

A MARKET ANALYSIS OF RACE-CONSCIOUS UNIVERSITY ADMISSIONS FOR STUDENTS OF COLOR

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ABSTRACT

Recently, students of color and their supporters have raised considerable attention surrounding the racial inequalities that exist on college campuses across the country. Students are protesting against hostile racial climates and demanding colleges to respond to racial discrimination. This campaign for improved racial dynamics comes at the same time that the Supreme Court is considering its latest case on affirmative action. *Fisher v. University of Texas at Austin* could potentially end race-conscious admissions and dramatically decrease the number of students of color admitted to public universities.

Prominent opponents of affirmative action in higher education have focused on the supposed detriments to students of color who attend universities with race-conscious admissions policies. Allegedly, students of color will be stigmatized as “affirmative action admits” and “mismatched” by matriculating at a school where they are unprepared to succeed. Justice Scalia most recently articulated this view during oral arguments this term in *Fisher*:

[T]here are those who contend that it does not benefit African Americans to . . . get them into the University of Texas where they do not do well, as opposed to having them go to a less-advanced school, . . . a slower-track school where they do well. One of . . . the briefs pointed out that . . . most of the . . . black scientists in this country don’t come from schools like the University of Texas.

. . .

. . . They come from lesser schools where they do not feel that they’re . . . being pushed ahead in . . . classes that are too . . . fast for them.¹

Affirmative action opponents contend that these costs are so serious that students of color benefit from bans on affirmative action, such as those

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1. Transcript of Oral Argument at 67, *Fisher v. Univ. of Tex.*, No. 14-981 (Dec. 9, 2015).

recently upheld by the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action*.

These arguments, however, ignore the significant harms associated with race-neutral environments. Such harms for students of color include racial isolation, stereotype threat, racial microaggressions, identity performance, and forced racial labor. Although these detriments arguably occur at almost all predominately white institutions, race-neutral environments greatly exacerbate these injuries because there are so few people of color on campus. These costs are not only intrinsic but also have economic consequences.

This Article is the first-ever cost-benefit analysis of affirmative action in higher education for students of color. It argues that the economic and intrinsic benefits of attending race-conscious universities greatly outweigh the costs for students of color.

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INTRODUCTION

Throughout the affirmative action in higher education debate, much attention has focused on the possible harms students of color incur when they attend a university that practices affirmative action (race-conscious

colleges).² Opponents contend that race-conscious colleges stigmatize students of color as “affirmative action admits” and, as a result, impair future employment opportunities.³ Additionally, prominent opponents argue that students of color admitted through affirmative action are “mismatched” because they are not prepared for the rigors of selective universities.⁴ In contrast, the harms associated with attending colleges that ban affirmative action (race-neutral colleges)⁵ practically go unnoticed.

I first noticed that there was something different about race-neutral universities when I enrolled at UCLA School of Law.⁶ My initial impression as a first-year student was distress and disappointment that there were so few students of color in my classes; in fact, my large section of eighty students had just one black student, and I was the only Japanese-American student. As my first year commenced, I observed little things that really bothered me. In Constitutional Law, students stared at me when we came to a case about Japanese Internment, and I felt pressured to speak on behalf of all Japanese-Americans. One student asked where I was from, and when I told him Los Angeles, he responded with, “No, where are you *really* from?” I often found myself in groups of all white students or in rooms where I counted the number of students of color on one hand. I was consistently uncomfortable and anxious by the lack of diversity.

In 2012, during my first year, the UCLA School of Law Diversity Action Committee conducted a survey in which 76% of students of color agreed that “[n]on-white students face challenges at UCLA Law that white students do not face.”⁷ Only 49% of students of color agreed with the statement, “The classroom environment at UCLA Law is welcoming to students regardless of race,” compared to 74% of white students who agreed.⁸ These survey results made me think about the experiences of students of color attending race-neutral schools and the added pressures

2. For the remainder of this Article, I will refer to these colleges as “race-conscious colleges.”

3. See, e.g., Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1301–02 (2008).

4. See, e.g., Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party at 3–10, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345).

