: white applicants for disability benefits are more likely to receive benefits than black applicants.3

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Under the Individuals with Disabilities Education Act (IDEA), young Americans with educational disabilities are entitled to a free and appropriate public education, which includes an individualized educational program tailored to accommodate unique educational needs. Similar to SSD and SSI, race is not considered for purposes of IDEA eligibility. An extensive and enduring body of evidence, however, suggests a significant racial disparity in the identification of at least some educational disabilities: African-American students are more likely to be identified as disabled than Caucasian students.

Comparatively, there exists a paradox between SSA and IDEA disability determinations, as African-Americans are less likely to be considered “disabled” for purposes of receiving disability benefits but are more likely to be considered “disabled” for purposes of IDEA. This paradox appears superficially irresolvable because African-Americans cannot simultaneously be less likely and, at the same time, more likely to be disabled than Caucasians.

There are some confounding variables, however, when conjunctively analyzing SSA and IDEA disability determinations. Specifically, the relevant disability definitions, which are derived from each respective federal statute, are not quite the same. SSA and IDEA disability determinations are reached through different processes, and different actors render the final determinations unless, of course, the disability determinations make their way to Article III courts. Additionally, the pool of eligible individuals is different because IDEA candidates are, on average, younger than SSA candidates.

None of the foregoing disparities, however, offer an obvious account for the paradox. Nothing about the definitions, processes, decision-makers, or eligible pools are racially distinct, at least not in the fashion suggested by the evidence. Thus, the comparison may be apples-to-oranges, but it is nonetheless fruit, and there are no obvious reasons why the differences should matter.

More meaningful differences and a more compelling account of the paradox can be found beneath the surface in the distinct balance of interests implicated by the differences in disability determinations.

SSD applicants have an interest in securing benefits, and, in theory, the public has an interest in ensuring their receipt. Countervailing interests, such as the general interest in conserving the public fisc, the bureaucratic interests in stasis, and

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5 See id.
9 See id.
the interest in maintaining certain racial advantages by preserving the dominant culture, may complicate the public interest. 10

The public’s interest also coexists with the interests of special education students. Special education students have an interest in securing appropriate educational services, and the public has an interest in providing these services. The interests of both parties, however, are muddied by the history and current reality of special education; being labeled as “disabled” or in need of special education is associated with educational segregation, diminished educational opportunities, poor educational outcomes, and a lingering stigma of generalized inferiority. 11 Coincidentally, this type of treatment parallels the way the dominant majority has treated African-Americans throughout much of history. This parallel may be no coincidence at all. The disability paradox may be an illustration of the late Derrick Bell’s “interest convergence” dilemma. 12

According to Professor Bell’s interest-convergence thesis, civil rights victories for African-Americans—and likely for other political minorities as well—have tended to occur only when the interests of African-Americans converge with the interests of Caucasian America. 13 Therefore, when those interests diverge, entailing Caucasian America perceives no benefit, or no net benefit, from advancing civil rights for African-Americans, attempts to advance civil rights are less likely to succeed.

Interest-convergence may also account for the disability paradox. To further explain, the interests of African-Americans may diverge from majoritarian interests in one context but converge in others. In the SSD context, the interests of African-American applicants in securing benefits diverge from majoritarian interests in conserving the public fisc. The majoritarian interest may also encompass a desire to perpetuate a racially tinged hierarchy composed of deserving and undeserving beneficiaries of public funds. In the educational context, however, the interests of

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10 See Nicholas Eberstadt, Yes, Mr. President, We Are a Nation of Takers, WALL ST. J., Jan. 24, 2013 (describing the push and pull between societies need for government assistance programs and public response to such programs).

11 See Dept. of Ed., Provisional Data File: SY2010-11 Four-Year Regulatory Adjusted Cohort Graduation Rates (Nov. 26, 2012), http://www2.ed.gov/documents/press-releases/state-2010-11-registration-rate-data.pdf (reporting that the average overall state graduation rate was 78.3%; for students with disabilities, the average state graduation rate was 57.2%); See also Beth A Ferri & David J Connor, Tools of Exclusion: Race, Disability, and (Re)segregated Education, 107 TEACHERS COLLEGE RECORD 453 (2005).

12 Professor Bell, who passed away on October 5, 2011, formally introduced the interest-convergence analysis derived from Brown v. Board of Ed., 347 U.S. 483 (1954), in his article, The Interest-convergence Dilemma, 93 HARV. L. REV. 518, 523 (1980). Thereafter, it was one of the central tenets of his highly influential work. See, e.g., Derrick Bell, Diversity’s Distractions, 103 COLUM. L. REV. 1622, 1624 (2003) (suggesting, when read together, the Supreme Court’s decisions in the University of Michigan affirmative action cases “provide a definitive example of my Interest-Convergence theory.”).

African-American students converge with majoritarian interests in securing funding for special education.

Part I of this Article describes the evidence supporting the argument that there is a racial disparity in the way SSD benefits are awarded. In particular, Part I addresses over thirty years of studies, many by the federal government, which consistently reveal the significant role race plays in SSD disability determinations. The studies illustrate African-Americans are less likely to receive disability benefits than Caucasians.¹⁴

Part II summarizes the large body of evidence documenting racial disparities in disability labeling under IDEA. It notes that the disproportionately high numbers of African-American students in special education classes have persisted despite of extensive research and documentation, private litigation, and a congressional mandate ordering states to review and revise their practices relating to students with disabilities.¹⁵

Finally, Part III attempts to account for this disability paradox by applying the interest-convergence framework. It describes Professor Bell’s original thesis, reviews a recent critique, and summarizes the slightly modified version of the thesis offered by Professor Lani Guinier. Applying the Bell-Guinier framework, it concludes the disability paradox reflects a convergence of interests and promotes the existing racial hierarchy in three ways: first, by perpetuating inequalities in economic and educational opportunities; second, by promoting racial segregation; and, finally, by reinforcing negative racial stereotypes about racial minorities, including black Americans.

I. RACIAL DISPARITIES IN SOCIAL SECURITY DISABILITY DETERMINATIONS

The SSA provides two means of supplementary income to eligible disabled people: SSD and SSI.¹⁶ Workers who become disabled after a substantial work history and after having paid into the Social Security system, are recognized as having “insured status” and are able to draw from the SSD system.¹⁷ An “aged, blind, or disabled individual” not of “insured status” for purposes of SSD benefits may be


entitled to SSI. Unlike SSD, SSI eligibility and the benefit amount are “need-based.” Need is calculated with reference to both annual income and available resources. Calculations of both income and resources are subject to a series of exclusions. The income limitation, for example, excludes need-based assistance from state programs, and the resource limitation excludes the value of one’s home, “household goods, personal effects, and an automobile, to the extent that their total value does not exceed such amount as the Commissioner of Social Security determines to be reasonable.”

Although the eligible populations are different, the disability standards for SSI and SSD are the same: claimants are entitled to benefits if they have a medically determinable impairment, which prevents them from engaging in “substantial gainful activity.” Social Security regulations mandate a five-step process for determinations of disability.

In step one, the Commissioner must determine whether the claimant is currently engaging in substantial gainful activity. If the claimant is not engaged in substantial gainful activity, the analysis of the claim proceeds to step two. Step two, commonly known as “severity regulation,” involves a minimum threshold determination of whether the claimant is suffering from a severe impairment. If the claimant is not engaged in substantial gainful activity and has a severe impairment, the evaluation then proceeds to step three. Step three requires a determination of whether the impairment is equivalent to one of a number of listed impairments the Commissioner acknowledges as being so severe as to preclude one from substantial gainful activity. If the impairment meets or equals a “Listed Impairment,” the claimant is conclusively presumed to be disabled. If a claimant

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18 See 42 USC §1381, et. seq.
20 Id. (for single persons, resources cannot exceed $2,000 and for married persons living together, resources cannot exceed $3,000).
21 Id.
22 42 U.S.C. § 1382(b).
23 Claussen v. Chater, 950 F.Supp. 1287, 1292 (D. N.J. 1996). Since the disability standard and the determination processes are the same, the two separate programs will be conflated for purposes of this project and generally referred to as Social Security Disability, or SSD.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
does not suffer from a “Listed Impairment” or its equivalent, the analysis proceeds to steps four and five.\footnote{Id.}

Under these steps, the Commissioner must determine whether the claimant retains the ability to perform either his or her former work or some less demanding employment.\footnote{Id.} Step four requires a determination of whether the claimant retains the residual functional capacity to perform work he or she performed in the past.\footnote{Id.} If the claimant is able to meet the demands of his or her past work, then he or she is not disabled within the meaning of the Act.\footnote{Id.} At step four, as in the previous steps, the claimant bears the burden of proof.\footnote{Claussen, 950 F.Supp. at 1294.}

If a claimant demonstrates an inability to resume his or her former occupation, the evaluation moves to step five.\footnote{See 20 C.F.R. §§ 404.1520, 416.920 (explaining the five-step sequential process used to determine if one is disabled).} At this final stage, the burden of proof shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability.\footnote{Claussen, 950 F.Supp. at 1294.} Further, a determination of disability at step five must be based on the claimant's age, education, work experience and residual functional capacity, and must consider the cumulative effect of all of the claimant's impairments.\footnote{See 20 C.F.R. §§ 404.1520, 416.920; see also Sullivan v. Zebley, 493 U.S. 521 (1990); Claussen, 950 F.Supp. 1287 (as applied to a claim of disability resulting from multiple sclerosis).}

Furthermore, SSD claimants face a lengthy bureaucratic process to secure their disability determination. The process includes:

1. an initial application to the state agency charged with administering the program;
2. if unsuccessful, a request for reconsideration by the same state agency;
3. if unsuccessful, a request for a hearing before an Administrative Law Judge (ALJ);
4. if unsuccessful, a request for review by the Appeals Council; and

The time between an applicant’s initial application and a hearing before an ALJ can take up to two years.\footnote{Id.}
Despite what appears to be a standardized scheme to evaluate claims for disability benefits and what appears to be plenty of time for careful deliberation, negative aspects such as inconsistency, opacity, and the effects of structural and unconscious biases plague the process.\textsuperscript{41} Of greatest concern is the substantially higher rate at which Caucasian applicants are awarded benefits in comparison to African-American applicants.\textsuperscript{42}

The SSA’s disparate treatment of African-Americans applying for disability benefits is far from novel. As early as 1980, researchers sifted through available evidence in order to explain the apparent racial disparities in award rates.\textsuperscript{43}

In April 1992, the SSA itself issued a lengthy report on the disparate approval ratings between African-American and Caucasian applicants for disability benefits.\textsuperscript{44} The report concluded that further investigation was necessary before any definitive conclusions could be drawn.\textsuperscript{45} In September 1992, just five months later, the SSA issued another report attempting to fulfill the April 1992 report’s call for further research.\textsuperscript{46} The investigation brought limited success in determining the cause of the disparate treatment of applicants.\textsuperscript{47} The report successfully identified the point in the process during which much inexplicable disparate treatment took place: the ALJ level.\textsuperscript{48} While there were disparate levels of treatment between African-American and Caucasian disability applicants at the initial stages, most of the differences could be explained by factors unrelated to the applicant’s race.\textsuperscript{49} At the ALJ level, however, much of the difference in approval rates could not be explained.\textsuperscript{50} This conclusion brought into question the relatively limited oversight of ALJ decision-making.

In September 2002, the General Accounting Office (GAO, now the Government Accountability Office) reported that a lack of data regarding the race of applicants prevented researchers from drawing a definitive conclusion about the

\textsuperscript{40} See Claussen, 950 F.Supp. 1287.

\textsuperscript{41} See Vendel, supra note 3.

\textsuperscript{42} See id.

\textsuperscript{43} See, e.g., Thorpe , supra note 3.


\textsuperscript{45} Id. at 47.


\textsuperscript{47} Id.

\textsuperscript{48} Id. at 2.

\textsuperscript{49} Id.

\textsuperscript{50} Id.
impact of race at the ALJ decision-making level.\textsuperscript{51} In November 2003, however, the GAO issued a follow-up study with some startling results.\textsuperscript{52} The data revealed, among claimants who were represented by attorneys, white and African-American claimants were equally likely to be allowed benefits, but among claimants who were not represented by attorneys, African-American claimants were significantly less likely to be awarded benefits than white claimants. Moreover, claimants who were represented by persons other than attorneys, such as legal aides, friends[, or family, were more likely to be awarded benefits than claimants who are not represented; however, among claimants represented by these nonattorneys, African-Americans were less likely to be awarded benefits than whites.\textsuperscript{53}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
Region & All & White & African-American & Other race/ethnicity \\
\hline
All Regions & 59 & 63 & 49 & 51 \\
\hline
Region 1: Boston & 73 & 76 & 66 & 62 \\
\hline
Region 2: New York & 64 & 72 & 51 & 57 \\
\hline
Region 3: Philadelphia & 60 & 62 & 59 & 37 \\
\hline
Region 4: Atlanta & 60 & 65 & 51 & 61 \\
\hline
Region 5: Chicago & 55 & 59 & 46 & 45 \\
\hline
Region 6: Dallas & 54 & 61 & 39 & 52 \\
\hline
Region 7: Kansas City & 59 & 61 & 51 & 45 \\
\hline
Region 8: Denver & 59 & 61 & 66 & 48 \\
\hline
Region 9: San Francisco & 53 & 57 & 49 & 45 \\
\hline
Region 10: Seattle & 60 & 62 & 53 & 51 \\
\hline
\end{tabular}
\caption{Percentage of Claimants Allowed Benefits at the Hearings Level by Race and Region, 1997 to 2000.}
\end{table}

\textsuperscript{51} U.S. GEN. ACCOUNTING OFFICE, GAO-02-831, SSA DISABILITY DECISION MAKING: ADDITIONAL MEASURES WOULD ENHANCE AGENCY’S ABILITY TO DETERMINE WHETHER RACIAL BIAS EXISTS at 3, 6, 18 (2002) (significantly, the SSA claimed that the lack of such statistics suggested a lack of racial bias, as compared to GAO’s interpretation that the lack of such statistics cannot definitively rule out racial bias).

\textsuperscript{52} U.S. GEN. ACCOUNTING OFFICE, GAO-04-14, SSA DISABILITY DECISION MAKING: ADDITIONAL STEPS NEEDED TO ENSURE ACCURACY AND FAIRNESS OF DECISIONS AT THE HEARINGS LEVEL at 11 (2003).

\textsuperscript{53} Id. at 5.
In 2007, several researchers from the GAO published a literature review and independent empirical study of racial disparities within the SSA’s disability benefits programs. The study noted, “Current SSA data indicates that racial differences exist in benefit award rates at the hearings level[]” and “these differences . . . are evident in almost every SSA region.” These crude or unadjusted racial differences in award rates, however, reflected no attempt to discount confounding variables. Accordingly, the researchers attempted to control for non-racial variables utilizing logistic regression models and Oaxaca decomposition methods.

The subsequent regression analysis of almost 8000 claims revealed a claimant’s race had a significant effect on ALJ decisions in some cases:

When we compared white claimants with African-American claimants, we found statistically significant differences in the likelihood of allowance, but only among claimants who had no representation. For example, among claimants with no representation, the odds of being allowed benefits for African-Americans were about one half as high as the odds of being allowed for white claimants. In contrast, among claimants with attorney representation, we found no statistically significant difference in the likelihood of allowances between whites and African-Americans. Interestingly, 58% of the African-Americans in our sample had attorneys, while 71% of white claimants had attorneys.

The study also found that the positive impact of attorney representation was much greater for African-American claimants than for Caucasian claimants:

Specifically, the odds of being awarded benefits for African-American claimants with attorney representation were more than five times higher than the odds of being allowed for African-American claimants without attorney representation. In comparison, the odds of being allowed benefits for white claimants with attorney representation were three times higher than the odds of being allowed benefits for white claimants with no representation.

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55 Id. at 31.
56 Id.
57 Id. at 28.
58 Id. at 31 (7,908 total claims).
59 Id. at 38-39.
60 Id. at 39.
61 Id.
The researchers further concluded that they “cannot empirically explain why the effect of attorney representation is greater for African-Americans.” 62

The results of the Oaxaca decomposition were similar. 63 Most of the disparity in award rates was explicable in cases with attorney representation:

78% of the difference in predicted award rates between whites and African-Americans is due to differences in characteristics between African-Americans and whites. The remaining 22% is due to either unequal treatment in the disability decision-making process or factors that are not controlled for in the model or to some combination of the two. 64

Among claimants without attorney representation, however, only

60% of the difference in predicted award rates between whites and African-Americans is due to differences in characteristics. The remaining 40% is due to either unequal treatment or factors that are not controlled for in the model or to some combination of the two. The results of this technique buttress the conclusions from our final logistic regression model. 65

Thus, the researchers concluded, “[A]mong claimants without attorney representation, there are substantial differences in award rates between African-Americans and Caucasians that cannot be explained by differences in other factors.” 66

II. RACIAL DISPROPORTIONALITY UNDER IDEA

IDEA was enacted in part because Congress recognized, “[I]t is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results

62 Id. Two attorneys associated with the National Organization of Social Security Claimant Representatives (NOSSCR), however, state that a possible explanation is because “attorneys increase the claimant’s likelihood of being awarded benefits by (1) providing assistance with the development of evidence over and above SSA’s efforts to develop evidence and (2) coaching claimants to improve their credibility as witnesses; Id. Another possible explanation is that “attorneys often screen cases to select claimants with strong cases. Id.

63 See id. at 41.

64 Id.

65 Id.

66 Id.
for such children and to ensure equal protection of the law.\textsuperscript{67} One of IDEA’s stated purposes is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[].”\textsuperscript{68}

A state, which accepts IDEA Part B funds, is mandated to provide children with disabilities between the ages of three and twenty-one with a free appropriate public education (FAPE).\textsuperscript{69} Not only does IDEA impose the FAPE requirement, but it also imposes an affirmative duty on the state to identify, locate, and evaluate all children with disabilities residing in the state.\textsuperscript{70} In addition, the school must develop an Individualized Education Program (IEP) for each child with a disability.\textsuperscript{71} The IEP for each student must ensure that

\begin{quote}
[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.\textsuperscript{72}
\end{quote}

The “IEP Team” includes the parents of a child, at least one regular education teacher of the child, at least one special education teacher, a school representative familiar with the curriculum and available resources, and an individual who can interpret the implications of evaluation results.\textsuperscript{73} The IEP Team seeks to identify how the child is performing academically and whether the child’s disability affects his or her progress in the regular educational curriculum.\textsuperscript{74} The IEP Team will then create “measurable annual goals,”\textsuperscript{75} “a statement of the special education and related services and supplementary aids and services,”\textsuperscript{76} “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class[,]”\textsuperscript{77} and “a statement of any individual-appropriate accommodations

\begin{footnotesize}
\begin{enumerate}
\item[68]  Id. at § 1400(d)(1)(A).
\item[69]  Id. at § 1412(a)(1)(A) (2005).
\item[70]  Id. at § 1412(a)(3)(A).
\item[71]  Id. at § 1412(a)(4).
\item[72]  Id. at § 1412(a)(5)(A).
\item[73]  Id. at § 1414(d)(1)(B).
\item[74]  Id. at § 1414(d)(1)(A)(i)(I)(aa).
\item[75]  Id. at § 1414(d)(1)(A)(i)(II).
\item[76]  Id. at § 1414(d)(1)(A)(i)(IV).
\item[77]  Id. at § 1414(d)(1)(A)(i)(V).
\end{enumerate}
\end{footnotesize}
that are necessary to measure the academic achievement and functional performance of the child[78]

Congress enacted IDEA because it found children with disabilities were: (A) not receiving appropriate educational services; (B) excluded entirely from the public school system; (C) denied successful educational experiences because of undiagnosed disabilities, and (D) public schools often lack resources to assist families.79 One goal of IDEA, of course, was to open the doors of public education to children with disabilities. Beyond access, however, Congress was concerned that even when granted access to public education, children with disabilities were still not provided appropriate services to ensure their academic success.

In 1982, the Supreme Court minimized the impact IDEA might have had on many children.80 In Board of Education v. Rowley, the Court decided a school did not deny a deaf student a FAPE when the school refused to provide a sign-language interpreter in the classroom.81 In reaching this decision, the Court swept away the broad mandate many presumed IDEA imposed on school districts across the country.82 Rather than require schools to accommodate students with disabilities to ensure each child can achieve his or her full potential by accessing the full range of the general educational curriculum, the Court held IDEA only requires schools to provide services that provide a benefit to the child and that allow the child to advance from grade to grade:

Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.

Students with disabilities, then, are entitled to access to public education, but little more. This limited promise stands in stark contrast with similar mandates for gifted programs.85

Although gifted students are often provided with specialized education, many times removed from the regular classroom and provided supplemental curriculum,
IDEA does not apply to them. Gifted students are not necessarily children with disabilities. In fact, “gifted and talented” means students who give evidence of high achievement capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields, and who need services or activities not ordinarily provided by the school in order to fully develop those capabilities.

Thus, while certain students, who are presumably high achievers, are singled out for exceptional services, students with disabilities are singled out for services that merely provide a benefit; the rest of the students are entitled to a general education.

IDEA defines a child with a disability as:

- a child…with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance…, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services.

Essentially, the IDEA definition encompasses two requirements: (1) whether a child is identified as having an impairment, and (2) whether the child needs special education because of that impairment.

The process for identifying a child with a disability begins with the school seeking parental consent to conduct an evaluation. An effective evaluation procedure uses a variety of assessment methods and elicits a wide scope of information. IDEA specifically states the educational agency “shall . . . not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the student.”

Note, however, that implications for labels vary between the States. For instance, in Delaware, “Exceptional Child’ means a child with a disability or a gifted and talented child[.]” 14 Del.C. § 3101(4). Furthermore, state definitions for “gifted and talented” may vary. In Delaware, “gifted or talented child” means “a child [between the ages of four and twenty-one] or until receipt of a regular high school diploma, whichever occurs first, who by virtue of certain outstanding abilities is capable of a high performance in an identified field.” Such an individual, identified by professionally qualified persons, may require differentiated educational programs or services beyond those normally provided by the regular school program in order to realize that individual’s full contribution to self and society.” 14 Del.C. § 3101(6).


Id. at § 1401(3)(A); see also 34 C.F.R. § 300.8(c) (2007) (providing definitions for each of the impairments listed in the definition).


Id. at § 1414(b)(2)(A) (“gather[s] relevant functional, developmental, and academic information”).
It is imperative for the agency to use techniques that balance cognitive and behavioral factors in addition to physical or developmental factors.\(^{92}\)

IDEA stipulates the determinant factor of whether a child is a child with a disability shall not be “lack of appropriate instruction in reading, math[,]…or limited English proficiency.”\(^{93}\) Furthermore, “a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability[.]”\(^{94}\) Consequently, in the evaluation process, there is a constant battle between defining children with disabilities and distinguishing them from other types of non-successful students. Implicitly, some students simply do not succeed for any reason within IDEA’s jurisdiction.

In enacting IDEA, Congress noted, as “[m]inority children comprise an increasing percentage of public school students[,]…recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession[.]”\(^{95}\) IDEA further found that when considering the general school population, “[m]ore minority children continue to be served in special education than would be expected[,] and] African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their [Caucasian] counterparts.”\(^{96}\) Lastly, Congress found some studies have indicated “schools with predominately [Caucasian] students and teachers have placed disproportionately high numbers of their minority students into special education,”\(^{97}\) and “[a]s the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.”\(^{98}\)

Due to the recognized disproportionate representation of minorities in certain categories of disability in certain locales and the potential that disproportionality may be linked to bias, either unconscious or intentional, IDEA Part B mandates states to collect data to determine if there is a significant disproportionality based on race and ethnicity.\(^{99}\) In the event of significant disproportionality, the state must “review, and, if appropriate, revis[e] policies, procedures, and practices used in such identification or placement[.]”\(^{100}\)

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91 Id. at § 1414(b)(2)(B).
92 Id. at § 1414(b)(2)(C).
93 Id. at § 1414(b)(5).
94 Id. at § 1414(b)(6)(A) (enumerating the basic skills).
95 Id. at § 1400(c)(10)(C) and (D).
96 Id. at § 1400(c)(12)(B) and (C).
97 Id. at § 1400(c)(12)(E).
98 Id. at § 1400(c)(13)(A).
99 Id. at § 1418(d).
100 Id. at § 1418(d)(2).
Of special significance is the disproportionality in the specific categories of “mental retardation,” 101 emotional disturbance,” 102 and “specific learning disabilities.” 103 Known as “soft identifications” or “social model” categories, these types of disabilities “depend on clinical judgment, not just medical or biological testing.” 104

In 2008, a team of researchers led by Russell J. Skiba of Indiana University concluded the “disproportionate representation of minority students is among the most critical and enduring problems in the field of special education.” 105 The study also noted that this disproportionality continues to persist despite litigation, federal reports, and “abundant research on the issue.” 106 In addition, the study revealed “consistent patterns of disproportionality,” 107 i.e., a disproportionality that was relatively stable over time. 108 African Americans were “the most over-represented group in special education programs in nearly every state.” 109 This research was augmented by the 31st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (IDEA). 110

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101 “Mental retardation means significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child’s educational performance.” 34 C.F.R. § 300.8(c)(6).

102 34 C.F.R. § 300.8(c)(4) (“[e]motion disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems…Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under [this section]”).

103 34 C.F.R. § 300.8(c)(10) (“[s]pecific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia…Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage”).

104 Redfield, supra note 6, at 182.

105 Skiba, supra note 6; see e.g., Chinn, supra note 15.

106 Id. at 264-65.

107 Id. at 268.

108 Id. at 269.

109 Id. at 269.

issued a report in November of 2012, demonstrating, in unequivocal fashion, the continuing disparities in labeling students with disabilities under IDEA.111

DOE uses “risk ratio” to measure disproportionality.112 A “risk ratio” is calculated by comparing a subgroup’s “risk index,” or proportion of a particular subgroup assigned to a subject category, with that of another subgroup.113 For example, if 5% of all African-American students are considered disabled under IDEA and 5% of all Caucasian students are considered disabled under IDEA, then each group has a risk index of 5%, and the risk ratio is 1.0, which is proportionally equal.114 If just 2.5% of Caucasian students were considered disabled, however, then the risk ratio for African-American students would be 2.0, indicating African-American students would be twice as likely to be labeled disabled under IDEA.115

According to the DOE analysis, African-American infants (birth through age two) were tied with Hispanic infants for the lowest risk ratio in their age group, indicating they were less likely to be served under IDEA.116 In contrast, Caucasian infants were more likely to be served under IDEA with a risk ratio of 1.2.117 For children ages three through five, black children “with a risk ratio of 0.97, were almost as likely to be served under Part B as children ages [three] through [five] of all other racial/ethnic groups combined,”118 whereas white children were, again, more likely to be served, with a risk ratio of 1.29.119

The ratios were inverted among school-aged children (ages six through twenty-one).120 “[African-American] (not Hispanic) students were 1.45 times more likely to be served…under IDEA, Part B, than students in all other racial/ethnic groups combined[.]”121 Caucasian students, meanwhile, had the second lowest risk ratio among school-aged children at just 0.88.122

Particularly insightful were the risk ratios for specified disabilities. For Caucasian students, three of the four lowest risk ratios were for the so-called “soft categories” of cognitive or behavioral disabilities, which include “intellectual disabilities” (.63), “specific learning disabilities” (.75), and “emotional disturbance”

111 See id.
112 See id. at 16.
113 For a useful overview of the terminology, see Skiba, supra note 6, at 266-68.
114 See id. at 267.
115 See id.
116 DOE REPORT, supra note 111, at 16.
117 Id.
118 Id. at 32.
119 Id. at 31 tbl.4.
120 Id. at 57.
121 Id.
122 DOE REPORT, supra note 111, at 57 tbl.16.
For African-American students, these same “soft” disabilities presented three of their four highest risk ratios: “specific learning disabilities” (1.47), “emotional disturbance” (2.29), and “intellectual disabilities” (2.64). Moreover, African-American students’ risk ratios for “emotional disturbance” and “intellectual disabilities” were the highest for any disability among the test groups.

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123 Id. (among the four lowest for white students was “hearing impairments,” with a risk ratio of .75)

124 Id. (also among the top four for black students was “multiple disabilities,” with a risk ratio of 1.49)

125 Id. at 58. The numbers from Delaware are consistent with the national trend: African-American children are far more likely to be labeled as “mentally retarded,” “emotionally disturbed,” or to have “specific learning disabilities” than White children. See IDEA Part B Child Count, DATA ACCOUNTABILITY CENTER (Sept. 10, 2012), available at http://www.ideadata.org/PartBChildCount.asp (follow “csv” hyperlink under “2011”). In Delaware, Black school-age children account for about 6,710 or forty percent (40%) of students with disabilities compared to White school-age children who account for about 7,667 or forty-five percent (45%). Id. Black students represent forty-eight percent (48%) (774) of the students in the category “intellectual disability,” compared to thirty-seven percent (37%) (598) white students. Id. Black students represent forty-four percent (44%), or 3,851 of Delaware students labeled with specific learning disabilities compared to forty percent (40%), or 3,501 of White students. Id. Not only are the numbers disproportionate in the representation of Black students as a percentage of the student body in the State, but also when compared to National data. Id. The complete table of risk ratios follows:

<table>
<thead>
<tr>
<th>Disability</th>
<th>American Indian/Alaska Native</th>
<th>Asian/Pacific Islander</th>
<th>Black (not Hispanic)</th>
<th>Hispanic</th>
<th>White (not Hispanic)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All disabilities below</td>
<td>1.58</td>
<td>0.53</td>
<td>1.45</td>
<td>0.95</td>
<td>0.88</td>
</tr>
<tr>
<td>Autism</td>
<td>0.77</td>
<td>1.32</td>
<td>0.93</td>
<td>0.61</td>
<td>1.32</td>
</tr>
<tr>
<td>Deaf-blindness</td>
<td>2.02</td>
<td>1.00</td>
<td>0.84</td>
<td>1.02</td>
<td>1.04</td>
</tr>
<tr>
<td>Emotional disturbance</td>
<td>1.69</td>
<td>0.26</td>
<td>2.29</td>
<td>0.56</td>
<td>0.85</td>
</tr>
<tr>
<td>Hearing impairments</td>
<td>1.27</td>
<td>1.26</td>
<td>1.09</td>
<td>1.31</td>
<td>0.75</td>
</tr>
<tr>
<td>Intellectual disabilities</td>
<td>1.38</td>
<td>0.51</td>
<td>2.64</td>
<td>0.76</td>
<td>0.63</td>
</tr>
<tr>
<td>Multiple disabilities</td>
<td>1.29</td>
<td>0.66</td>
<td>1.49</td>
<td>0.67</td>
<td>1.03</td>
</tr>
<tr>
<td>Orthopedic impairments</td>
<td>1.06</td>
<td>0.87</td>
<td>0.94</td>
<td>1.20</td>
<td>0.93</td>
</tr>
<tr>
<td>Other health impairments</td>
<td>1.34</td>
<td>0.35</td>
<td>1.22</td>
<td>0.50</td>
<td>1.43</td>
</tr>
<tr>
<td>Specific learning disabilities</td>
<td>1.84</td>
<td>0.40</td>
<td>1.47</td>
<td>1.22</td>
<td>0.75</td>
</tr>
<tr>
<td>Speech or language impairments</td>
<td>1.45</td>
<td>0.77</td>
<td>1.03</td>
<td>0.96</td>
<td>1.03</td>
</tr>
</tbody>
</table>
III. AN INTEREST-CONVERGENCE ANALYSIS

A. The Disability Paradox

Evidence suggests that racial minorities, and African-Americans in particular, are less likely to be considered “disabled” when applying for SSD benefits, but are more likely to be considered “disabled” for purposes of placement in special education classes under IDEA.126 What could account for this paradox?

Perhaps an explanation could be found in the differences between the two programs: SSD and IDEA employ different definitions, serve different populations, and utilize different processes.127 Nothing about these differences offers an obvious explanation for the paradox; if anything, the differences suggest the disparities should run in the opposite direction.

To be classified as disabled under the SSD program, an individual must have a medically determinable impairment and be unable to engage, by virtue of the impairment, in substantial gainful employment.128 To be classified as disabled under IDEA, an individual must have one or more specified impairments (although one of the specifications is for “other health impairments”) and need, by virtue of those impairments, special education.129 As a result, the definitions target different aspects of disability: the SSD definition targets the work consequences,130 and the IDEA definition targets the educational consequences.131 Benefits are also available to different populations: SSD to working-age Americans (and their beneficiaries),132 and IDEA to younger Americans (under Part B, ages three to twenty-one).133

It is possible that by some objective measure, that is, some measure that is independent of labeling biases, older African-Americans are proportionally less likely to have work-related disabilities while younger African-Americans are proportionally more likely to have education-related disabilities.134 That result, however, seems unlikely because nothing in the available evidence supports the proposition that the racial gap in disability is a phenomenon confined to youth.135 A comprehensive examination of more than two-million respondents to the Census Bureau’s 2006 American Community Survey concluded that African-Americans experienced a

126 See discussion supra Parts I, II.
127 Id.
128 See 20 C.F.R. § 416.905(a).
130 See 20 C.F.R. § 416.905(a).
132 See 42 U.S.C. § 1381 et. seq.
134 See discussion supra Parts I, II.
higher risk of disability and, specifically, functional limitations, vision/hearing/sensory impairment, and memory/learning problems across their lifespan. The racial gap in disability actually peaked in midlife, specifically ages fifty to sixty-nine, when African-American respondents were roughly twice as likely to have disabilities. These findings are consistent with studies suggesting that, for a combination of medical and socio-economic reasons, elderly African-Americans are more likely to be disabled than elderly Caucasians; elderly African-Americans also experience the onset of disability at an earlier age. In summation, the evidence suggests the racial gap in disability does not decrease with age but actually increases, reaching its peak near the end of the working years.

An alternative explanation may be found in the differences between the disability determination processes utilized under SSD and IDEA. SSD determinations are made initially by state agencies; applicants not satisfied with the initial determination may request reconsideration from the agency and then, if necessary, a hearing before an ALJ, followed by a subsequent review by an Appeals Council. IDEA determinations are made by local educational agencies after notice, evaluation, and a meeting with the child and her parents or guardians; parents not satisfied with the results of this determination may request a due process hearing before an impartial hearing officer. In both processes, dissatisfied parties can appeal the results of the administrative process to the federal courts.

The SSD process is, thus, more formal and more cumbersome. Ordinarily, formality suggests the SSD process is relatively disadvantageous to African-Americans, who, because of wealth disparities, would seem less likely to have access to the legal resources needed to pursue a claim to a successful conclusion. The formality of the SSD process, however, is likely not the explanation. The availability of attorney’s fees in SSD cases—typically, through contingency fee arrangements—generally, ensures the availability of qualified and vigorous representation even to low-income clients. Additionally, the relatively formalized process reduces the likelihood and impact of improper biases, including those rooted in or related to

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136 Id. at 834, 836.
137 Id. at 836.
140 See Nuru-Jeter, supra note 135, at 834-37.
142 See Perry A. Zirkel, Over Due Process Revisions for the Individuals with Disabilities Education Act, 55 MONT. L. REV. 403 (1994).
143 See Levy, supra note 141, at 467; See Zirkel, supra note 142.
Thus, nothing in relation to the determination processes fully explains the disability gap.

The differences between SSD and IDEA may play some role in the formation of the disability gap. Consequently, it would take a far more sophisticated analysis than employed above to completely discount the aforementioned differences. Thus, neither logic nor the available empirical evidence offer any apparent support for the proposition that differences in the programs themselves—in their definitions, beneficiaries, or processes—can account for all or any significant portion of the disability gap. More compelling explanations may be found elsewhere; specifically, an elegant and persuasive explanation may be found in the interest-convergence thesis.

B. Interest Convergence and Divergence

1. Interest-Convergence: The Bell Thesis

One of the earliest and most influential criticisms of the Supreme Court’s decision in Brown v. Board of Education was voiced in April 1959. Herbert Wechsler, Columbia professor of law, appeared at Harvard Law School to give the prestigious Holmes Lecture. In his speech, and article memorializing his speech in the pages of the Harvard Law Review, Wechsler declared his sympathy with the Brown Court’s effort. He professed his inability, however, to discern a “neutral principle” legitimizing the Court’s decision.

For Wechsler, the problem with Brown “inheres strictly in the reasoning of the opinion.” He deduced the opinion “must have rested on the view that racial
segregation is, in principle, a denial of equality to the minority against whom it is directed.

Nevertheless, neither the cited empirical evidence nor the Court’s rhetoric was sufficient to persuade Wechsler the proposition is valid. Wechsler concluded the real harm of segregation was not inequality; instead, the real harm was a deprivation of the freedom of association: a harm that would fall equally on pro-segregation Caucasians if they were forced to integrate. Therefore, the difficulty with the Brown decision was lack of neutrality. Wechsler claimed the decision was partial toward African-American interests and a black perspective, vindicating “the freedom of association is denied by segregation” but failing to recognize that “integration forces an association upon those for whom it is unpleasant or repugnant.”