5. For the remainder of this Article, I will refer to these colleges as “race-neutral colleges.”

6. Proposition 209 banned universities within the UC System from practicing affirmative action. See *infra* Section I.A.

7. Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL’Y 71, 105 (2013); see also Gina Kass, *The Personal Take of “Student Speak Out” Effectively Addresses Antagonism*, DAILY BRUIN (Apr. 12, 2012), http://dailybruin.com/2012/04/12/the_personal_take_of_student_speak_out_effectively_addresses_antagonism/.

8. Feingold & Souza, *supra* note 7.

and burdens that students of color face.⁹ I reflected on all the times when I was too distracted and anxious by the racial dynamics of the environment to focus on studying, and I wondered if I had made the right decision to attend a race-neutral law school.

In educational settings, students of color experience racial isolation, stereotype threat, racial microaggressions, identity performance, and racial labor. Admittedly, students of color will face these issues at any predominately white college or university. Race-neutral colleges, however, exacerbate these harms because there are so few students of color. Moreover, these harms translate into economic costs because they distract from and interfere with academic performance. In commoditized terms, a degree from a race-conscious college is worth more than a degree from a race-neutral college because there are exacerbated costs to attending a race-neutral school.

This Article is unique in that it discusses affirmative action from the perspective of students of color. Unfortunately, much of the affirmative action debate, especially the diversity rationale,¹⁰ discusses what is best for white students.¹¹ White students are the primary beneficiaries of diversity because they profit the most from being around students of color in higher educational setting. Much of this has to do with the intense levels of K-12 school segregation in which most white students rarely have the opportunity to interact with classmates of color before college.¹²

9. Throughout this Article, I refer to both undergraduate degrees and law degrees. The reason is that most of the affirmative action debate has surrounded around both undergraduate and law school admissions.

10. *Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003) (“[S]tudent body diversity is a compelling state interest [T]hese [educational] benefits [that diversity is designed to produce] are substantial [T]he Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’ These benefits are ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds’ [N]umerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’” (sixth alteration in original) (citations omitted) (first quoting Appendix to Petition for Writ of Certiorari, *Grutter*, 539 U.S. 306 (No. 02-241); then quoting Brief of the American Educational Research Association et al. as Amici Curiae, *Grutter*, 539 U.S. 306 (No. 02-241))). For more on the constitutionality of the diversity rationale, see generally Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998).

11. See Tara J. Yosso et al., *From Jim Crow to Affirmative Action and Back Again: A Critical Race Discussion of Racialized Rationales and Access to Higher Education*, 28 REV. RES. EDUC. 1, 8 (2004) (“Because of the resistance to enrolling students of color in historically White institutions, the diversity rationale articulates these benefits in relation to White students. The unquestioned majoritarian story within this rationale is that students of color are admitted so that they can help White students become more racially tolerant, liven up class dialogue, and prepare White students for getting a job in a multicultural, global economy. How this scenario enriches the education of students of color remains unclear.”).

12. See GARY ORFIELD ET AL., *E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS* 41–51 (2012), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf.

College students of color, on the other hand, typically have had much more exposure to people of other races before coming to college.¹³ Thus, college students of color are more likely to have already acquired the skills derived from diversity before entering college. Therefore, the diversity rationale in affirmative action is really about using students of color to teach and provide diversity skills to white students. This Article, however, is about what is in the best interest for students of color. It places students of color at the center of the analysis in hopes of developing legal solutions that benefit students of color, as opposed to only considering what is best for white students.

Part I provides a background on state bans against race-conscious college admissions and explores the recent issues before the Supreme Court. Part I also challenges and disagrees with the notion that race-neutral or colorblindness equates to equal opportunity. Race-neutral is not neutral at all, and in fact, race-neutral policies benefit whites and disadvantage students of color. Part II discusses stigma and mismatch arguments, and how those arguments lead to economic claims relating to the diminished value of race-conscious college degrees. Part III reports on the effects of race-neutral college admissions in the market for students of color and shows that students of color prefer to attend race-conscious colleges. Part III also looks at comparative studies regarding stigma at race-neutral and race-conscious colleges. Part IV investigates why students of color are choosing race-conscious colleges over race-neutral colleges by exploring the hidden costs of attending race-neutral schools. Part V argues that stigma and mismatch theorists are incorrect; affirmative action actually increases both the intrinsic and economic value of a college degree for students of color.¹⁴

13. Research has shown that students of color “who attend diverse K-12 schools have a higher college attendance rate than those who do not.” Brief of Amici Curiae American Council on Education and 20 Other Higher Education Organizations in Support of Respondents at 14, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (*Parents*), 551 U.S. 701 (2007) (Nos. 05-908, 05-915). In California, the “racial composition of public schools is strongly associated with the likelihood of gaining access to [the] UC [System].” Brief of 19 Former Chancellors of the University of California as Amici Curiae in Support of Respondents at 21, *Parents*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915). More specifically, studies prove that a negative correlation exists “between concentrated black and Latino enrollment and UC eligibility.” *Id.* at 22.

14. Some may argue that I have approached stigma and mismatch theorists all wrong, by engaging in a conversation that commodifies college degrees. Perhaps some make a corruption argument that by commodifying higher education degrees, I have cheapened what it means to earn a college or professional degree. Conceivably, college degrees should be more about receiving a well-rounded education and growing into a thoughtful citizen, and not about the worth of a piece of paper and its signaling effect to future employers. Although I am very sympathetic to this argument, I also understand higher education to already be a commodified system that people often discuss in market terms. Attempting to change the way that we frame higher education would only distract from my central thesis.

In addition, affirmative action jurisprudence also considers higher education as part of the labor market system. In finding that diversity is a compelling state interest in *Grutter*, Justice O’Connor writes:

I. RACE-NEUTRAL VS. RACE-CONSCIOUS ADMISSIONS

Considering race in college admissions is a hotly contested political and legal debate. For the most part, the debate is exclusive to public universities because they are subject to the Equal Protection Clause of the Fourteenth Amendment.¹⁵ As it stands today, public universities can—but are not required to—consider race as a factor among many in college admissions, so long as the admissions policy does not amount to a quota system.¹⁶ Although public universities can consider race, eight states have completely banned the practice through voter propositions, executive order by the state governor, or statute.¹⁷ Arguments for state bans on affirmative action include the following: claims of reverse discrimination against whites; the desire to be a colorblind society; preferential treatment is unfair; and stigma and mismatch are detrimental to students of color. This part begins with a background on state bans on affirmative action and a discussion of the debate recently held before the Supreme Court. Additionally, this part challenges race-neutrality and explores how race-neutrality is actually a preference for whites.

A. State Bans on Race-Conscious Admissions

Currently, eight states ban race-based affirmative action in admission to public universities.¹⁸ In 1996, California was the first state to ban race-conscious admissions through voter initiative, which appeared on the ballot as Proposition 209 (Prop 209).¹⁹ Prop 209 was an amendment to the state constitution, which proposed, “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the opera-

[N]umerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.

Grutter, 539 U.S. at 330 (citations omitted) (quoting Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241)). Thus, people situate the affirmative action debate as part of the larger labor economy. By discussing college degrees in commodified terms, I have merely contributed to the debate in the language in which people traditionally discuss affirmative action.

15. Private universities, however, are not subject to the Equal Protection Clause, and thus, are able to practice various forms of race-conscious admissions free from the Supreme Court’s scrutiny.

16. See *Grutter*, 539 U.S. at 322–23. There are other narrow tailoring requirements to meet the demands of strict scrutiny, but that discussion is outside the scope of this paper.