Professor Derrick Bell first presented his “interest-convergence” thesis as part of an effort to locate the “neutral principle” that eluded Wechsler. Bell believed that by examining Brown in its historical context and by comparing the decision with other subsequent desegregation decisions, a neutral explanatory principle would emerge, a principle that apparently animated—if it did not justify—the Brown decision. Bell wrote,

[It is possible to discern in more recent school decisions the outline of a principle, applied without direct acknowledgment, that could serve as the positivistic expression of the neutral statement of general applicability sought by Professor Wechsler. Its elements rely as much on political history as legal precedent and emphasize the world as it is rather than how we might want it to be. Translated from judicial activity in racial cases both before and after Brown, this principle of “interest convergence” provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

For Bell, then, the decision in Brown did not turn on a relative assessment of the associational interests of Caucasian and African-Americans; Wechsler was

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151 Id. at 33.
152 Id. at 34.
153 Id.
154 Id.
155 Id. at 35.
156 Id. at 34. For more on Wechsler’s critique and its implications for modern desegregation cases, see Robert L. Hayman, Jr., Neutral Principles and the Resegregation Decisions, 9 WIDENER LAW SYMPOSIUM JOURNAL 129, 129-64 (2002).
157 See Bell, supra note 12, at 519.
158 Bell, supra note 12, at 523.
159 Id.
incorrect regarding that notion.\textsuperscript{160} Importantly, those who believed the “neutral principle” supporting \textit{Brown} was precisely the equality principle \textit{Brown} claimed to vindicate were also wrong. Bell disagreed that \textit{Brown} ‘simply’ stood for the principle that segregation was uniquely harmful to African-Americans and that such a simplistic understanding offended the guarantee of equal protection. Back in 1960, Professor Charles Black of Yale wrote in response to Wechsler,

\begin{quote}
[T]he basic scheme of reasoning on which these cases can be justified is awkwardly simple. First, the equal protection clause of the Fourteenth Amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law. No subtlety at all. Yet I cannot disabuse myself of the idea that that is really all there is to the segregation cases. If both these propositions can be supported by the preponderance of argument, the cases were rightly decided.\textsuperscript{161}
\end{quote}

For Bell, \textit{Brown} was no more about the unequal harm done to African-Americans than it was about their associational interests:

It follows that the availability of Fourteenth Amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice — or its appearance — may, from time to time, be counted among the interests deemed important by the courts and by society’s policymakers.\textsuperscript{162}

Here was the key to \textit{Brown} and where the interests converged: on the appearance of “racial justice.”\textsuperscript{163} Many African-Americans argued that compulsory segregation was morally wrong and inherently unequal; many Caucasians agreed.\textsuperscript{164} Therefore, official representatives of America, specifically, the Solicitor General of the United States, had joined the battle, and the Supreme Court, at long last, granted African-Americans their victory.\textsuperscript{165} This outcome was achieved only when it became clear that the continuing existence of formal racial segregation compromised not merely the principle of equality but, also, the strategic interests of the United States

\begin{footnotes}
\item[160] Id.
\item[162] Bell, supra note 12, at 523.
\item[163] Id.
\item[164] See id. at 525.
\item[165] See id. at 524.
\end{footnotes}
in the Cold War battle for the hearts and minds of the international community.\textsuperscript{166} “I contend,” Bell concluded,

the decision in \textit{Brown} to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.\textsuperscript{167}

For Professor Bell, interest-convergence explained the monumental victory in \textit{Brown v. Board of Education}. In the midst of the Cold War, white America had powerful international interests in seeing an end to official racial segregation.\textsuperscript{168} As the desegregation struggle continued, however, the interests of black and white America diverged. White America sought only a formal end to segregation; it had little interest in actually integrating its schools.\textsuperscript{169}

Both critics and supporters of the interest-convergence thesis agree the thesis has had an enormous influence on contemporary jurisprudence, providing a fresh and distinctive perspective on the struggle for racial equality.\textsuperscript{170} Thus, the thesis has been used to account for the results in a wide variety of legal disputes.\textsuperscript{171} Several theorists, for example, have suggested that the thesis provides the best account of the modern Court’s affirmative action doctrine.\textsuperscript{172} Racial affirmative action is nearly impossible to justify as a remedy for discrimination against African-Americans, but it is now justified principally by reference to the benefits it affords white America—i.e., the benefits conferred through education in a racially diverse environment.\textsuperscript{173}

2. \textit{Interest-Convergence: A Contemporary Critique}

In a recent article, University of Texas Law Professor Justin Driver suggests that although the “interest-convergence” thesis has made “considerable contributions to legal discourse,”\textsuperscript{174} a meaningful critique of Professor Bell’s theory is

\begin{itemize}
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Id. at 528-29.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} See, e.g., Daria Roithmayr, \textit{Tacking Left: A Radical Critique of Grutter}, 21 CONST. COMMENT. 191, 213 (2004) (“\textit{Grutter} demonstrates Bell’s point. . . . [T]he Court finds a compelling interest in diversifying the classroom for the benefit of white students.”).
\item \textsuperscript{173} Id.
\end{itemize}
In an effort to jump-start that critique, Professor Driver offers four specific criticisms: first, the thesis incorrectly presumes the existence of distinctive “black interests” and “white interests;” second, the thesis wrongly proposes historical continuity between the racial experience of Caucasians and African-Americans, third, the thesis slights both the individual and group agency of Caucasian and African-Americans; and lastly, Professor Bell failed to adequately test his own hypothesis.

Each of those four proposed criticisms miss the mark, however, by failing to address issues that are both important and relevant for purposes of this study.

Regarding the first criticism, it is undoubtedly the case that the interests of members of any racial group are not monolithic, and, indeed, there are instances where intra-group perceptions and preferences may sharply diverge from one another. The mere fact that distinctive interests are not universally shared, however, does not make them any less distinctive. Similarly, the fact that distinctive interests are not discernible in some cases does not entail they are not discernible in all cases. Professor Driver appears to concede these points, in acknowledging the existence of distinct black interests in the Jim Crow era. It must be noted that *Plessy v. Ferguson* was hardly the closing expression of white supremacy, and the legal and political issues surrounding race and racial equality have not disappeared in the hundred years since that decision. Those issues persist today, although perceived differently, and may be resolved differently by various groups of Americans divided among racial lines, some of which are defined by race.

To take just one example, in a 2012 survey by the Pew Research Center, 62% of African-American respondents agreed “every possible effort,” including the use of preferential treatment, should be made “to improve the position of minorities.” Comparatively, a mere 22% of Caucasian respondents held the same view. Thus, according to the survey, racial affirmative action was not universally embraced or opposed by either group; that result is hardly a surprise, as one need not look past

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175 *Id.* at 156.
176 *Id.* at 165.
177 *Id.* at 171.
178 *Id.* at 175.
179 *Id.* at 181.
180 *Id.* at 165.
181 Pew Research Center, *Trends in American Values: 1987-2012 – Partisan Polarization Surges in Bush, Obama Years* 89 (June 4, 2012). The survey also reported more generally that “African Americans have consistently been more confident than whites in government’s ability to perform efficiently and more supportive of the social safety net and a larger role for the government in society” *Id.* at 31. Additionally, the survey found that black and white Americans held vastly different perceptions of our progress toward racial equality: 61% of blacks said, “there has been little real improvement in the position of black people in this country,” while just 33% of whites had that view. *Id.* at 87.
182 *Id.*
the opinions of the Supreme Court for similar evidence. Determining interests by such a method cannot be the standard for denonminating an interest; if it is, then group interests would not exist. Contrarily, as Professor Bell presumed, as long as race has political and legal salience, as it still does, it is logical to infer the existence of racial group interests. Naturally, groups have varying interests, regardless of identifying characteristics such as race, economic status, and political affiliations. It is the collective acceptance of those interests that brings the group into fruition.

Regarding the second critique, Professor Bell’s thesis is distorted by the “misperception” of continuity in America’s racial experience, Professor Driver somewhat misses the point. Professor Driver uses one of Professor Bell’s more provocative observations as the springboard for his analysis, “[t]he difference in the condition of slaves in one of the gradual emancipation states and black people today is more of degree than kind.” Professor Driver suggests “to state this point is to refute it” because it flies “in the face of the overwhelming evidence of the tremendous strides that the United States has made with respect to race relations.” The point is not that there has not been any improvement in “race relations,” or even that there has not been any improvement for African-Americans, either in absolute terms or relative to Caucasians; instead, the central dynamic of the American experience with regard to race has been constant: African-Americans remain inferior to Caucasians by every significant socio-economic measure. Attempts to reduce inequality, at the expense of white superiority, continue to be met with resistance, sometimes in the legislative arena and sometimes in the Supreme Court. The schools were desegregated; racial equality, however, has yet to be realized. In the struggle for equality, there have been periods of progress; despite that progress, inequality persists. Thus, is it impossible to perceive a central continuity in America’s racial experience?

Professor Driver’s third critique, that the interest-convergence thesis “accords an almost complete absence of agency” to Caucasian and African-Americans, is a common criticism of critical and postmodern theory. Whatever its force in other contexts, it is a misplaced criticism here. The interest-convergence

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183 See, Ann L. Lijima, Affirmative Action: A Close Case for a Split Court, 60 BENCH & B. MINN. 16, Feb. 2003, at 3-5, 7. Discussing current views toward racial affirmative action held by Justice Thomas, who has been a persistent critic of racial affirmative action on the current Court, and Justice Breyer and Ginsberg who have been consistent supporters.

184 Driver, supra note 174, at 171.

185 Id. (citing Derrick A. Bell, Jr., Bakke, Minority Admissions, and the Usual Price of Racial Remedies, 67 CALIF. L. REV. 3, 16 (1979)).

186 Id., at 171-72.


188 Driver, supra note 174, at 173.

189 Id. at 172.

190 Driver, supra note 174, at 172.

191 Driver, supra note 174, at 175.
theory is not, as Professor Driver suggests, a claim about either the inevitable futility of black resistance to inequality or the inevitable complicity of white decision-makers in preserving white privilege. It does not, as Professor Driver concludes, lead, ultimately, to despair. To the contrary, the thesis offers an account of the historical constraints of the struggle for equality; it identifies what has been the condition predicate for success. As a historical account, however, the thesis celebrates the role of individual crusaders—black and white—in affecting positive change. “[I]nterest-convergence” is necessary for lasting legal change, but it still requires action—sometimes daring action—from protestors, lawyers, and judges. Moreover, insight into the historical constraints offers not only strategic advantages while operating within its framework but exposes the constraints to scrutiny and, ultimately, to the possibility of change.

192 Professor Stephen Feldman makes a similar point in his own response to Professor Driver. For Professor Feldman, the critical error is in obscuring the historical nature of the interest-convergence thesis:

Driver seriously diminishes Bell’s contributions by describing the interest-convergence thesis as future-oriented. Scholars can use interest convergence as a tool—a broad lens—to help explain historical developments related to social justice, whether focused on African Americans, other racial minorities, religious minorities, or similarly marginalized groups. As such, interest convergence is not a universal maxim, but it is a historical pattern that appears repeatedly throughout American history, no more, no less. Indeed, interest convergence is neither an assertion of permanent social landscapes nor a strategy for the future.


193 As Professor Bell himself explained in his initial presentation of the interest-convergence thesis, the Cold War concerns pervasive in 1954 America may seem insufficient proof of self-interest leverage to produce a decision as important as Brown. They are cited, however, to help assess and not to diminish the Supreme Court’s most important statement on the principle of racial equality. Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform.

Bell, supra note 12, at 525.

194 Professor Bell ultimately soured on the prospects for legal equality, but he continued to advocate the need for struggle. That struggle, he suggested, has not only existential value, but instrumental value as well: “Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight in itself has meaning and should give us hope for the future.” Derrick Bell, Racial Realism, 27 CONN. L. REV. 363, 377 (1992). “I am convinced,” he concluded,

that there is something real out there in America for black people. It is not, however, the romantic love of integration. It is surely not the long-sought goal of equality under law, though we must maintain the struggle against racism else the erosion of black rights will become even worse than it is now. The Racial Realism that we must seek is simply a hard-eyed view of racism as it is and our subordinate role in it. We must realize, as our slave forebears, that the struggle
Professor Driver’s fourth and final critique asserts that the interest-convergence thesis is rendered irrefutable by the tendency of its supporters, including Professor Bell, to subject cases to varying levels of scrutiny to reveal, or to ignore, underlying meanings.\(^\text{195}\) In support of this criticism, Professor Driver cites a number of cases, including older cases, such as *Strauder v. West Virginia*,\(^\text{196}\) and more recent cases, including *Palmore v. Sidoti*,\(^\text{197}\) which are at odds with the theory and were largely dismissed by Professor Bell.

Indeed, arguments can be made that the aforementioned outlying cases do fit the theory; Professor Bell asserted some of these arguments, and Professor Driver even raised some of his own. Ultimately, the criticism that every case does not fit in the racial corpus must be subjected to the same “sustained” analysis.\(^\text{198}\) Professor Bell, however, should not bear that burden. Rather, Professor Bell’s work is best viewed not as the final word on interest-convergence but as an invitation to dialogue. Professor Driver’s work is a part of this ongoing dialogue as is the instant effort.

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for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression, even if that oppression is never overcome.

*Id.*, at 377-78.

\(^{195}\) Driver, *supra* note 174, at 181.

\(^{196}\) *Strauder v. West Virginia*, 100 U.S. 303 (1879) (holding a West Virginia law that categorically excluded black citizens from the jury pool was unconstitutional). Professor Driver makes much of Chief Justice Strong’s language in *Strauder*, which recognizes the stigmatizing effects of racial exclusion. However, the narrow holding of *Strauder* had limited practical value as the Chief Justice was careful to note that while the Constitution prohibited categorical exclusion from the jury pool, it did not necessarily guarantee that black jurors actually serve on juries. Further, any understanding about racial exclusion that was gained from *Strauder* was quickly undone, initially by *Pace v. Alabama*, 106 U.S. 583 (1883) (finding a lack of inequality in Alabama’s anti-miscegenation law), and then completely by *Plessy v. Ferguson*, 163 U.S. 537 (1896) (insisting that racial segregation did not connote inferiority, and that, in any event, if “one race be inferior to the other socially, the [C]onstitution of the United States cannot put them upon the same plane.”). Even the narrow holding had limited practical value: the Chief Justice was careful to note that while the Constitution prohibited categorical exclusion from the jury pool, it did not necessarily guarantee that black jurors actually serve.

\(^{197}\) See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (finding the decision of a Florida trial court that had modified a custodial agreement because the custodial parent had entered into an inter-racial relationship, which later became an inter-racial marriage, unconstitutional). Chief Justice Burger’s opinion in this case would seemingly have been an easy and unremarkable one, except for the rhetorical gymnastics required to accommodate the Court’s rigid “state action” requirement. Conceding the possibility that social prejudice might genuinely have caused the judge to be concerned for the welfare of the child, Chief Justice Burger declared that “[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” This rhetorical mishmash may have confirmed the incoherence of the public-private dichotomy, but it signaled no change in the Court’s embrace.

\(^{198}\) See, e.g., Driver, *supra* note 174, at 185 (“Rather than offering a sustained analysis of the opinions, however, Professor Bell merely cited them in a footnote as instances of contradiction-closing cases”); “Professor Bell has refrained from dedicating sustained attention.” *Id.* at 186.
3. Interest-Convergence: Forging Convergence, Divergence, and Identity

The dialogue on interest-convergence was significantly re-shaped in 2004, with the publication of Harvard Law Professor Lani Guinier’s re-assessment of Brown and the interest-convergence thesis. In From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma, Professor Guinier offers her own exegesis of Brown with an expanded analysis of the racial interests at play.199 Those interests, Professor Guinier notes, were forged by generations of racial politics and included complex alliances and divisions, which were often of a deeply psychological nature.200 To truly read Brown, Professor Guinier suggests, one must be able to read race, in all of its dimensions.201 Thus, Professor Guinier advocates a new “racial literacy” as a way to untangle the various interest convergences and divergences present in the desegregation cases.202

Professor Guinier’s analysis begins with a survey of the racial landscape at the time of Brown.203 An important part of that landscape was the intra-racial alliance of working-class and wealthy Caucasians.204 That alliance was no accident; “the psychology of segregation,” Professor Guinier observes, “did not affect African-Americans alone; it convinced working-class Caucasians that their interests lay in white solidarity rather than collective cross-racial mobilization around economic interests.”205

In Professor Guinier’s view, the advocates of desegregation, and the Brown Court itself, critically erred in failing to perceive the strength of this alliance.206 That failing, in turn, was rooted in a broader shortcoming, the inability to recognize that segregation was just a symptom of deeper disorders—the belief in black inferiority and a commitment to white supremacy.207 Professor Guinier notes how the late Judge Robert Carter, one of the NAACP attorneys in Brown, came belatedly to this realization:

Both Northern and Southern white liberals and blacks looked upon racial segregation by law as the primary race relations evil in this country. It was not until Brown I was decided that blacks were able to understand that the fundamental vice was not legally enforced racial

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200 Id. at 114.
201 See id.
202 Id. at 114-15.
203 Id. at 98.
204 Id. at 99.
205 Id. at 96.
206 Id. at 99.
207 Id.
segregation itself; that this was a mere by-product, a symptom of the greater and more pernicious disease—white supremacy.  

Brown compounded its error with an asymmetric focus on segregation’s psychological harms to black children, thereby reinforcing both the stigma of inferiority and a divergence of black-white interests. "Brown's racial liberalism," Professor Guinier maintains, “did not offer poor whites even an elementary framework for understanding what they might gain as a result of integration.” The Brown decision “solidified the false interest convergence between southern white elites and southern poor whites, ignored the interest divergence between poor and middle-class blacks, and exacerbated the interest divergences between poor and working-class whites and blacks.”

Three vital points emerge from Professor Guinier’s analysis. The first involves an appreciation of the ways in which race is constructed—that is, the ways in which racial identity and racial interests merge. Professor Guinier indicates that the various convergences and divergences of racial interests are neither accidental nor natural but result from the careful manipulations of powerful parties who use race to advance their interests.

Those most advantaged by the status quo have historically manipulated race to order social, economic, and political relations to their benefit. Then and now, race is used to manufacture both convergences and divergences of interest that track class and geographic divisions. The racialized hierarchies that result reinforce divergences of interest among and between groups with varying social status and privilege, which the ideology of white supremacy converts into rationales for the status quo. Racism normalizes these racialized hierarchies; it diverts attention from the unequal distribution of resources and power they perpetuate. Using race as a decoy offers short-term psychological advantages to poor and working-class whites, but it also masks how much poor whites have in common with poor blacks and other people of color.

A second, closely-related notion suggests race is not the only variable in the forging and re-forging of convergent, or divergent, interests. Professor Guinier’s analysis of segregation and desegregation reveals “the dynamic interplay among race, class, and geography.” She explains further:

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208 Id. (quoting Robert Carter, A Reassessment of Brown v. Board, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 23 (Derrick A. Bell, ed., 1980)).
209 Id. at 109.
210 Id. at 102.
211 Id.
212 See id. at 94-100.
213 Id. at 114.
214 Id.
215 Id. at 115.
While racial literacy never loses sight of race, it does not focus exclusively on race. It constantly interrogates the dynamic relationship among race, class, geography, gender, and other explanatory variables. It sees the danger of basing a strategy for monumental social change on assumptions about individual prejudice and individual victims. It considers the way psychological interests can mask political and economic interests for poor and working-class whites. It analyzes the psychological economy of white racial solidarity for poor and working-class whites and blacks, independent of manipulations by ‘the industrialists and the lawyers and politicians who served them.’ Racial literacy suggests that racialized hierarchies mirror the distribution of power and resources in the society more generally. In other words, problems that converge around blacks are often visible signs of broader societal dysfunction. Real interest convergences among poor and working-class blacks and whites are possible, but only when complex issues are analyzed and acted upon with their structural, not just their legal or their asymmetric psychological, underpinnings in mind. This means moving beyond a simple justice paradigm that is based on formal equality, while contemplating what it will take to create a moral consensus about the role of government and the place of the public itself.216

While Professor Guinier focuses on the interplay between race, class, and geography,217 disability is also a vital part of the racial landscape and an essential part of the instant work. Disability mirrors the story of race, and, often, the two narratives intersect.218 Essentially, racial disparities in disability determinations signify the distribution and preservation of power.219

Such notions lead to a third critical point: for Professor Guinier—and for, less explicitly, Professor Bell before her—racial hierarchy results not from the sum of individual prejudices but from deeply entrenched and deeply inscribed structures of power.220 “[R]acial literacy emphasizes the relationship between race and power. Racial literacy reads race in its psychological, interpersonal, and structural dimensions. It acknowledges the importance of individual agency but refuses to lose sight of institutional and environmental forces that both shape and reflect that agency.”221

216 Id.
217 Id.
219 See id. at 170-71; Guinier, supra note 199, at 115.
220 Guinier, supra note 199, at 115.
221 Id.
Thus, the critical locus of interest-convergence scrutiny is not so much the individual decisions, which consist with or contradict racial hierarchy; instead, the theory emphasizes the processes of forging racial identities and racial interests and of shaping the perceptions of those identities and interests. Consequently, the aggregate results of those individual decisions are both predictable and, to those in power, more palatable.

C. Interest Convergence and Divergence in Disability Decisions.

1. Interest-Convergence and Individual Intent

The interest-convergence theory offers a compelling account of the disability paradox. The contradictory disparities in disability determinations are rational when considered as manifestations of converging and diverging racial interests; minority over-representation in the IDEA context is consistent with majority interests while in the SSD context, it is not. Before exploring this view, it is important to disclaim a contention that is not a part of this thesis. Professor Bell’s original interest-convergence theory is, generally, read as an account of the subjective motivations of decision-makers. Thus, the nine justices of the Brown Court acted upon the perceived benefits to white America in ruling segregation unconstitutional. Extending the interest-convergence thesis to disability decisions allegedly includes a statement regarding the subjective motivations of decision-makers. The interest-convergence theory suggests those decision-makers are inclined to find, or not find, disability based on their perceptions of the alignments between their decisions and white interests. That notion, though, is not the aim of this thesis.

Quite to the contrary, this thesis suggests decision-makers, in such cases, intend to perpetuate racial hierarchy; their decisions are the deliberate expression of racial hostility. Further, they may even consciously weigh the benefits of their decisions to “white America.” With regard to the question of whether that approach is often, occasionally, or hardly ever employed is not answered here; instead, no matter the frequency, those disability decisions are consistent with an alignment of interests, which preserve the racial and ability hierarchies. Those determinations are rendered despite whether the racial gaps in disability decisions, and the hierarchies they reinforce, are consciously desired, merely tolerated, or largely unnoticed because they are so unexceptional.

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We do note, however, that the processes seem to permit the expression of bias, see generally, Vendel, supra note 3 (bias in SSD process), and that in some cases, the expression of racial or ethnic bias has been sufficiently extreme and overt to require judicial correction. See, e.g., Grant v. Commissioner, SSA, 111 F. Supp. 2d 556 (M. D. Pa. 2000) (vacating decisions of ALJ who used the word “nigger” and who disparaged blacks, Hispanics, and other “no-goodniks”); Pastrana v. Chater, 917 F. Supp. 103, 110-111 (D. P. R. 1996) (vacating decision of ALJ who at considerable length, derided work habits of Puerto Ricans).

See, e.g., id.
To briefly clarify, individual decisions in these cases are substantially constrained by structures of power. For Professor Bell, those structures established a condition predicate to civil rights victories; consequently, efforts to secure equality could succeed only when minority interests were perceived to align with majority interests. Professor Guinier elaborated on the role of powerful interests in constructing the critical variables in Bell’s thesis including constructing race and racial interests, in forging convergences and divergences within and between those interests and in shaping the perception of those interests and of their alignment. Thus, the constraints present in the processes described by Professors Bell and Guinier are a part of the modern racial landscape. Indeed, the results of the disability decisions rendered within that landscape are, in the aggregate, consistent with the interest-convergence thesis.

An attempt to gauge the presence or level of racial animus in individual disability determinations is not made; neither “animus” nor “intent” nor any of the operative legal terms do justice to the full range of possible correlations between human cognition and action. The results of the individual decisions can be at least partially explained without solving the intractable problems surrounding human volition.

Moreover, a focus on the motives behind individual decisions misses a still simpler point: the class of decision-makers is enormous and may fairly include all of

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224 Bell, supra note 12, at 523.
225 Guinier, supra note 199, at 94.
226 Thus, Skiba, et al., conclude, “there is no single simple explanation that appears to fit the data on special education disproportionality. Rather, minority disproportionality in special education appears to be multiply determined, a product of a number of social forces interacting in the lives of children and the schools that serve them[.]” Skiba, supra note 6, at 278.
227 Philosopher Martha Nussbaum explains:

Western philosophers, ever since Plato and Aristotle, have agreed that the explanation of human action requires quite a few distinct concepts; these include the concepts of belief, desire, perception, appetite, and emotion—at the very least. Some contemporary philosophers have felt that Aristotle was basically right, and that we do not need any categories other than those he introduced. Others have not been so satisfied. The Stoics introduced a further notion of impulse (hormê), in the belief that the Aristotelian categories did not altogether capture the innate tendency of things to preserve their being. In a related move, Spinoza introduced the idea of conatus, and gave it great prominence. Kant was partial to the notion of inclination (Neigung), feeling that it captured features of emotion and desire not fully included in the Aristotelian/mediaeval framework. Recently some philosophers have argued that the concept of intention is both irreducible to any of the others and an essential part of explaining action. And of course others have shown an interest in the concepts introduced by psychoanalysis.

society. This inclusive notion is partially due to the nature of the processes at hand. The SSD process includes not merely ALJs but also a wide variety of state and federal employees.\(^\text{228}\) The IDEA process includes not merely hearing examiners but also teachers and parents.\(^\text{229}\)

This inclusive notion is also partially due to the systemic nature of the decisions that produce and consistently re-produce the disparities. With regard to the IDEA disparities, Skiba, \textit{et al.}, note:

There may be some temptation to restrict the interpretation of “inappropriate identification” so as to focus primarily on special education policies, practices, and procedures. Yet, the data clearly indicate[s] that racial and ethnic disparities in special education are not solely a special education problem, but are also rooted in a number of sources of educational inequity in general education, including curriculum; classroom management; teacher quality; and resource quality and availability. Students who are referred to special education because they have failed to receive quality instruction or effective classroom management have been inappropriately identified as much as if they were given an inappropriate test as part of special education assessment.\(^\text{230}\)

Finally, this inclusive notion is also partially due to the enduring nature of the disparities; the question, after all, is not only why this disability paradox exists but also why the paradox persists. After decades of research and analysis, the paradox remains unresolved, and little progress has been made in reducing its constituent disparities. In this apparent acquiescence to inequality, society may simply be complicit.

2. \textit{Interest-Convergence and Racial Hierarchy}

Therefore, with regard to all of the foregoing, the conflicting disparities in disability determinations are consistent with a white-over-black racial hierarchy and, thus, also comport with the interest-convergence account. In particular, the disability paradox reflects a convergence of interests and promotes the existing racial hierarchy in three ways: first, by perpetuating inequalities in economic and educational opportunities; second, by promoting racial segregation; and third, by reinforcing negative racial stereotypes about racial minorities, including African-Americans.

\textit{a. Unequal Opportunities}

Identifying an individual as “disabled” produces a very different outcome in the SSD context when compared to the IDEA context. Denial of SSD and SSI benefits for claimants with medial impediments entails those individuals often go

\begin{itemize}
\item \textit{See Vendel, supra note 3, at 775-76.}\(^\text{228}\)
\item \textit{See 20 U.S.C. § 1414(d)(1)(b) (2010).}\(^\text{229}\)
\item \textit{Skiba, supra note 6, at 282 (citations omitted).}\(^\text{230}\)
\end{itemize}
without the public benefits necessary for their subsistence. The consequences are heightened for racial minorities and their dependents; African-Americans, in particular, confront an array of inter-related systemic disadvantages. They are more likely to be unemployed, poor, subjected to inadequate access to health care, resulting in severe medical problems, and increased reliance on disability benefits. Minorities frequently experience these social and economic disadvantages over multiple generations.

In contrast, a positive determination for IDEA applicants entails more negative consequences, especially for minority students. Data recently released by the United States Department of Education documents depressed graduation rates for students with disabilities in nearly every state. In forty-seven of the forty-eight reporting jurisdictions, students identified as having disabilities under IDEA


232 According to the Census Bureau, the 2011 poverty rate among black Americans was 27.6%; among white Americans it was 9.8%. A gap of at least twenty points has been constant throughout the four-decade time span covered by this analysis. See U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2011 52-53 (September 2012).

233 See, e.g., U.S. Department of Health & Human Services, 2011 National Healthcare Disparities Report 242 (March 2012) (noting that previous and current disparities reports indicate “Blacks had poorer quality of care and worse access to care than Whites for many measures tracked in the reports”).

234 See, e.g., Jennifer M. Orsi, et al., Black–White Health Disparities in the United States and Chicago: A 15-Year Progress Analysis, 100 AM J PUBLIC HEALTH 349, 352 (Feb. 2010) (noting that racial disparities in health in the United States have been well documented, and finding “minimal progress being made by the United States as a whole toward the reduction or elimination of racial health disparities”); Vernelia R. Randall, Eliminating Racial Discrimination in Health Care: A Call for State Health Care Anti-Discrimination Law, 10 DEPAUL J. HEALTH CARE L. 1, 2-3 (2006) (noting that racial minorities “are sicker than white Americans; they are dying at a significantly higher rate”).

235 The Social Security Administration notes that in 2011, “12.6 percent of the population was African American; however, 19 percent of disabled workers receiving benefits were African American.” Social Security Is Important To African Americans, available at http://www.ssa.gov/pressoffice/factsheets/africanamer.htm.


238 Reporting jurisdictions included forty-seven states plus the District of Columbia. Idaho, Kentucky, and Oklahoma received or have a pending request for an extension of the time line for data submission. Only South Dakota reported a higher graduation for students with disabilities, 84%, compared to an overall graduation rate of 83%. Id.
graduated at a lower rate than the overall population: the gap ranged from six points to fifty-two points, with an average gap of twenty-one points.\textsuperscript{239}

Within the cohort of students with disabilities, the reality is even more severe. Professor Beth A. Ferri and David J. Connor observe,

Recent studies show how the label of disability triggers disparate outcomes for White students and students of color. For White students, special education eligibility is more likely to guarantee access to extra support services, maintenance in general education classrooms, and accommodation for high-status examinations. For students of color, however, being labeled as disabled can result in decreased access to general education and poorer transition outcomes.\textsuperscript{240}

This trend is confirmed by the \textit{31st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (IDEA)}.\textsuperscript{241} The DOE report also documents markedly different outcomes for black and white students identified as “disabled” under IDEA.\textsuperscript{242} According to the report, the Caucasian student dropout rate is 21.1\% while the African-American student dropout rate is 32.5\%.\textsuperscript{243} For Caucasian students, the graduation rate is 64.3\%; for African-American students, the graduation rate is 42.5\%.\textsuperscript{244}

\textbf{b. Segregation.}

White “interest” in maintaining some degree of segregation persists.\textsuperscript{245} According to the General Social Survey (GSS), from 1972 to 1996 (when GSS stopped posing the question in its surveys), the percentage of Caucasian Americans who objected to sending their children to schools with “a few blacks” dropped to a negligible number.\textsuperscript{246} The percentage who objected to sending their children to schools that were “half black,” however, held steady at roughly 20\%; those who objected to sending their children to schools that were “mostly black” also held steady at roughly 40\%.\textsuperscript{247} Lawrence D. Bobo, et al. posited such objections are “consistent with the notion that whites are defending their group position.”\textsuperscript{248}

\begin{itemize}
\item \textsuperscript{239} The average overall state graduation rate was 78.3\%; for students with disabilities, the average state graduation rate was 57.2\%. \textit{See U.S. Dept. of Ed., supra} note 11.
\item \textsuperscript{240} \textit{Ferri & Connor, supra} note 11.
\item \textsuperscript{241} \textit{See generally DOE Report, supra} note 111.
\item \textsuperscript{242} \textit{Id.}
\item \textsuperscript{243} \textit{Id.} at 69. \textit{For Hispanic students, the drop-out rate was 32.4\%. Id.}
\item \textsuperscript{244} \textit{Id.} \textit{For Hispanic students, the graduation rate was 44.8\%. Id.}
\item \textsuperscript{245} \textit{See Lawrence D. Bobo, et al., Real Record on Racial Attitudes, in Social Trends in American Life: Findings from the General Social Survey since 1972 50 Figure 3.4} (Peter V. Marsden, ed. 2012).
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{248} \textit{Id.} at 49.
\end{itemize}
The disability paradox may correlate with this “interest” in racial segregation, as SSD denials may indirectly foster segregation while positive disability determinations under IDEA may directly produce racial segregation.

Arguably, since SSD denials result in a loss of potential income, African-American claimants are disadvantaged due to their disproportionately high number of denials. Given the obvious relationship between income and housing choices, along with the “reinvigorated” positive correlation between residential segregation and de facto school segregation, an indirect effect of a differential loss of potential income may be increased racial segregation of both neighborhoods and schools.

Alternatively, grants of IDEA disabilities promote a different kind of racial segregation—*intra*-school segregation—and do so quite directly. Ability tracking, combined with the longstanding racial gaps in standardized measures of ability, has long produced racial separation within schools. As Ferri and Connor note:

During the 1950s, as Brown was becoming a reality, a sharp rise in standardized testing helped to establish a set of rigid norms regarding academic ability based on White, middle-class American experiences, values and expectations. As an institutionalized practice, the testing movement simultaneously identified and created groups of students who deviated from the “normal” or “average” student. The result was the seemingly beneficent provision of separate classes...Yet, because of biased notions of race and ability, “special” classes became increasingly populated by minority, immigrant, and other already marginalized students.

IDEA’s inclusion directive should have diminished this trend. Ferri and Connor note, however, the mandate “resulted in resistance similar to that expressed in response to school desegregation shortly after Brown.” As a result, “racially segregating schooling practices have given way to largely under-acknowledged and more covert forms of racial segregation, including some special-education practices.

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249 See supra Part I.


251 See supra Part II.


253 See supra Part II.

254 Ferri & Connor, supra note 11, at 457-58 (internal citations omitted).

255 Id. at 453.
Since the inception of special education, the discourses of racism and ableism have bled into one another, permitting forms of racial segregation under the guise of ‘disability.’”

Data from the 31st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act also substantiates the claim. In its statistical summary on inclusion, the DOE noted,

[F]or each racial/ethnic group, the largest percentage of students ages six through twenty-one was served under IDEA, Part B, inside the regular class 80% or more of the day. The students who were served inside the regular class 80% or more of the day accounted for at least 50 percent of the students in each of the racial/ethnic groups except for the black (not Hispanic) group. The percentages of students in the racial/ethnic groups who were served inside the regular class 80% or more of the day ranged from 48.2 percent to 60.8 percent.

African-American students were at the bottom of the inclusion scale: less than half, 48.2%, of African-American students were in regular classrooms more than 80% of the day. In comparison, white student were at the top of the inclusion scale: 60.8% of Caucasian students were in regular classrooms more than 80% of the day. Further, 11.9% of Caucasian students were inside the regular class less than 40% of the day, whereas 21.7% of African-American students were inside the regular class less than 40% of the day.

Thus, it certainly appears, as Ferri and Connor assert, that special education operates “as a tool for…racial resegregation.”

c. Stereotypes

The disability paradox is also consistent with a succession of racial stereotypes, which portray African-Americans as less industrious and intelligent than Caucasian Americans. Those two stereotypes have proven to be remarkably durable.

As to the first, a review of the General Social Surveys from 1977 to 2008 revealed, “[L]ack of ‘motivation or will power’ is the most commonly endorsed explanation of black disadvantage[.]” Additionally, a 2012 Associate Press survey, conducted with researchers from Stanford University, the University of Michigan and the National Opinion Research Center at the University of Chicago, found respondents were less likely to agree that “determined to succeed” or “hard-
working” described “most blacks” as compared to “most whites[ ]” respondents were more likely to agree that “most blacks” were well-described as “lazy.” The survey also found 33% of all respondents agreed “if blacks would only try harder, they could be just as well off as whites[ ]” 36% of all respondents agreed “[b]lacks are demanding too much from the rest of society[ ]” and 39% of all respondents responded “[m]ost blacks who receive money from welfare programs could get along without it if they tried.”

The disproportionate denial of SSD benefits is consistent with these views. Explicit in the denial is the determination that the claimant is not sufficiently impaired as claimed and is able to work; implicit in the denial is the normative conclusion that the claimant should be more self-reliant and less dependent on government assisted benefits. And if those conclusions are embedded with special force or frequency in the case of black claimants, those conclusions reinforce many Americans’ perception of “most blacks.”

Regarding the second stereotype, the presumed intellectual inferiority of African-Americans has long remained a staple of racist ideology and, even today, supports a small cottage industry of pseudo-scientific claptrap. While Caucasians today are less likely than their forebears to explicitly embrace the presumption, it has not disappeared entirely. In 1990, more than half of the Caucasian respondents to the General Social Survey reported their belief that whites were more intelligent than African-Americans. By 2008, that percentage had dropped precipitously; still, approximately one-fourth of all Caucasian respondents explicitly asserted the intellectual superiority of whites over blacks.

Disability determinations in the IDEA context reinforce these views. For African-American students receiving benefits under IDEA, the highest risk ratio reported by the DOE was for “intellectual disabilities,” while for white students, the lowest risk ratio was for “intellectual disabilities.” The history of intellectual disability, or of “mental retardation,” the term that preceded it, is a history of

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264 See The Associated Press Racial Attitudes Survey, 18-22 (Oct. 29, 2012), available at http://surveys.ap.org/data%5CGI%5CAP_Racial_Attitudes_Toplevel_09182012.pdf. Among the respondents, 59% believed that “determined to succeed” described blacks “moderately well,” “very well” or “extremely well,” while 81% thought the same of whites; 66% believed that “hard-working” described blacks “moderately well,” “very well” or “extremely well,” while 82% thought the same of whites; 14% believed that “lazy” described blacks “very well” or “extremely well,” while just 5% thought the same of whites.