17. These states include: California, Florida, Washington, Arizona, Oklahoma, Nebraska, New Hampshire, and Michigan. Drew Desilver, *Supreme Court Says States Can Ban Affirmative Action; 8 Already Have*, PEW RES. CTR. (Apr. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have/>.

18. *Id.*

19. Coal. for Econ. Equity v. Wilson (*Econ. Equity II*), 122 F.3d 692, 697 (9th Cir. 1997). Proposition 209 was called the California Civil Rights Initiative. “Proposition 209 passed by a margin of 54 to 46 percent; of nearly 9 million Californians casting ballots . . .” *Id.*

tion of public employment, public education, or public contracting.”²⁰ Although the amendment itself does not mention affirmative action, the California Ballot Pamphlet explained Prop 209 to voters as an initiative that would eliminate race-based affirmative action programs.²¹ Various progressive organizations²² challenged the constitutionality of Prop 209 in federal court.²³ The case made its way up to the Ninth Circuit Court of Appeals in which the court upheld the proposition.²⁴

In 2006, a similar proposition appeared on the Michigan statewide ballot. The initiative, commonly known as Proposal 2 (Prop 2), proposed to amend the Michigan constitution to read that any “public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.”²⁵ Although the initiative passed,²⁶ the Sixth Circuit Court of Appeals eventually struck down the initiative as unconstitutional²⁷ and created a circuit split between the Sixth and Ninth Circuits. In April 2014, the Court reversed the Sixth Circuit opinion and upheld the ban.²⁸

In both the California and Michigan cases, proponents of the bans created a narrative in which race-neutrality, or colorblindness, results in fairness and equality.²⁹ Ward Connerly, one of the major political advo-

20. CAL. CONST. art. I, § 31(a).

21. *Econ. Equity II*, 122 F.3d at 696. The California Ballot Pamphlet, produced by the California Legislative Analyst’s Office, explained:

A **YES** vote on [Proposition 209] means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give “preferential treatment” on the basis of sex, race, color, ethnicity, or national origin.

A **NO** vote on this measure means State and local government affirmative action program would remain in effect to the extent they are permitted under the United States Constitution.

Id. (alteration in original).

22. These progressive organizations included: The Coalition for Economic Equity; California NAACP; Northern California NAACP; California Labor Federation; AFL-CIO; Council for Asian American Business Associations, California; Chinese American Citizens’ Alliance; Women Construction Business Owners and Executives, California Chapter; United Minority Business Entrepreneurs; Chinese for Affirmative Action; Black Advocates in State Service; Asian Pacific American Labor Alliance; La Voz Chicana; and Black Chamber of Commerce of California. *See Econ. Equity II*, 122 F.3d at 692.

23. *Coal. for Econ. Equity v. Wilson (Econ. Equity I)*, 946 F. Supp. 1480, 1488 (N.D. Cal. 1996), *vacated sub nom. Econ. Equity II*, 122 F.3d 692.

24. *See Econ. Equity II*, 122 F.3d at 710–11 (finding no likelihood of success on equal protection or preemption challenges to Proposition 209).

25. MICH. CONST. art. I, § 26.

26. “Michigan voters [passed Proposition 2] by a margin of 58% to 42%.” *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 471 (6th Cir. 2012), *rev’d sub nom. Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary*, 134 S. Ct. 1623 (2014).

27. *Id.* at 491 (holding the proposed amendment unconstitutional).

28. *Schuette*, 134 S. Ct. at 1638.