265 See id. at 23-24.

266 Thus, the most recent assault on Social Security, in the form of a complaint is “the recent American flight from work has largely been a flight to government disability programs.” Eberstadt, supra note 10, at 15.

267 For a critique of these racist theories, see Hayman, supra note 253.

268 See Bobo, supra note 245, at 60.

269 See id.

270 See DOE REPORT, supra note 111, at 57 tbl 16.
exclusion; it is no coincidence that it largely tracks the history of race in America. The histories of “race” and “mental retardation” are, more than parallel; they have a common history; they were made similarly, and they were made together.

Leonardo and Broderick observe,

[L]ike race, ability is a relational system. In terms of race, the category, White, cannot exist without its denigrated other, such as Black or people of color generally; in terms of ability, constructs such as smartness only function by disparaging in both discursive and material ways their complement, those deemed to be uneducable and disposable. In both cases, the privileged group is provided with honor, investment, and capital, whereas the marginalized segment is dishonored and dispossessed. And each of these ideological systems (of Whiteness and of smartness) tends to operate in symbiotic service of the other in their mutual (though not exclusive) constitution of “the normative center of schools.”

Further, implicit in the discourse of exclusion,” note Ferri and Connor, “are perceptions of black and disabled people as unequivocally inferior.” Such perceptions “are deeply entrenched in the cultural imagination and are evident in oppressive legislation, educational practice, as well as in the distorted portrayals of ‘others’ in academic scholarship, literature, media, and film.”

These perceptions also appear to be present in disability determinations under the SSA and IDEA.

**CONCLUSION**

Viewed through the lens of the interest-convergence thesis, the disability paradox is essentially no paradox at all. Although the racial disparities in SSD and IDEA disability determinations run in opposite directions, each has the effect of promoting white racial advantages by favoring white economic and educational opportunities; by promoting racial segregation; and by reinforcing racial stereotypes that depict Caucasians as more industrious and more intelligent than African-Americans.

These consequences are both inter-related and mutually-reinforcing aspects of the racial hierarchy, which is, in turn, integrally related to the ability hierarchy. Ferri and Connor explain,

[B]locking the access of Black people and people with disabilities to all levels of society rests on a central, but often unarticulated,

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271 See Hayman, supra note 252.
272 See id.
273 Leonardo & Broderick, supra note 252, at 2208 (citation omitted).
274 Ferri & Connor, supra note 11, at 469.
275 Id. (citation omitted).
assumption of superiority by the dominant group. This very superiority is threatened by integration, which historically has evoked many fears, including an increased competition for jobs, miscegenation, and “pollution” of the nation’s gene pool. Thus, access appears to literally diminish White and able-bodied presence, and therefore, power.276

Restricting that access preserves the hierarchy in another critical way: by disrupting the possibilities for interest convergences along egalitarian lines. “Once blackness becomes the face of failure,” notes Professor Guinier, “race then influences and constrains social, economic, and political opportunities among and between blacks and whites and between blacks and other people of color.” 277

Despite these constraints, opportunities still exist for people with disabilities of all races to seek and secure greater opportunity and more inclusion, for racial minorities with and without impairments to seek and secure freedom from the disabling effects of “race,” for all Americans to seek and secure a more egalitarian future, one liberated from structural and ideological constraints—from the policies and practices, from the myths and biases—of the past.

Striving to fulfill those opportunities begins with understanding.

276 Id. at 470; See also Leonardo & Broderick, supra note 252, at 2214 (noting “the ways that the ideology of smartness operates in the service of the ideology of Whiteness and vice versa.”).

277 Guinier, supra note 199, at 108-09.
THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES
2012 NATIONAL LAWYERS CONVENTION

CIVIL RIGHTS
WHO BENEFITS FROM AFFIRMATIVE ACTION AND GENDER
CONSCIOUSNESS?

PANELISTS:
MARTIN "MARTY" CASTRO
President and CEO, Castro Synergies, LLC, and Castro Rioja Enterprises, LLC;
Chairman, Illinois Human Rights Commission and the U.S. Commission on Civil
Rights; Co-Founder, New Futuro, LLC

PROFESSOR GAIL HERIOT
University of San Diego School of Law, and Commissioner,
U.S. Commission on Civil Rights

PROFESSOR THEODORE M. "TED" SHAW
Columbia Law School

STUART S. TAYLOR JR.
Contributing Editor, National Journal

Moderator:
JUDGE CARLOS BEA
U.S. Court of Appeals, Ninth Circuit

12:00 p.m. to 2:15 p.m.
November 16, 2012

Washington, D.C.

JUDGE CARLOS BEA: Good afternoon, ladies and gentlemen. Good afternoon. Could we get started?

[Tapping on glass.]

JUDGE CARLOS BEA: Thank you very much, Mr. Klausner.

Welcome to The Federalist Society presentation on "Who Benefits from Affirmative Action and Race and Gender Consciousness?"

Albion Winegar Tourgée, who was counsel for Homer Plessy in Plessy v. Ferguson, is often credited with originating the metaphor of "colorblind" law. For the past 40 years, Tourgée's concept of legal colorblindness has been considered by many legal scholars and policy makers and activists to be a hindrance to the advancement of racial minorities just as legal gender blindness has been considered a hindrance to the advancement of women.
Race consciousness, as its advocates put it, has become the norm. Gender consciousness is its twin. What have been the consequences of these experiments? This panel will examine two distinct areas of affirmative action: college admission and employment. Among other things, panelists will discuss the scholarly evidence that has been put before the Supreme Court in the fall term case of Fisher v. University of Texas.

Skeptics of race-preferential college admissions policies argue that the evidence shows that these policies have decreased rather than increased the number of minority physicians, engineers, college professors, and lawyers in the nation. They will also discuss evidence that affirmative action for men has become the norm at many liberal arts schools.

In the area of employment, the panelists will debate the extent to which the antidiscrimination laws have been interpreted in ways that make it more difficult for women and minorities with fewer job skills, or for that matter anyone with fewer job skills, to get their foot in a door in today's weak job market. Has the bureaucratic behemoth administering antidiscrimination laws gone too far in the regulation of private employment relationships? If so, who benefits and who is hurt? The issue not so much, is affirmative action right, but does it work?

So to discuss this we have a really wonderful panel, very distinguished and balanced between the academic and the practical and the persons who have been in the public arena. I will introduce each speaker before he or she talks and will advise you which side the speaker will take. The opening statements will take about 12 minutes. After that I will direct questions raised by the statements to each of the panelists and ask them to limit their response to one minute. Then we will take questions from the audience as time permits.

Our first speaker is Marty Castro. Marty Castro is the president and CEO of Castro Synergies, LLC, which provides strategic consulting services to corporations, entrepreneurs, and nonprofit organizations seeking to have a positive social impact on diverse communities.

In January 2011, President Barack Obama appointed Marty to the United States Commission on Civil Rights. In March 2011 he was elevated to the position of chairperson of USCCR, making him the agency's eighth chair since the formation of the commission, and the first Latino chairperson in the history of USCCR. Marty got his B.A. in political science from DePaul University and his J.D. from the University of Michigan Law School in 1988.

Let me stop right there. For those of you who haven't heard, the Sixth Circuit yesterday, in an en banc opinion 8-to-7, invalidated Michigan's Proposition No. 2, which bans race, sex preferences for admission to universities, and puts it on a collision course with the Ninth Circuit, which found exactly contrary to that in 1997 in an opinion penned by Judge O'Scannlain. If we have time, we'll discuss that.
Marty practiced law and was a partner of several prestigious law firms, including Baker & McKenzie, which was then the world's largest international firm. He was also vice president of external affairs for Aetna, Inc., where he had profit and loss responsibilities for Aetna's diverse market strategy in the Chicago regional market.

Please welcome Marty Castro.

[Applause.]

MARTY CASTRO: Thank you, Your Honor. And I want to thank The Federalist Society for inviting me here today. I especially want to thank my colleague on the commission, Gail Heriot, for extending the invitation personally.

Before I proceed with my remarks I just want to make clear that my remarks today are unrelated to my service on the U.S. Civil Rights Commission and are my own personal views, unrelated to any of my government positions.

Well, the interesting question we have today is who benefits from affirmative action? Frankly, I believe everyone in this room does in one way or another, or has, in the past, through programs that may not have been considered affirmative action, been the beneficiaries of racial preferences in society, whether through education, employment, et cetera.

I am the son and grandson of Mexican immigrants. My grandparents came to this country in the 1920s; my mother came in the 1960s, looking for better opportunities, and I am the result of that effort. They did not have formal education. I'm the first in my family to graduate high school, the first to go on to college and graduate there, and the first to go on to anything beyond that when I got my law degree at the University of Michigan.

And at Michigan, I am very proud to say, I was a product of the affirmative action program at that law school. It gave me an opportunity to prove myself despite all the challenges that I had to try to get to that point, not only economically and culturally but also, even though I was an excellent student in high school, my high school guidance counselor told me that I should not go to college. And that is not an unusual story in communities of color.

Also, I feel that the opportunity to attend the University of Michigan through their special admissions program has allowed me to live the American dream, not only for myself and my family, but to make a contribution for others. I am financially successful. I am personally satisfied. I have been, as you heard from my bio, involved in a number of prestigious businesses, and I am now allowed to serve my country. And I am not the exception to affirmative action. I am the rule.

There are those who say that affirmative action programs hinder minorities. They stigmatize us. They mismatch us and they put us in over our heads. Well, law school is a tough place. College is a tough place. But I can tell you, I wasn't in over my head. And studies show, contrary to the belief that maybe some folks in this
room have, that minority students who go to the prestigious schools, to the elite schools as the result of affirmative action programs actually are successful. In fact, my law school, during the Michigan litigation, conducted a study of those of us who were minority alumni. And I'll just read you a real quick quote from that report by one of my law professors, David Chambers:

"By any of our study's measures, Michigan's minority alumni are, as a group, highly successful in their careers although as a group they entered Michigan with lower LSAT scores and lower undergraduate GPAs than other students. In their jobs immediately after law school and in their jobs today, Michigan minority alumni are professionals fully in the mainstream of American economy. They are well represented in all sectors of the legal profession. They are successful financially. They are leaders in their communities and generous donors of their time to pro bono work in nonprofit organizations. Most are happy with their careers, and minority alumni respond no differently than white alumni when asked about overall career satisfaction.

"LSAT scores and undergraduate GPA scores, two factors that figure prominently in admissions decisions, correlate with law school grades, but they seem to have no relationship to success after law school, whether you measure that success by earned income, career satisfaction, or service contribution. In fact, if admissions at Michigan had been determined entirely by LSAT scores and UGPA, most of the minority students who graduated from Michigan would not have been admitted, even though the measure that would have worked to exclude them seems to have virtually no value as a predictor of post-law school accomplishments and success."

So why affirmative action? Those of us who support it have various reasons for it. There's the compensatory view, that is for past wrongs that folks are still suffering the effects from; corrective, that is injuries or inequalities that have existed in the not-too-distant past and currently; or diversity, which is really what has been the subject of most of the litigation of the Supreme Court, the diversity that brings different points of view to benefit and enrich who? Ultimately really the dominant culture, the white students in that school who, but for having diverse colleagues, might not see the different life experiences.

But I believe in the social justice reasons for the affirmative action programs, particularly when you look at discrimination and racism being not something that is in the distant past but it's something that exists today in our cities, in our schools, in our communities. We see that are schools are being resegregated. We see that children of color continue to live in communities that are segregated, whose schools lack the resources to educate them properly, whose schools lack the programs and processes that have given other students in majority communities an advantage by the time we get to college and law school consideration.

So I do believe that racism and exclusion does exist in our society and in our institutions today, and I believe that is one of the most important reasons for us to continue to have affirmative action programs. And I believe that programs must be race-conscious. I'm not saying that race should be the only factor, but it must be an
important factor because the reasons that those inequalities exist relate directly to race and ethnicity discrimination.

I don't support a colorblind approach. While it may sound wonderful, and that is a goal we all aspire to one day, it's not there yet. And in fact, I also don't believe in a color-mute approach. It is very difficult for us as Americans to talk about race. I think we need to do it more often and we need to do it in a context like this one. And I'm really glad to be here because I may not be able to convince anyone here, and I'm sure no one will convince me to change my point of view, but I think we need these kinds of dialogues in order to better understand where we come from on these issues, particularly one as controversial as race and admissions.

But as I said, historically there are inequities. For generations the system has been set up to provide racial preferences for the white dominant culture, which is responsible for the continuing lack of students in many of the institutions we see today, because not long ago, in the 1950s, the University of Texas did not admit blacks. Their stated reason was, well, we're training lawyers for the Texas bar and the Texas bar doesn't hire blacks so we're not going to train them. In the 1930s Harvard basically had the same view of Jewish lawyers. And that historic lack of access is still reverberating in the halls of higher education today.

We also have issues such as legacy. We really don't talk about the fact that there are more legacy admits than there are minority admits through affirmative action programs, yet I rarely hear anyone saying we should dismantle legacy, although I know that my colleague Gail Heriot has raised that. But by and large that goes unquestioned or unchallenged, although maybe folks want to challenge it now that we're seeing some minorities that are in legacy. But still, in Ivy League schools 96 percent of current alumni are white, so that legacy system continues in place.

As was mentioned earlier on the gender side of things, another issue I know that Gail has been a leader on, white men are being denied access—if you look at it that way—to colleges and law schools more by white women than by minority applicants. So I think we have to—if we're really going to take a look at this, we need to take a look at the whole thing.

Also, I think that today when you look at the communities of color, as I said they're high-poverty schools, and even minority students who come from well-to-do families still end up in schools that are unequal because of the segregation that we see in our schools. White students have more and better opportunities because of the way we fund our education to be able to participate more fully in their education, including having advanced placement courses in many of the schools where many minority schools do not.

Therefore, by the time we get to college admission or law school, we have not had the opportunity, as others, to be able to have advanced placement. We also have ability tracking, which places many qualified minority students into remedial courses, and folks like me who were told by my own counselor, despite my grades, I shouldn't go to college.
So it's not just a class issue, although there is that. To me really the issue becomes a catch-22. We have to be able to start not just at affirmative action and higher education, but we really have to look at what tools we need to bring to bear in the earliest parts of that pipeline so that when we do finally get to compete for applications in higher education, we have more of a level playing field.

I believe that students of color who are admitted to programs—and the studies show this—are not less qualified and are not less capable than their white counterparts. The test scores of students of color are more a reflection of the effects of racism and lack of resources than they are on merit. I also believe standardized tests are not predictive ultimately of that student's success. But ultimately I believe this problem was created by race consciousness and it has to be solved by race consciousness.

And I will end my remarks with a quote from a gentleman who I think a lot of folks in this room know: "Time and experience have shown us that laws and edicts of nondiscrimination are not enough. Justice demands that each and every citizen consciously adopt and accelerate a real and personal commitment to affirmative action so as to make equal opportunity a reality." And that was Governor Ronald Reagan. Thank you.

[Applause.]

JUDGE CARLOS BEA: Thank you, Marty.

Our next speaker is Stuart Taylor Jr. Stuart is an author and freelance journalist who has been focusing on legal and policy issues, and is also a Brookings Institution nonresident senior fellow and a National Journal contributing editor. He teaches law and the news media at Stanford Law School and practices law on occasion.

Mr. Taylor has recently coauthored a book with Mr. Sander on affirmative action. It was published October 9th and it's published by Basic Books, and it's entitled, Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit it.

Mr. Taylor also filed, with Professor Sander, an amicus curiae brief in the pending Supreme Court affirmative action case of Fisher v. Texas. He previously coauthored with KC Johnson a critically acclaimed 2007 book, Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Fraud.

Mr. Taylor graduated from Princeton University in 1970 with an AB in history. After working as a reporter for the Baltimore Evening Sun from 1971 to '74 he moved to Harvard Law School, serving as a note editor for the Harvard Law Review and graduating in 1977 with high honors.

Mr. Taylor practiced law with Wilmer, Cutler & Pickering from '78 to '80 and then he joined the New York Times Washington bureau in 1980, covering legal affairs from 1980 to '85, and the Supreme Court from 1985 to 1988.
Mr. Taylor characterizes himself as a critic of affirmative action but not an abolitionist. He seeks transparency in how affirmative action is conceived and administered. He seeks performance statistics of beneficiaries. And he warns that unless we do something about race preferences, they will still be around a hundred years from now, not the 25 years that Justice O'Connor thought necessary in 2003 in the case of *Grutter v. Bollinger*.

The effects of large preferences, as he will explain in his *Mismatch* book with Richard Sander, shows that although discrimination may exist out there, it does not exist in college admissions except as to whites and Asians.

Mr. Taylor.

[Applause.]

**STUART TAYLOR JR.**: Thanks very much for that kind introduction. And thanks to The Federalist Society for having me here.

Marty Castro has spoken very eloquently of the benefits of racial affirmative action. I call it racial preferences because that's what it's come to mean in university admissions. And I acknowledge those benefits. I applaud those benefits. I think that there were more benefits at the beginning of this process than there are lately, but surely there are benefits. There are also costs. I'm here mainly to talk about those costs, and it's a weighing of the costs and benefits that ultimately needs to influence policy making on these issues.

I should mention that Gail Heriot I think will speak more about affirmative action in the workplace. And so don't worry, those of you who wanted to hear about the workplace. It's not all going to be universities.

As Judge Bea indicated, in our new book Richard Sander and I argue that racial preferences hurt many and perhaps even most—this is an imprecise business—of the minority students they're intended to help by bringing them without warning—"without warning" is important—by telling them, you're going to do fine, and then bringing them into academic settings where they're likely to struggle academically and become demoralized.

And transparency—one reason we see transparency as a remedy is sort of a consumer protection measure to protect minority students who are being set up to fail, as we think in some cases, as to what they're getting into. Now, this is not to deny that many black and Hispanic students can compete at the highest levels, but many of those who receive large preferences—and I emphasize large preferences—are being set up to fail.

I'm not suggesting that somebody who gets a little tie-breaking preference is being set up to fail, but the students who receive large preferences, which are the norm, we contend—I think the evidence shows—are victims of what we call "mismatch."
They would do much better academically—and we think perhaps be much better off in many other ways—if they attended schools for which they were well qualified, if they attended schools where their entering academic credentials are more or less on a par with those of their classmates.

Now, Mr. Castro said he doesn't think SAT scores prove much, but they're—along with grades, that's what the colleges and the other university institutions use as their guide to who's best qualified, who's best prepared academically. It's just that they use a totally different scale depending on the race of the applicant, with Asians, by the way, the smallest and least politically powerful of minorities, being the systematic people on the losing end of these comparisons, as demonstrated by the facts from the University of Texas where Asian students are, on average, far better prepared academically than any other racial group, including whites.

These academic struggles have nothing to do with race as such. They have everything to do with large preferences, which cause similar problems for many athletes, for children of very rich donors, and the like. Mr. Castro mentioned legacies. I don't support legacy preferences, but one distinction that's important to keep in mind is that from the evidence I've see, the legacy preferences tend to be rather small. I'm not defending them but they're rather small. The mismatch problem is a factor of large preferences.

An outpouring of social science evidence shows that this mismatch problem largely explains why black students tend to cluster toward the bottom of the class, why most of those who aspire to be science majors, who aspire to be professors and scholars, end up giving up those aspirations and fleeing to softer courses, why black law graduates fail the bar exam at something like four times the rate of white bar graduates, and why a careful survey shows them to have low—shows affirmative action beneficiaries, recipients I would say—to have low levels of academic self-confidence.

There are also new data from the University of California after racial preferences were banned by Proposition 209, effective 1998, indicating that contrary to a lot of the publicity about what a terrible thing this was for minorities at the University of California, grades—you know, what happened was kids who might have gotten into Berkeley and done not so well ended up at, let's say, Davis or Riverside, other UC campuses, and did fine. Overall for minorities, grades went up, graduation rates went up, science persistence rates went up.

And there's even a study by my coauthor indicating that the top—the best-prepared black and Hispanic students found the University of California campuses to which they could get admitted more attractive, on average, after preferences were banned than before. We suspect—we certainly couldn't prove—we suspect that the attraction is having a degree that's free of the taint that, oh, you just got in because of your race.

While mismatch theory is controversial—especially controversial is our claim that preferred minorities, many of them, would be better off at less selective schools—it
rests on a foundation of facts that are undisputed—largely undisputed among experts.

First, almost all selective schools routinely use very large racial preferences in admissions, leading to racial gaps of up to 200, 400 points in the mean SAT scores among admitted students and also in the mean high school GPAs. In any measure of academic achievement that’s used by colleges in deciding who to admit, they end up with large racial gaps in their student body.

Second, this leads to half of black students roughly ranking in the bottom 20 percent of their class in college and in the bottom 10 percent of their classes in law school, and black dropout rates a multiple of white dropout rates.

Third, many black students who aspire to major in science or engineering end up doing so badly that they flee to softer courses and abandon their aspirations.

Fourth, the same is true, according to another study, of black students who aspire to be professors. They come in; they take hard courses; they do badly. Their academic self-confidence on average tends to be diminished. They give up on the idea of becoming professors.

Fifth, so far undisputed studies show that these students would have far better chances of sticking with science or engineering or pre-med and achieving their goals if they attended colleges for which well qualified.

Sixth, contrary to an oft-repeated myth, affirmative action recipients by and large do not gain ground on their classmates during the four years of college or the three years of law school, or whatever the education is. Often, the data suggests, they lose ground.

Seventh, these problems are least visible at the most elite colleges. At a law school like Michigan, for example, where Mr. Castro attended, these problems would be considerably less visible than they would at a law school 20 or 30 places farther down in the prestige rankings because at the top there's a much better supply of relatively well-qualified minority students. As you go down in the prestige curve, in order to fill their own targets for minority enrollment they're forced to create much larger gaps in academic preparation.

Eighth, as to law school, even when one compares black and white students who enter law school with very comparable academic qualifications, the black students are still far more likely to fail the bar exam.

I repeat, the above facts are largely undisputed among experts. There has been great dispute, on the other hand, about my coauthor Rick Sander's work on law school mismatch, and there's two briefs in the Supreme Court devoted largely to attacking his work on law school mismatch. Many scholars have attacked his statistical methodology. As best I can tell, most of these have also happened to have staked
their reputations over the years on the premise that racial preferences are altogether benign, and so I'm not sure they're completely disinterested.

The detailed law school mismatch debate and the statistical arguments back and forth are much too complex to try and summarize here, but one point is clear: None of Rick Sander’s critics has suggested a remotely plausible theory for why black students are so much more likely to fail the bar exam than whites with comparable academic credentials on entering law school.

Our theory is that the blacks are learning less in law school than comparably qualified whites because they are systematically brought into schools for which they are not well prepared. They’re falling behind in class, many of them. They’re getting poor grades. They’re learning less. And they’re graduating, if they graduate, with diminished academic self-confidence. That’s our theory. Rick’s critics have a lot to say about his statistical methods but they don’t seem to have a plausible theory of their own.

Just a couple of random points, responding to Marty Castro. He mentioned social justice reasons for supporting affirmative action. It is true that at the outset in the '60s the same students who tended to get racial preferences also tended to come from, you know, families where nobody had previously gone to college, to come from the lower segments of the income distribution. That's no longer true. That hasn't been true for a long time.

Now racial preferences are given mostly to the best-qualified black and Hispanic students, and the best-qualified black and Hispanic students are disproportionately the wealthiest black and Hispanic students. And the way the system works, these students are systematically being preferred to less wealthy, better-qualified Asian students and white students. So I think that affirmative action, as it operates today, is making socioeconomic inequality worse, not better.

Also, Mr. Castro mentioned Jewish lawyers being discriminated against—or Jewish would-be lawyers—in decades past. And that's true and that was terrible. I think it reminded me of the haunting resemblance between the view of people in the '20s of the Ivy elites that, well, we have too many Jews here; they're doing too well; we have to keep the numbers down. Well, that's what's going on with Asians right now all over the country. Too many Asians doing too well. Have to keep the numbers down. And racial preferences are one of the tools of doing that.

I'll stop there. Thank you.

[Applause.]

JUDGE CARLOS BEA: Thank you.

Our next speaker is Gail Heriot, who is a professor of law at the University of San Diego and a member also of the United States Commission on Civil Rights. Among
her areas of expertise are civil rights, employment law, product liability, remedies, and torts.

Her work has appeared in legal journals like the *Michigan Law Review*, the *Virginia Law Review*, and the *Harvard Journal on Legislation*. She also writes for popular newspapers and magazines including the *Wall Street Journal*, the *Weekly Standard*, *Los Angeles Times*, and the *San Diego Union Tribune*.

Gail is a former civil rights counsel to the United States Senate Committee on the Judiciary and a former associate dean for academic affairs at George Mason University Law School. Prior to entering academia she practiced law at the Washington law firm of Hogan & Hartson and the Chicago law firm of Mayer, Brown & Platt. She clerked for Justice Seymour Simon of the Illinois Supreme Court.

Professor Heriot graduated with highest distinction from Northwestern University in 1978 and earned her J.D. cum laude in 1981 from the University of Chicago Law School, where she served as an associate editor of the *Law Review*. Professor Heriot will discuss principally affirmative action in the employment area.

Professor Heriot?

[Applause.]

**PROFESSOR GAIL HERIOT:** It's dark over in my little corner and I've got presbyopia, so I guess I'm going to have to talk from up here.

Stuart Taylor has told you a story of how good intentions have backfired in the area of college admissions. I want to talk about a few other policy areas involving race and gender consciousness that have also backfired.

First I want to point out, however, that you can't blame all this on liberals. I believe some of the blame belongs to conservatives. Yes, I mean people like you and me here. Savvy conservatives hate to talk about issues of race and gender because they're afraid it will get them in trouble. They are afraid that their liberal friends and colleagues will unfairly accuse them of racism or of engaging in a war on women, so they clam up.

But these are not issues that you can clam up on. They are too important. When small-government types are AWOL on race and gender issues, you can pretty much figure that the policies that will get adopted are going to be big-government policies. And as usual, big-government policies will fall victim to the rule of unintended consequences.

If you are looking at the question of who benefits in this area, alas it turns out not to be the women and minorities who are the intended beneficiaries that benefit. If there's anyone who benefits, I would say that it is the throbbing federal leviathan and those who benefit from that leviathan.
Let me give you an example in the area of education. One of the Obama administration's gravest errors, in my opinion, was its school discipline initiative. And of course that's an ongoing initiative. It is a fact that African-American students are disciplined in school more often than white students. It is also a fact that white students are disciplined more often than Asian students.

Like a general fighting the last war, Secretary of Education Arne Duncan believes that intentional discrimination is the root cause of all of this. In an emotional speech that he gave on the Edmund Pettus Bridge in Selma, Alabama marking the 45th anniversary of the "Bloody Sunday" confrontation there, Duncan vowed that he would aggressively root out that intentional discrimination. But what his armies of Department of Education bureaucrats were really doing—with the best intentions of course, but what they were really doing was mistaking aggregate rates of discipline for racism on the part of classroom teachers.

The Oakland, California school system recently agreed, under pressure from the Department of Education to, quote, "targeted reductions" in the use of student suspensions for African-American and Latino students. These are disciplinary quotas, plain and simple, forced on schools by the Department of Education. The danger should be obvious.

First, what if an important reason that African-American students are being disciplined more than white students, and that white students are being disciplined more than Asian students, is that they are misbehaving more often? Think of it. Study after study has shown that children who grow up in fatherless households are more likely to misbehave in school than students who have intact families. The out-of-wedlock birth rates for African Americans these days are over 70 percent. It's 28 percent for whites and much lower for Asians. For that not to have a very profound effect on rates on misbehavior would take a miracle.

Second, what if the cost of failing to discipline misbehaving students falls on the misbehaving students themselves, or even worse, upon their fellow students? And of course with African-American students, disproportionately their fellow students will be other African-American students who are trying to learn amid classroom disorder. Will unleashing the Department of Education on these schools—will it cause the schools simply to tolerate more classroom disorder, thus making it difficult for students in the same classroom to learn?

Here is where a healthy dose of conservative values—values that I'm afraid were AWOL in this case—should have been applied. Trying to control a problem like this, a nuanced, fact-specific problem, from inside the beltway is simply not possible. Even the most well-meaning federal edict tends to be devoid of nuance by the time it gets down to the foot soldiers, in this case the classroom teachers: Don't discipline misbehaving African-American students unless you have a good reason.

An edict like that is going to be naturally understood by school district officials as: Don't do it unless you are confident that you can persuade some federal bureaucrat,
whose judgment you have no reason to trust, that you've done it for a good reason, sometime in the future. In turn, that gets translated to the school principal as: Don't discipline African-American students unless you've jumped through the following inconvenient procedural hoops that we've set up for you so that we can satisfy that federal bureaucrat of the future. That in turn gets translated to the school teacher as: Don't do it. It's only going to get us in trouble.

Now, if how and when to discipline "little Johnny" in school is not a local issue, then I'm afraid there are no more local issues. It is entirely possible, I believe, that the way schools discipline children today needs improvement, but to look at it as a race discrimination issue is a profound error.

So let's move to employment, because I believe it is a tribute to the resilience of the American people that anybody gets hired today, given our laws.

[Laughter.]

PROFESSOR GAIL HERIOT: We must never lose sight of the fact that overly restrictive and overly complex laws regulating the employment relationship only encourage employers to take jobs overseas. So here we have another policy backfire. It is the least-skilled among us who are hurt most by policies of this sort.

We all of course remember Martin Luther King's justly famous statement that he looks forward to the day that his children will be judged by the content of their character rather than the color of their skin. My friend Roger Clegg, who I believe is in the audience here somewhere, has said that the law as it exists today does precisely the opposite. An employer can consider race and gender as well for affirmative action purposes, but under the EEOC's guidance it is illegal in most cases for an employer to decline to hire an applicant because he has a criminal record.

If there's one matter of record about a person that lets others know something about the content of his character, it is his criminal record. The idea appears to have been to benefit young black males, who are more likely to have criminal records than, say, elderly Asian females. But a policy like this can backfire. There is already published empirical evidence that young black males may be worse off under the new guidance. If an employer cannot check, he may err on the side of caution and not hire from pools that he may believe, rightly or wrongly, are of higher risk.

Imagine a small businessman who has 10 jobs, let's say, that are really good entry-level jobs, don't require any particular skills, and in the past he's hired recent high school grads without skills, or even some high school dropouts. And as a result, maybe in the past, out of the 10 hires, maybe even eight were young African-American males.

When that small businessman looks at the new guidance and says, okay, you know, I cannot check on these criminal background—I can't make a criminal background check anymore the way I used to—maybe even I was disobeying the last guidance—
but he may decide he can't take the risk and so he hires 30 part-time employees instead, college students from the nearby elite university.

And now, instead of a majority of African-American males, maybe there's only one or two in that pool that get the part-time job. Maybe there's just one African-American male who gets that part-time job now and he's an African-American male who is the son of a dermatologist from Bethesda.

Some of you might be scratching your heads and wondering how it can be a violation of Title VII, which bans discrimination based on race, sex, religion, and national origin, to not be able to consider why it's a violation to consider criminal background. If that's what you are thinking, all I can say is, you know, wake up, mom and dad; it's 2012.

Those who supported the new guidelines, although you can quibble around the edges, their view was that this is basically an ordinary application of Title VII. And, you know, again, you can quibble about that on the edges, but they're not entirely wrong on that. Once you accept the disparate impact theory as an appropriate theory of liability under Title VII, it's easy to get there.

That's the problem. The EEOC took the position very shortly after the passage of Title VII, the original Title VII, that it prohibits both conscious discriminatory treatment and unconscious discriminatory treatment, and they're right on that. Of course it does. But they also took the position that it bans qualifications that have a disparate impact that cannot be justified by business necessity; alas the notorious Griggs case. In that case the Supreme Court appeared to accept that analysis, and Congress acquiesced in 1991.

The problem with this analysis is not simply that it contradicts the original language of Title VII. The problem is that all job qualifications have a disparate impact on some group. Job qualifications that require heavy lifting have a disparate impact on women. Job qualifications that require fine handiwork have a disparate impact on men. Job qualifications that require experience in the donut industry have a disparate favorable impact, and thus a negative impact, on the rest of the world. The favorable impact is on Cambodian Americans who disproportionately have that experience. Hotel-motel management; subcontinent Indian Americans do very well there. And winter wheat; Scandinavian Americans are good at that one.

I will happily write a check for a thousand dollars to anyone in this room who can come up with an actual job qualification that separates actual successful applicants from unsuccessful applicants that doesn't have a disparate impact on some group somewhere—some religion, one of the genders, a racial group, a religious group, an ethnic group somewhere. I don't think you can do it.

The upshot of all of this of course is that all employment qualifications are illegal. Enforcement is thus utterly lawless, arbitrary, and racially discriminatory to boot. No employer who announces that it has any clear job qualifications can feel safe under this regime. And, surprise, they also aren't allowed to have subjective job
qualifications. So that pretty much rules everything out. If you're thinking this is good for America, I would suggest that you rethink that. This causes the economy generally to suffer. And if employment rates are any guide on this, minority members suffer more than others.

I will stop there. I have other examples that we can talk about in the question-and-answer period if that's what you want to do.

[Applause.]

JUDGE CARLOS BEA: Our next speaker, and batting clean-up, is Ted Shaw. Mr. Shaw is counsel to the firm of Fulbright & Jaworski. His practice involves civil litigation and representation of institutional clients on matters concerning diversity and civil rights.

Prior to joining Fulbright, Mr. Shaw was director, counsel, and president of the NAACP Legal Defense and Education Fund, for which he worked in various capacities over the span of 26 years. In 1990, Mr. Shaw left LDF, the Legal Defense Fund, to join the faculty at the University of Michigan School of Law, where he taught constitutional law, civil procedure, and civil rights.

While at Michigan, he played a key role in initiating a review of the law school's admissions practices and policies and served on the faculty committee that promulgated the admissions policies and programs that was upheld by the United States Supreme Court in 2003 in the case of Grutter v. Bollinger. At present Mr. Shaw is Professor of Professional Practice in Law at Columbia, the university law school.

Mr. Shaw.

[Applause.]

PROFESSOR TED SHAW: Thank you. I am grateful for the invitation to spend some time with you at The Federalist Society convention. I've done this before and will be happy to do it again if you'll have me again. But I also want to say that every time I come I am, in many ways, stimulated by what I hear. I won't always say how I'm stimulated—

[Laughter.]

PROFESSOR TED SHAW: —but I am. And I think it's a very valuable thing when those of us who share different views of the world and the most compelling issues that confront us have an opportunity to exchange ideas. I deeply believe that.

Having said that, I was thinking about the opinion that came down yesterday in the Sixth Circuit, a deeply divided opinion, 8-to-7. None of us I think would fool ourselves about where this is headed. And I looked in the opinion to see if one of my former students, who is now serving on the Sixth Circuit, which way he went. He didn't participate. I'm told that he is on the faculty of Michigan Law School now.
But the reason I raise it is because he was one of my favorite students in Michigan, very conservative, and a person of high integrity in my view. We didn't share all of the same views. Many of them we didn't share. But I deeply respected him and I think he deeply respected me. There's a great difference between people who are, in my view, intellectually and instinctively conservative and open-minded, and people who are ideologues. And I'm sure that you would say the same thing, or many of you, on the same—with respect to people who are liberals who are not open-minded and who are ideologues. I think that's an important distinction.

Having said that, there's a lot on the table. I won't have an opportunity to say all that I would like to say. And I want to resist the temptation by and large to engage in a kind of personal testimony. I think it's powerful, or can be—nothing wrong with it. But I have learned as I've gotten older that we all have our stories to tell. And, you know, it's interesting when you get to know people and their personal backgrounds. As I said, we all have our stories to tell.

But I can't resist saying this: I grew up in a public housing project in the Bronx in a family, therefore, that was poor, without my father in the household. And I am also a beneficiary of affirmative action. And I say that unashamedly, unabashedly. And I don't suffer any psychological problems that many people say affirmative action beneficiaries struggle from. And I have no question that I am better off where I am right now because of the opportunities that were open to me.

And it didn't mean that I was unqualified. What it meant was that the light of opportunity historically hadn't some to shine in places like the project where I grew up, and still doesn't for the most part. We have deep-seated racial and financial, economic inequality in this country, and we continue to have it. Some people care about that issue a little bit more than others. I care about it deeply. I don't apologize for having been a beneficiary of affirmative action.

Now let me say a few words about Fisher. There's all kinds of reasons that this Court shouldn't have taken Fisher. You know, we could talk about stare decisis. We could talk about standing. But the Court did take it, and I suspect that most of us believe that the outcome is more likely than not going to be that Grutter doesn't survive, or if it survives, it doesn't survive in a form that it exists now, that it will be significantly and substantially gutted. I'd be happy to be wrong about that but I don't think I am.

Let me say something about the oral argument in Grutter. I was deeply disappointed in that argument. And while I'm sure that almost everybody in this room disagrees with me on the substance of the issues that are before the court in Grutter—I'm sorry, not in Grutter but in Fisher—if you have not read the transcript of the oral argument, I encourage you to read it. It was, in my view—and I'm not going to mince words—extraordinarily low brow. It didn't do justice to the significance and the importance of the issues that were before the Court.