29. *See, e.g., Pete Williams & Daniel Arkin, Supreme Court Takes on Affirmative Action in Michigan Ban Case*, NBC NEWS (Oct. 15, 2013, 5:13 PM),

cates for both propositions, responded to a federal court upholding California's affirmative action ban, "I'm pleased, but not surprised" 'The country is clearly going to have to move in the direction of treating everybody fairly.'"³⁰ Michigan's attorney general, Bill Schuette, whose office defended Prop 2 before the Supreme Court, commented on the case, "It's wrong to treat people differently based on your race or the color of your skin."³¹

Importantly, many contest whether bans on affirmative action actually promote equality. Mark Rossenbaum, a prominent civil rights attorney who argued to strike down Prop 2 before the Supreme Court, pointed out that other groups (for example, legacy students³²) could seek preferential treatment by the university, but Prop 2 prevents students of color from doing the same.³³ He contends, "I want the same rule book. I want the same playing field. The problem with Proposal 2 is that it creates two playing fields."³⁴ Rossenbaum's comments shed light on an important way in which state bans on affirmative action, or colorblind policies, provide a preference to whites: White students are more likely to benefit from legacy policies since historically there have been more white college graduates, and during segregation, many colleges did not admit students of color. Rarely does anyone question these policies as an unfair preference.³⁵ Considering that there is sizeable debate regarding the fairness of race-neutrality, this narrative deserves further attention.

http://usnews.nbcnews.com/_news/2013/10/15/20975390-supreme-court-takes-on-affirmative-action-in-michigan-ban-case; Anthony York, *State Affirmative Action Ban Upheld by Federal Court*, L.A. TIMES (Apr. 2, 2012, 3:16 PM), <http://latimesblogs.latimes.com/california-politics/2012/04/state-affirmative-action-ban-upheld-by-federal-court.html>; see also Karthick Ramakrishnan, Opinion Editorial, *Affirmative Action at California Colleges: A Debate Based on Fear*, L.A. TIMES (Mar. 7, 2014), <http://articles.latimes.com/2014/mar/07/opinion/la-oe-0307-ramakrishnan-prop209-affirmative-action-20140307> ("[Affirmative action] [o]pponents argue for equal treatment in how rules are applied across racial groups.").

30. York, *supra* note 29 (quoting statement by Ward Connerly).

31. Williams & Arkin, *supra* note 29 (quoting statement by Bill Schuette, Mich. Att'y Gen.).

32. Legacy students are the sons or daughters of alumni. It is well known throughout higher education that legacy students receive some degree of preferential treatment in the admissions process to most schools. In fact, most college applications include a section in which prospective students can indicate whether a parent or relative is an alumnus of the college. Interestingly, stigma theorists are not concerned with the stigmatization of legacy students. Perhaps this is because legacy students do not have clear markers, such as skin color. Interestingly, stigma theorists seem to only focus on students of color in their attack on "preferential treatment." Student-athletes are another category of students in which one can claim preferential treatment; however, those students do not concern stigma theorists either.

33. Williams & Arkin, *supra* note 29.

34. *Id.* (quoting statement attributed to Mark Rosenbaum by the Associated Press).

35. See Edmund Zagorin, *Race-Blind Admissions are Affirmative Action for Whites*, AM. PROSPECT (Apr. 21, 2014), <http://prospect.org/article/race-blind-admissions-are-affirmative-action-whites> ("[N]o group experiences more affirmative action than white people. Michigan's formal pro-white affirmative action policy, colloquially known as 'legacy preference,' puts the children of alumni ahead of other applicants. It unquestionably favors the white and the wealthy, at the expense of the poor and the black."); see also Evan J. Mandery, Opinion, *End College Legacy Preferences*, N.Y. TIMES (Apr. 24, 2014), <http://www.nytimes.com/2014/04/25/opinion/end-college-legacy-preferences.html>; see generally AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN

B. Race-Neutral = A Preference for Whites

Certain conservative members of the Supreme Court throughout affirmative action jurisprudence have produced colorblind rhetoric,³⁶ and this rhetoric has traveled into other areas of the law,³⁷ including K-12 school desegregation,³⁸ voting,³⁹ and antidiscrimination law.⁴⁰ In *Parents Involved in Community Schools v. Seattle School District No. 1*,⁴¹ a case concerning race-conscious school assignments in K-12 public schools, Chief Justice Roberts famously said, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁴² His implication here is that any amount of race-consciousness is discrimination in the form of reverse discrimination against whites and, thus, we should prefer a colorblind approach. This move toward colorblindness has allowed conservative justices to apply the Equal Protection Clause to protect whites. The underlying assumption is that colorblindness, or the nonrecognition of race, is always nondiscriminatory.⁴³ In the affirmative action context, proponents of colorblindness contend that a race-neutral admissions process will be purely meritorious because it does not consider race.⁴⁴

Although race-conscious admissions have survived for roughly fifty years,⁴⁵ the Court has largely scaled back on affirmative action programs

COLLEGE ADMISSIONS (Richard D. Kahlenberg ed., 2010) (discussing legacy preference in college admissions and its impact on immigrant and minority groups).

36. I use the terms “colorblind” and “race-neutral” interchangeably to reference the nonrecognition of race.

37. Civil rights activists and social justice minded citizens should be very troubled by arguments of colorblindness and preference in the context of affirmative action. These arguments are not contained within the realm of just affirmative action, but rather, they challenge “ethnic and women’s studies programs, identity-based student organizations, ethnic alumni associations, outreach and noticing requirements, and even breast cancer screenings and domestic violence shelters as forms of preference.” Kimberlé W. Crenshaw, “Framing Affirmative Action,” 105 MICH. L. REV. FIRST IMPRESSIONS 123, 126 (2006). Thus, affirmative action jurisprudence has much greater consequences for not only people of color, but also women, the LGBT community, the disabled, and the poor.

38. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (*Parents Involved*), 551 U.S. 701, 762–63 (2007) (Thomas, J., concurring).

39. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2628–29 (2013).

40. See *Washington v. Davis*, 426 U.S. 229, 245–48 (1976).

41. 551 U.S. 701 (2007).

42. *Parents Involved*, 551 U.S. at 748.

43. See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 17 (1991) (“Decisions that use color-blind nonrecognition are often regarded as superior to race-conscious decisions. Proponents of nonrecognition argue that it facilitates meritocratic decisionmaking by preventing the corrupting consideration of race. They regard race as a ‘political’ or ‘special interest’ consideration, detrimental to fair decisionmaking.”).

44. See sources cited *supra* note 29.

45. Interestingly, the origins of affirmative action stem back to President Lyndon B. Johnson and his social programs of the 1960s that targeted the advancement of people of color. See Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Loss: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA LAW REV. 272, 278–79 (2015). In 1965, during the height of the Civil Rights Movement, President Johnson had this to say in a speech at Howard University:

with the use of colorblind ideals. Justice Thomas, perhaps the strongest colorblind opponent to affirmative action, writes, “The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”⁴⁶ Justice Thomas prefers that the government never consider race or even acknowledge that different races exist. To disregard race, however, is to ignore the systemic and historic discrimination that people of color have faced in this country.

When the Supreme Court employs a colorblind doctrine, the justices are essentially maintaining the status quo, including the existing racial hierarchy. Colorblind jurists contend that race-conscious policies discriminate against white students because the consideration of race provides a preference for students of color.⁴⁷ This conclusion fails to recognize the systemic inequalities that permeate society, especially in education,⁴⁸ and assumes that institutional racism is nonexistent. In order for one to think that race-conscious admissions policies are a preference for students of color, then one would have to believe that white students and students of color are competing on equal footing and that systemic racism does not exist in education. In reality, by the time students apply to college, most white students have gained a systemic educational advantage over students of color.⁴⁹ Thus, considering race is not a preference for students of color, it is an attempt to compensate for systemic inequality.

This is precisely the problem with the diversity rationale in affirmative action jurisprudence. The diversity rationale presumes an equal start-

But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

Lyndon B. Johnson, President, United States, Commencement Address at Howard University: “To Fulfill These Rights” (June 4, 1965), <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>. It is important to note that the original purpose of affirmative action programs was to account for past harms and systemic discrimination against people of color.