People can and do disagree deeply about those issues, but that oral argument and the exchange there shed almost no light on anything. So I was deeply disappointed
about that. I think we all have to ask, you know, what's going on here with the consideration of these cases? I believe if we and the Court owe the country anything, it's to come to these issues not only soberly but to apply the highest intellectual standards to our exercise of our consideration of these cases. I challenge any of you—I really do—to tell me that that oral argument reflected that.

Okay, so there's some sour grapes. Let me turn then to some substantive things.

One of the disappointing things about the argument I think goes to the core of what has happened about affirmative action and diversity issues over the last 40 years or so. And when I say that, I take—for example, if you look at the transcript of the oral argument, if you look at the part of the oral argument in which Justice Alito had an exchange with the lawyer from the University of Texas and he said that: You seem to be arguing something that I haven't seen before.

The lawyer is making the argument that the University of Texas was not in a position where it was admitting students from the—African-American or Latino students from the second decile and non-10 percent students. And his point, had he been allowed to articulate it a little bit more—but I understood the point that he was trying to make—was that some of the best-prepared black and Latino students may not have been in the top 10 percent only worked because of segregation in high schools, you know. And people call that "colorblind" I suppose in some places. I call it "don't ask and don't tell" when it comes to race.

Everybody knows that the only reason that the 10 percent plan produced diversity in the aftermath of the Hopwood case is because of segregation in high schools. In any event, when Justice Alito said that he didn't understand the argument that was being made, he then pointed to what I presume to be a hypothetical situation in which the son, or the daughter presumably, of a physician, an African-American physician, or a law partner whose wife was also a partner in a firm in the top 1 percent of income makers in the country, and he said, if you're talking about those folks getting in, I don't understand your argument because I thought that these efforts really began as an effort to help those disadvantaged minority students.

On that point I at least partially agree with Justice Alito with respect to the origins of these efforts. He's right about that. That's where it began. The problem is, is that the Supreme Court threw the remedial rationale on affirmative action under the bus in Bakke all those years ago. And what we got was Powell's rationale—that's diversity—which is much more palatable to many Americans because you don't have to talk about that unpleasant history of racial discrimination.

You know, we can talk about diversity efforts, but it was rooted not in the 14th Amendment Equal Protection Clause interests of students of color in getting access into these institutions, but rather in the First Amendment interests of the university in having a diverse student body.

I take that as a second-best rationale, but frankly—and I don't have the time to tell you why I say this except to refer to it very quickly—frankly the reality is that even
now in 2012, if you do the math and start with 1619—we'll commemorate the 400th anniversary of the arrival of Africans at Jamestown in a few years. If you do the math and you look at the history of both slavery and segregation in this country, which really didn't end as a formal matter, as a legal matter, until the late 1960s—if you challenge me on that I can tell you why I say that—even now, nine out of 10 days of the presence of Africans in North America has been spent in either slavery or Jim Crow segregation, okay?

And almost immediately after the end of that era we have the assault on efforts to try to do something and a remedial justification to address that. That's been thrown under the bus. It's unpalatable. Nobody wants to talk about that. What we're left with is the rationale in Bakke. And then of course that became attacked—came under attack, rather.

But if we are to be honest about it and to think about this and the question that Justice Alito was pointing to, if you are talking about diversity, then diversity would allow people from all kinds of backgrounds, all kind of economic strata, to be subject to the efforts of colleges and universities to enroll them. If you're going to talk about disadvantage, you're talking about a remedial rationale. And as I said, the country has, and the Supreme Court for the most part, has abandoned that. So there's a lot of confusion in the jurisprudence and the discourse that we're engaged in.

Much more I could say about that. Let me just say a few words about some of what we heard about employment and discipline. You know, I really wasn't prepared to say much about that, but I'll just say this: The employment and discipline issues are issues that we ought to spend some time about. I do not think—and, you know, I'll go back and do some more looking at this, but I don't think it's true or accurate to say that people—employers cannot consider, in any circumstances, whether somebody has a criminal record in employment. And they're doing that all the time.

Now, we do have disproportionate criminalization of African Americans and Latinos, and there are studies that have been done, one study that I know you're aware of, which talks about the—a study where black men who had no criminal record have less of a chance of being hired than white men who had criminal records. You still have a lot of inequity in these issues, but even if you only look at people who are subject to the criminal process because, in fact, they did violate the law, you'd see disproportionate sentencing, you'd see disproportionate, you know, taking people to trial as opposed to putting them, if it's drugs, into some kind of diversion program.

I'm not saying that there isn't a problem within the African-American community or Latino community. Yes, we have demons in our own communities, external and internal, just like any community has, but you still see a lot of disproportionate over-criminalization of young black people. And it starts, in many instances, in schools—and Latinos—with discipline: a 6-year-old girl in Florida who throws a temper tantrum being taken away in handcuffs.
You know, I could go on and give you more examples. Look at the Advancement Project report on those kinds of issues. So I think that we need to have a little bit more complex and nuanced a discussion about these issues.

My good friend—well, actually maybe we're not good friends—

[Laughter.]

**PROFESSOR TED SHAW:** —but my adversary Stuart Taylor and I, we bumped heads on a lot of issues over the years, and we could bump—

**STUART TAYLOR JR.:** Will you settle for "friend"?

**PROFESSOR TED SHAW:** Pardon me?

**STUART TAYLOR JR.:** Friend?

**PROFESSOR TED SHAW:** "Friend" is fine.

[Laughter.]

**PROFESSOR TED SHAW:** You know, we've bumped heads, and there's a lot that he said that I would just take issue with, starting with terminology. You know, when we talk about loaded language, you know, preferences, et cetera—I mean, the debate is almost over, and he knows that, when you use that kind of language.

But substantively I'd also say that there's a deep, deep-seated belief, I think, on the part of many Americans still, many white Americans, and frankly it's been internalized in many black Americans and other Americans also, about the intellectual inferiority of African Americans, about black people in general. It is impolite to talk about it. People don't want to admit it. But I think that it underlies a good deal of discourse about issues of race.

And I'll stop there and just say that race continues to be one of our biggest issues in this country. I agree with you, Gail. We need to talk about it, and we need to talk about it honestly and openly. We need to explore what we think about it. There's a lot of discomfort in quarters like this about the changes that are going on in this country demographically and otherwise that got reflected in the election. But I believe that that discomfort probably will be alleviated better by an open and honest discourse about issues of race.

So, much more that I would love to say, Stuart, in response to what you've said. Time doesn't permit. I've probably gone on past my time anyway. I wish you all the best in your convention and in many of your endeavors.

[Laughter.]

[Applause.]
JUDGE CARLOS BEA: Now it comes time for me to ask questions of the panelists, but it occurred to me that as I saw the panelists listening to each other and taking notes that maybe they'd like to have a minute or two of rebuttal or comment on anything that another panelist said.

So we'll start with you, Marty. Do you have anything to add to—

MARTY CASTRO: Oh, I've got notes and notes here.

[Laughter.]

JUDGE CARLOS BEA: Okay.

MARTY CASTRO: Let me find the ones that I really want to address.

You know, I think that—to talk about some of the things Professor Taylor—

ATTENDEE: Microphone.

MARTY CASTRO: Oh, I'm sorry. How's that? Better? Is it on? Okay—Professor Taylor mentioned. You know, I think that the issue of access to education—as actually Governor Scott was saying earlier—if you have an education, you can have anything. And I think that there is an effort underway to cut off the spigot based on the demographics of—the changing demographics of the country of folks who look like us, who look like me. Because of the numbers there is a fear, and the fear is that we are going to take the positions of power and we're going to ultimately be the majority and dominant group, and one of the best ways to stop that from happening is to actually limit access to education in the elite schools.

And the argument that—which is a very paternalistic argument, in my view—that, well, we don't want to put these minority students in over their heads; let's send them to the schools where they'll be—you know, better to get a B-plus there than to get a C-plus at Michigan, and they'll be better off, they won't be stigmatized, it will fit them better—I think is really a false argument. I think that, based on the studies, it shows that the students who do go to the elite schools actually do better.

But then he talked about those schools not being—you know, the schools—the lesser schools were not statistically—or not as good as they should have been. So I think that there's an internal conflict there. Why would we want to send folks to schools where they're not going to do as well and they're not going to get into positions at more prestigious law firms and corporations? It becomes self-fulfilling. Those folks then cannot build the equity and the wealth that will allow their children to be able to, in the next generation, overcome that.

So I think it becomes a cyclical situation. By sending us to the schools that are not as prestigious in a way to help us, you're really actually hurting us. And to suspect—although you can't prove, you say—that there is a taint, I think that that's, again, a
false argument. We can all suspect a lot of things, but if you are going to be saying that we as people of color are being tainted by a system, you need more proof than a suspect statement like that, particularly coming from, you know, someone who is as prominent as you are. People hear those things and they believe them without any real, solid support.

So there's a few other things but I'll leave it at that. I did want to say a few things about Gail but we'll talk about that later, on employment.

PROFESSOR GAIL HERIOT: I have an idea for you.

JUDGE CARLOS BEA: Stuart?

STUART TAYLOR JR.: Yeah, I'll follow up and respond on a couple of things.

First, Ted Shaw seems to think that the phrase "racial preferences" is somehow not fit for polite conversation. I emphatically disagree. The Supreme Court uses the term "racial preferences." Everybody uses the term "athlete preferences." Everybody uses the term "legacy preferences." Why should "racial preferences" be off limits, especially since affirmative action, when it began with President Kennedy's Executive Order, meant, quote, "Take affirmative action to ensure that applicants are employed and employees are treated during employment without regard to their race, creed, color, or national origin."

Affirmative action used to mean colorblind plus recruitment and outreach. And some people think it still means something like that. So if we want to talk about what the controversy is about, it's racial preferences. That's why I use that term.

In terms of the stereotype of intellectual inferiority, I deplore that stereotype. I maintain that racial preferences do more to maintain that stereotype than anything else. When half of black students are at the bottom 20 percent of their classes on average in colleges, the bottom 10 percent in law schools, that sends a message to everyone in that school, you know, as to academic capabilities.

People are too polite to talk about it but I know that when we interviewed African-American former students and administrators for this book, and we interviewed quite a few, the most universal complaint was that everyone assumed the reason they were in their college was they got in on account of race, and they resented this deeply. And I can see why they resented it deeply, but the assumption is being fed by racial preferences.

Marty Castro on "taint"—well, I think I responded to that.

The last thing, what Ted Shaw was saying about Justice Alito and his comments on affirmative action for wealthy African-American or Hispanic-American students, reminded me of something in our book that my dear friend Bill Coleman—William T. Coleman Jr., longtime chairman of the NAACP Legal Defense and Education
Fund, U.S. Cabinet member—and I assume he's a friend of Ted's too—he wrote in his memoir the following—and I wonder whether Ted or Mr. Castro disagree:

"Today race in and of itself is not usually an impediment to success at the highest levels of our society, or at any level for that matter," says Bill Coleman. "We need, therefore, to modify our diversification policies to focus more on creating opportunities for people entrapped in the cycle of poverty and those with special needs and challenges who have not had the benefit of strong family and community support systems.

"We must also take into account generations of poor whites in rural and urban areas, some of whom have been disadvantaged by government policies that focus only on providing racial preferences, regardless of circumstances. We should consider abolishing all distinctions based on race and ethnicity except targeted programs to assist African Americans still in need, in order to remedy the vestiges of slavery and government-sanctioned racial discrimination." This from a man who sat next to Thurgood Marshall when he reargued *Brown v. Board of Education*.

**MARTY CASTRO:** Well, I think that there are indeed still issues, as I said earlier, of racism and discrimination that exist today, directed at people of color. So I think for us to say that, you know, race ought not to be considered and that we ought to look just at economics, I do believe that we ought to factor in economic class as one factor, but not to the exclusion of race, because race still is a viable and actual bar to individuals, even wealthier individuals, to access.

And I don't think, as you said earlier, that wealthy minorities are really getting into these schools more often than those who are historically economically disadvantaged, not in what I have seen. And in fact, the legacy students that you talk about also are not small. They actually are much larger a share than the minority students who are coming in on these programs.

So I think there is active and current—I'm not talking about the historic issues of slavery. I'm talking about today there are issues of segregation and re-segregation in our communities that disadvantage students of color that we need to remedy for.

**JUDGE CARLOS BEA:** Let me change the subject matter just slightly. We've talked a great deal about diversity, and I would like to ask Gail—since one of the rationales of diversity is that it is actually beneficial to, say, the white or non-minority groups in school as a way of acclimatizing them for the real world—you're a teacher at the University of San Diego. Do you have any insights or observations as to whether diversity, as practiced today, is actually reaching that goal of better acclimatization for the non-minority students?

**PROFESSOR GAIL HERIOT:** I've got some other comments I want to make as well, but let me address your question first.

You know, first off, there's not a minority way of looking at the tax code and such or chemistry and such. I think most people agree on that. So, you know, putting that
aside, also putting aside the point that was already made—Stuart's point that instead of getting the kind of interactions that are imagined when we engage in these big racial preferences we sometimes get the opposite, that what happens on campus is the stereotypes are promoted because there is a gap in academic credentials that is largely an artifact of preferences, and so in that respect we're not getting the kind of benefit from diversity that I think that Powell was thinking of in the Bakke case.

But the most important point I have to make here relates back to the mismatch issue, and the evidence is not slight in the area of science and engineering, that mismatch is a problem. There have been, you know, quite a few studies at this point and the evidence is overwhelming. We would have more doctors, more dentists, more minority engineers, more minority scientists if we didn't engage in racial preferences.

So what are we saying when we're saying that there are some benefits from diversity? What we're saying then is that somehow minority students should nevertheless go to a school where they're not going to flourish as much and that they are essentially public utilities for the benefit of white students. That makes absolutely no sense, the notion of let's send minority students to a school where they're less likely to come out physicians, less likely to come out with high-prestige science and engineering majors because we want them somehow to benefit the white students. I mean, that just seems just bizarre to me.

I did want to make a couple of other comments here, though. I'm trying to look for some common ground. Like, Ted, I want to be your friend too.

[Laughter.]

PROFESSOR GAIL HERIOT: And it occurs to me that we're already agreeing on one point here, on the discipline issue. You are making the point that there are some pretty darn bizarre school discipline issues. But looking back at the notes of what I said here, I said in my initial remarks it is entirely possible that the way schools discipline children today needs improvement, but to look at it is a race discrimination issue is a mistake. Boy, is that ever true. There are some utterly bizarre discipline issues that I've been reading about in the paper.

And why do you think some of these things happen? You know, it's a complicated world out there and we get back to big government versus small government. For example, did you know that a few years back Congress passed a law that provided a nice big pot of money to those schools that wanted to hire more police officers to patrol the schools?

Well, what happens when there's money for police officers but not for other kinds of discipline? You know, the hammer is the only tool Congress gave them, so everything is a nail. Students get arrested for things they used to get a paddling for or they used to simply, you know, be sent to the library and told to sit still and not make another noise. But instead they get sent down to the police department.
I agree with you, Ted, that that's a problem. But if we look at it as a race discrimination problem we're not going to solve it. What we need to do is look at it for what it is, a problem of over-criminalization in the area of schools. And so there's something we can agree on, and I would be glad to help you out with that in lobbying Congress to stop that.

Other things that I think maybe with Marty we might have some common ground, and number one, Marty, I think that the U.S. Commission on Civil Rights should study legacy preferences because I think we both might get some information out of that that we'd be interested in.

But, number two, if you look back at the history of state universities, it's only in the last generation or two that some state universities have become super elite little Harvard, Yale, Stanfords in their own right. I don't think that's a particularly healthy thing. I would prefer that state universities bear in mind that taxpayers are footing the bill for that and that that's probably not the best institution to be super-elite. And if the schools were less elite, there would be less of a problem with racial diversity. It would come naturally without having to have preferential treatment. Let Harvard, let the Cal Techs of the world, and a lot of private schools, maybe be more academically elite. But there are some state universities that in my opinion are over the top on this.

MARTY CASTRO: May it please the court, may I respond to my colleague, Your Honor?

[Laughter.]

PROFESSOR TED SHAW: Can I get some equal time?

JUDGE CARLOS BEA: Sure.

PROFESSOR GAIL HERIOT: But I agree with you, Ted.

JUDGE CARLOS BEA: Go ahead.

MARTY CASTRO: Gail, I do consider you a good friend and we've actually collaborated a lot at the commission. I appreciate that. But I don't agree with you on the premise or the studies that you cite that say that if you eliminated affirmative action programs you'd actually have more minority— and I don't know if you said women as well, but more minority professionals that are being admitted to these schools.

I think the facts and the history is just the opposite. We've had schools prior to affirmative action that have been there for centuries, for decades, and they did not start spewing out minority—African American, Latino, or women—lawyers, judges, doctors. Not at all, until affirmative action programs were in place. And I think studies exist that show that quite the opposite of what you're saying is true. And in
fact, the studies that show that there would be more without affirmative action have faulty methodology. It's just plain and simple.

PROFESSOR GAIL HERIOT: Nobody has even criticized the methodology in any of the many science and engineering studies.

And let me just say one more quick thing, and that is a little earlier you were saying that your impression may be that some white people are sort of worried about minorities becoming more prosperous. Note what happens to white students. They go to the school that their academic credentials allow them, you know. What we're doing is we're treating minority students in a way that we don't treat white students. So if the belief is that somehow there's, like, this group of white people that are deciding what to do to keep minorities down, look what they're doing to the white students.

MARTY CASTRO: But there are white students who are being—

JUDGE CARLOS BEA: I'm sorry—

MARTY CASTRO: —being admitted over less-qualified—less-qualified white students are being admitted over more-qualified white students. What about that?

PROFESSOR TED SHAW: I'm only standing up because—

MARTY CASTRO: It's your turn.

PROFESSOR TED SHAW: —a lot of folks here I can't see. We're out of line of vision. I'm not getting up to give a speech but I do want some equal time.

[Laughter.]

PROFESSOR TED SHAW: So a few thoughts.

You know, I'm doing triage here. So, Stuart, I would love to have a dialogue with you—and, you know, we can have it offline if you like—about terminology. Suffice it to say that just because the Supreme Court uses some terminology doesn't mean to me that it's beyond criticism.

You know, I'm mentoring a young black man who is in the Bronx, grows up in very challenging circumstances, and I'm mentoring him. And the other day he told me he was about to take the SAT, and I had asked him before about taking an SAT course. He told me that, you know, the course was something like, you know, thousands of dollars. There's no way that he could take it. And I didn't have the money to give it to him. I would have if I did.

You know, there's a lot of common ground we probably can find, and that should be one of them, when we talk about what the SAT reflects and who gets to prepare for it and how that goes beyond race.
On that point I want to make very clear, my new best friend Gail—

[Laughter.]

PROFESSOR TED SHAW: —that I do believe that working-class and poor white Americans have gotten the short end of the stick in this country, for a lot of reasons—not affirmative action for the most part, though people believe disproportionately that was it and we could have a bigger dialogue about that. But I'm all in favor of thinking consciously about having to address the inequality inequity that they experience also for, as I say, a lot of reasons.

But I do want to—the core of what I want to talk about for a quick moment is taint, this notion of taint, you know. And, you know, with the degrees of African Americans and Latinos who go to, quote, "lesser" institutions—and you can use that terminology; I'm using it—would they be respected more? Would there be less taint than the degrees of somebody who goes to a greater institution? But more importantly, how do you know how to apply taint?

You know if you apply it—what I hear you saying is that the degrees of all minorities—African Americans, Latinos—are tainted because it's suspected they got in because of affirmative action. There's a deep, deep problem with that kind of analysis, you know? Why should I not apply taint to men, primarily white men, maybe some women, of a certain age and say, look, you went to college at a time when you got a pass, or at least you got in, to schools where no people of color could get in, you know, so I question your qualifications? I don't do that. I don't question that.

Now, some people might say, well, you have no reason for doing that, because you presume that they're qualified, which is one of the things that's wrong with the dialogue about so-called reverse discrimination as opposed to just plain old discrimination. But where that presumption comes from, I don't know. But this whole "tainted" business is a problem. You know, when I graduated from Columbia Law School and took the bar, I didn't take the "black bar," you know? I took the New York bar and then the California bar, and passed them, you know. So this "taint" business is deeply problematic, but if the question is whether or not people have a taint because they attended a first-rate institution and they're people of color, I think that reflects more a problem with how people see race than it does anything else. I don't think it's about affirmative action. I think that's about something else. But, you know, we can disagree about that.

I'll stop there except to say that, you know, you all have colorblindness, conservatives. That's yours now. It's not my goal, you know? We all see race. The question isn't whether we see it. The question is what its significance is, how we treat one another. Look at all of the reaction to the election, you know, what Romney is saying, what others are saying about why he lost, you know?
We all talk about race, you know. The Republican Party sure is talking about race. Now, I realize it's not the Republican Party. But it's not about colorblindness. The question is whether we, in spite of seeing race, whether we do justice, whether we treat each other fairly and work for opportunity.

JUDGE CARLOS BEA: Thank you, Ted.

[Applause.]

JUDGE CARLOS BEA: We're now going to take questions from the public. Would you please state your name and where you're from, and direct your question to one of the panelists, if you would?

MAYA NORONHA: Okay. Well, I have a question for all of the panelists.

JUDGE CARLOS BEA: All right. What's your name?

MAYA NORONHA: My name is Maya Norohha.

JUDGE CARLOS BEA: And where are you from?

MAYA NORONHA: I'm a Georgetown Law graduate.

Why do all of you have the premise that individuals of a certain race or those who come from a certain continent are homogenous? There are different countries, different religions, different languages, and different castes in Asia. Who is an Asian American anyway? Legalizing stereotypes is wrong. Judge me by what I have done right or what I have done wrong and not by a racial category that I did not choose.

[Applause.]

JUDGE CARLOS BEA: Does anybody want to answer that question?

PROFESSOR TED SHAW: Well, I'll just say that I don't make the presumption that you just talked about, although immigrants that have come to this country have come to this country that has a deep, deep, and long history and, you know, it doesn't get wiped away because somebody comes to this country.

I'm not saying that you should be categorized in a way that America tends to categorize things, but there's a legacy here that's still being worked out and worked through with respect to discrimination. And I think that people who come to this country have to recognize that too.

MARK MITTELLEMAN: Mark Mittleman from St. Louis. The title of the program I think is, affirmative action; who benefits? And while I'm not sure that any of us can solve today the problem of who's hurt by it, we know that there are some people who definitely benefit. And there are people with titles like "dean of diversity" and "head of diversity outreach" in the corporation. And those people are getting paid,
and maybe following the money is the way to address this question. Would anyone like to speak to that issue?

PROFESSOR TED SHAW: Sure.

PROFESSOR GAIL HERIOT: I—

PROFESSOR TED SHAW: Well, go ahead, Gail.

PROFESSOR GAIL HERIOT: I just want to point out that during the Proposition 209 campaign in California I debated dozens and dozens of people on the issue of whether or not that initiative should pass. And almost all of them were people who had jobs in the diversity industry. Those were the people that were most interested in making sure that it got defeated. And I don't think that's just, you know, an odd, random fact. I think that that is, in fact, the group that is most interested.

STUART TAYLOR JR.: Two points I might add in response to that. One, if you read Heather Mac Donald's article on this, there is just an astonishingly long list of diversity bureaucrats at various University of California campuses. And Roger Clegg, who may be here, could tell an interesting story about one of the heads of—how one of the heads of diversity at the University of Wisconsin helped orchestrate a near-mob occupation of his press conference when he went there to criticize racial preferences.

PROFESSOR GAIL HERIOT: I wouldn't call that a near-mob. That's a mob.

STUART TAYLOR JR.: Well, I'll leave it to Roger to say whether it was a mob.

JUDGE CARLOS BEA: All right. Next question?

PROFESSOR TED SHAW: Well, wait a minute. With all due respect, Judge, you know, I passed on to Gail but somebody else on this side ought to get an opportunity to say a word about that.

And the one thing I would say about diversity goes back to what I said before. You know, advocates for African Americans at the moment of time that Bakke was decided thought it was a loss, for reasons that I don't have the time to go into now. But it was Powell who created that diversity rationale, as I said, because people thought that the remedial rationale was unpalatable. You know, you don't want to talk about it. It's unpleasant. So having created that, there are consequences that have followed. But if diversity is the rationale, then I think people shouldn't be surprised that what you get is people who work on implementing it.

Now, the other thing is diversity has become another way of saying, let's do something to continue to see that we bring people in who historically have been excluded. Would I apologize for people having that as part or whole of their jobs? I wouldn't, but maybe you all think that's improper. I don't apologize for that.
JUDGE CARLOS BEA: Next question?

MARCO BROWN: Marco Brown from Salt Lake City.

So my wife and I have a son. His name is Elliot, and he's a black American. We got him from—adopted him from St. Louis. And so we put him in private school because no, you know, socioeconomic group or no group does worse in public schools than little black boys, unfortunately. We speak, you know, our respective foreign languages to him in the home. You know, I'm an attorney; I have my own firm. My question is, does my son deserve racial preferences when he gets to apply to college?

JUDGE CARLOS BEA: What do you think, Marty?

MARTY CASTRO: Well, your son may be going through, as he grows up, a society that still has institutional racism. There are studies that show that African Americans of equal wealth and education to white Americans still live in segregated communities. Their children still go to substandard schools. Their children have less money spent on their education than others, based on how we fund our education.

My sons, they live in a community that's much more affluent than the one I grew up in, yet my son—my eldest son has faced bullying and harassment at school based on his ethnicity. And it has had a dramatic and negative impact on him and his studies and his school—his school involvement. So there are issues such as that that many children, because of their color or their ethnicity, are still going to confront. And so I think I would not write off your child as someone who should benefit from a program like affirmative action in the future.

STUART TAYLOR JR.: One quick footnote: President Obama, then Senator Obama, was asked in 2007 by George Stephanopoulos in a TV interview whether his daughters, coming from a fairly prosperous family, should qualify for racial affirmative action preferences, whatever you call it, in admissions. The short answer was, no, my children are pretty privileged. That is not the way the policies have been implemented, of course, during the Obama administration.

PROFESSOR TED SHAW: Maybe, maybe not. It depends on his experiences, not as a—maybe not as a remedial rationale. I don't know. If diversity is still around, maybe, because his experience is going to be different from if he was white.

In all likelihood there are some things that he's going to experience—you know, you're raising a young black man. You know, there's a talk that you're going to have to have to him that you don't about. I'd like to talk to you about it if you don't know about it, you know, about how we interact, for example, with the police, you know? There's some experiences he's going to have that are going to be different. I commend you in what you're doing. I wish you the best.
ATTENDEE: My name is Jay Schweikert [ph]. I'm a law clerk on the D.C. Circuit.

It seems to me that a substantial portion of the disagreement on the panel is almost entirely empirical about—specifically on the questions of, one, how well the beneficiaries of affirmative action perform relative to other students in schools, and then what they go on to do afterwards and what effect affirmative action programs have on the number of minorities in particular fields. That's probably not a question that we can actually really resolve here unless we all sort of sat down and bent over charts and tables and really hashed out the methodology.

But the question that I want to ask, I think particularly for Mr. Castro and Mr. Taylor and Ms. Heriot, since I think you were the ones talking about this more so—and obviously Mr. Shaw can weigh in as well—if the sort of empirics on those questions really were as your opponents in this debate say—if they really were flipped and, you know, the studies that we sort of made abstract reference to a number of times, showed what your opponent says they're showing, would that be sufficient for you to change your mind on the desirability of affirmative action policies?

STUART TAYLOR JR.: All right, I'll go first.

I think there really isn't much dispute about the underlying facts that I outlined, the low grades in college, the subpar graduation rates, the bar exam flunk rates, the science dropout rates, the scholarly aspirations disappointment rates. None of those have been plausibly disputed by anybody and I didn't hear them disputed today exactly.

The dispute is about whether all of this depressing effect on black academic performance within colleges where affirmative action has brought them is leaving them worse off than they would be if they were at colleges for which they were well qualified. There is a very honest dispute about that, and obviously it's a matter of degree. Some people are probably worse off; some people are probably better off, you know? And then the numbers get complicated on how many there may be in each set.

I would say that if I were convinced that I was wrong in my premise that a very large percentage of black students, and to a lesser extent Hispanic students, who were supposed beneficiaries of affirmative action—if I was wrong on my premise that they'd be better off at less prestigious institutions, I would be far more favorable towards the policy than I am. I'm not untroubled by all of the traditional arguments about affirmative action—the stigma argument, the unfairness argument—but I'm most troubled by what I see as the negative effect on a lot of black students.

JUDGE CARLOS BEA: Go ahead.

MARTY CASTRO: I think he wanted us to all comment on that.
First of all, I don't agree with that, but if I did, if that was the premise that I undertook, what Stuart just said, that students of color who are well qualified to be in non-elite schools—that means ultimately that they're not qualified enough to be in elite schools—would I still support affirmative action, I would say I would support an expansion of it beyond just looking at college and professional schools because ultimately if I accept the premise that those students are not well qualified to matriculate at an elite school without some sort of taint, that means to me that I've got to go back, if I really want to make a change on this, to the beginning of that pipeline and ensure that the student in pre-K and in K and on forward has equal access and equal resources, so that the point when they get here to apply to college or law school they are better situated to be well qualified to matriculate into those schools.

So it really says to me that we should expand the program and make sure that, do we really want to be helpful to the minority students? If our effort here is not to stigmatize and to really advance them, then let's start really changing the pipeline at the very beginning.

PROFESSOR TED SHAW: Assuming what Stuart said is true—and I'm not going to—you know, let's assume that for a moment. You know, my issue is this: Even if you have minority students tending to congregate at the bottom of their class, I think that it's still—first of all, they're still qualified to be at those institutions. They're graduating from those institutions. They shouldn't be any more tainted than the other white students who may be with them who go out untainted because they have a degree from Harvard or Yale or whatever.

So, you know, that's part of my answer. Am I willing to look at the facts and think more about some of this? I always am. But the question I think—I think Stuart is right about this. The question isn't at the bottom of the—at the end of the day, what the facts are. The question is what we do about them.

JUDGE CARLOS BEA: Thank you very much.

Manny?

PROFESSOR GAIL HERIOT: Wait. I didn't get to—

[Simultaneous speaking.]

PROFESSOR GAIL HERIOT: I just wanted to comment on this as well. I want to also preface it with the notion that, again, on the science and engineering area this is not like some, you know, one empirical study. There's one by Rogers Elliot that was more than 10 years old now. There's one by Frederick Smyth and John. J. McArdle. There's one by Sander and Bowles. And now there's a new study out of Duke that basically supports those studies. That's four studies that suggest mismatch in science and engineering, and nobody's laid a single, solitary hand on one of them. You know, the evidence is overwhelming.
All that said, if we go into the alternative universe where it turns out that all of this is untrue—I have to confess, I am not a Puritan by nature. This would not be my issue if I did not believe that mismatch is a problem. I'm not certain, you know, how I would feel about the other aspects of it but I am absolutely certain that I would not be up here if it were not for the mismatch issue. That doesn't just, you know, tip the scales. It's huge, and it's certainly always been at the center of my thinking on this issue, even before I had data as solid as we have now.

JUDGE CARLOS BEA: Manny?

MANNY KLAUSNER: Manny Klausner from Los Angeles.

I think that there would be probably agreement among all the panelists that there is a racial gap in achievement in terms of grades, GPA, in high school graduate rate—high school graduation, at colleges, and in law schools. I think all of the panelists would probably agree that there is a racial gap in attrition rates and those who don't graduate from high school or college for especially top-tier colleges and law schools.

And to the extent that the racial gap is agreed to—and we realize there are many inequities and inequalities in the system—I'm particularly curious from the defenders of having race-conscious policies whether you favor, as perhaps a more tailored and less polarizing approach, to focus on going to the beginning of the pipeline, as Marty referred to, and look at K-through-12 as producing a very inequitable result—frequently underfunded schools that are dysfunctional; some people call them cesspools or worse—and maybe favor, instead of the present system, more focus on school choice: school vouchers, charter schools, home schooling some of the more modern technological means of bringing up to level the quality of education K-through-12. And then you have people have a more likely chance for success when they go on—in order to graduate high school, do better and go to better graduate schools.

MARTY CASTRO: Manny, I didn't mean to say that we would focus on the early childhood to the exclusion of continuing to focus on higher education. I think we need to look at the entire pipeline, because if we were just to focus exclusively on pre-K and K-through-12, we would have to wait many, many years.

MANNY KLAUSNER: But would you favor school choice?

MARTY CASTRO: But I do agree with you that we ought to look at—and I'm not a—I'm in the minority on this in my community. I am actually willing to look at issues like vouchers. I don't think it's going to necessarily work for everyone but I'm willing to have that conversation, because in certain urban schools like the City of Chicago there are a lot of schools that are failing our kids. Forty-four percent of schools in Chicago and 22 percent of schools in Illinois are now majority—you know, are Latino schools. And so I'm willing to look at other alternatives such as that but not to the exclusion of other possible scenarios.
PROFESSOR TED SHAW: I take the point. I agree to a great extent. Vouchers—you know, that debate happened. The Supreme Court upheld their use. I don't think they're a magic bullet but they're part of, you know, the overall educational scheme. The same thing is true of charter schools that are playing an important part in education. I'm not opposed to them, but I am not willing to give up on the vast majority of students who are in public schools who are experiencing the poor education you're talking about. So the danger is in focusing on those things and not focusing on these other students. But, you know, in general I agree.

PROFESSOR GAIL HERIOT: Touchback? Can I—

JUDGE CARLOS BEA: Go ahead.

PROFESSOR GAIL HERIOT: I just wanted to point out that Manny and I both worked on Proposition 209 in California, and right after that election one of the most gratifying things that happened was that people who had opposed Prop. 209 started thinking about, gosh, what are we going to do at the K-through-12 level? And, for example, the University of California at San Diego started a school—the Pruce [ph] School I think it's called—that was intended to help minority students, and the school has been a success.

So it's something that's important that when racial preferences are taken off the table, as they were in California, that has the beneficial effect of getting people to think about what other solutions might be out there and to concentrate where we should be concentrating, and that is in the K-through-12 level.

STUART TAYLOR JR.: Very quickly, Chapter 17 of our book, which you can all take a break and run out and buy—

[Laughter.]

STUART TAYLOR JR.: —is about fixing K-to-12 schools and about what the root of the problem is. And certainly one point is—one reason why, as Judge Bea said, I'm afraid we may have these preferences a hundred years from now is that what's coming out of schools is a very unequal racial group, and the gap is not closing.

Second, I'm proud that my wife Sally volunteers in one of the charter schools to try and make a difference in this downtown D.C. Prep.

Third, I think, although I could not prove, that one of the reasons for low achievement of minority groups in the schools is affirmative action. John McWhorter, eloquent black critic of affirmative action, has written in essence: I knew from the age of 10 that there was something called affirmative action and that it meant that I would not have to work as hard as my white classmates to get into a good college, and I acted accordingly.

JUDGE CARLOS BEA: Next question.
PROFESSOR TED SHAW: Well, there's one point of view.

STUART TAYLOR JR.: Once again, I think but cannot prove.

ALISON SOMIN: Alison Somin, U.S. Commission on Civil Rights. The title of this panel mentions, who benefits from race and gender consciousness, but the dialogue so far has been almost entirely about the race part of that and I would like to shift focus slightly.

Increasingly there is a lot of evidence that in the university admissions context the answer that, perhaps surprisingly, is men—in many universities that are more than 50 percent female there is increasing evidence that men actually get a leg up in admissions. I wondered if the defenders of affirmative action actually support this policy. And if so, why?

Also, what's interesting about the gender affirmative action debate is that several panelists have talked about the relationship between the compensatory justice and diversity rationales. When defending preferences for African Americans or Hispanics, the two rationales work together. In the gender one they really don't because men, the advantaged sex, are getting preferences, which seems to be very odd to many people. So I wonder if you could comment on that issue as well; that is, how the pulling apart of the two rationales in the gender context changes the debate.

JUDGE CARLOS BEA: And your question?

ALISON SOMIN: Do you support gender affirmative action? And, two, does the pulling apart of the compensatory and diversity rationales in the gender context change the discussion in the race context?

JUDGE CARLOS BEA: How about that, Marty?

MARTY CASTRO: Well, I didn't make reference to the fact that white males were now being admitted less than white females, and that maybe white females could expect a similar lawsuit from white males at some point to the extent that they may argue, as folks are arguing that, from race-based affirmative action that race and ethnicity are taking seats away. And I don't believe they are taking away seats.

But I do think that white women have really been the true beneficiaries of affirmative action. You know, law schools I believe now are over 50 percent white women.

ALISON SOMIN: That's not affirmative action. That's the whole point.

MARTY CASTRO: But they're not over 50 percent people of color. So, you know, women have really been the beneficiaries of programs such as this. And whether that's a success now or whether someone would argue, well, we've reached
that level of gender equality, I don't know. I don't know the answer to that. But when you look at society still, women are still underpaid for the same kind of work. Women are still discriminated against in society in ways that men are not.

So you cannot discount that and say, well, you know, we're going to say the women have made it now; they're outstripping the admissions of men and we're going to then just say, okay, work is done.

JUDGE CARLOS BEA: I'm sorry; I'm going to have to call this session because it's 2:15. We could go on and on and on, but the program says that we have to end at 2:15.

ALISON SOMIN: Okay.

JUDGE CARLOS BEA: So let's have a hand for the panel.

[Applause.]