46. *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part), *superseded on other grounds by constitutional amendment*, MICH. CONST. art. I, § 26.

47. *See Parents Involved*, 551 U.S. at 748.

48. *See generally* JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* (1991) [hereinafter KOZOL, *INEQUALITIES*]; JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* (2005) [hereinafter KOZOL, *SHAME*].

49. *See* KOZOL, *INEQUALITIES*, *supra* note 48, at 75–77; KOZOL, *SHAME*, *supra* note 48, at 280–82.

ing point and ignores social inequalities, which allows colorblind opponents to make claims of reverse discrimination and preferential treatment. The purpose of such race-conscious policies should be to address social inequalities. Nevertheless, colorblind advocates refuse to recognize systemic racism, and thus, they interpret policies that attempt to ameliorate racism as an unfair preference for students of color.⁵⁰

In their article *The New Racial Preferences*, Professors Devon Carbado and Cheryl Harris point out how state bans on affirmative action provide a preference to white students in writing personal statements.⁵¹ Carbado and Harris explain how strict adherence to colorblind ideals in college admissions prevents students of color from discussing their racial identity in personal statements.⁵² This proves to be a real disadvantage for students of color because they are unable to tell their entire stories; students of color are not be able to explain how race has affected their lives or even reference what their cultural background means to them.⁵³ On the other hand, such a strict colorblind policy does not burden white students in the same way. For many white students, race is not an important factor of their identity, at least not in the same way as it is for students of color.⁵⁴ One of the most significant privileges of being white is that white students can choose when and whether to think about race.⁵⁵ In contrast, students of color consider race on an almost daily basis.⁵⁶ There is no question that colorblind ideals of preventing students from discussing race disproportionately burdens students of color and results in a preference for white students.⁵⁷

Education reform policies that hope to achieve educational equity must be race-conscious.⁵⁸ Professor Michelle Alexander writes, “Although colorblind approaches to addressing the problems of poor people of color often seem pragmatic in the short run, in the long run they are counterproductive. Colorblindness, though widely touted as the solution,

50. See Crenshaw, *supra* note 37, at 126–28.

51. See Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1147–48 (2008).

52. *Id.* at 1148.

53. Notably, this could also hurt white students interested in racial justice issues as well because they would also likely want to discuss race in their personal statements.

54. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1124–25 (2008).

55. Cf. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, CIRTL NETWORK, http://www.cirtl.net/files/PartI_CreatingAwareness_WhitePrivilegeUnpackingtheInvisibleKnapsack.pdf (last visited Nov. 21, 2015).

56. See Robinson, *supra* note 54. Of course there are exceptions; for instance, a white student who goes to a predominately black school. These types of students, however, are very few considering the very low numbers of white students attending schools with majority students of color. See ORFIELD ET AL., *supra* note 12, at 10.

57. See Carbado & Harris, *supra* note 51, at 1147.

58. See Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies That We Tell About the Insignificance of Race*, 95 BOSTON U. L.R. (forthcoming 2016) (on file with author).

is actually the problem.”⁵⁹ If education policies remain within the confines of colorblindness, they will never be far-reaching enough to attack the underlying problem in public education: institutional racism.⁶⁰ Instead, policies will try to close the achievement gap and integrate schools through other mechanisms, such as socioeconomic status, but these policies are ineffective because they do not address the root of the problem.⁶¹ Professor Neil Gotanda contends, “[M]odern color-blind constitutionalism supports the supremacy of white interests and must therefore be regarded as racist. There is no legitimate rationale for the automatic rejection of all governmental consideration of race.”⁶²

II. THE SUPPOSED COSTS OF RACE-CONSCIOUS ADMISSIONS

Opponents to affirmative action claim that there are costs or harms to students of color who attend race-conscious colleges. The two most widely discussed costs are stigma and mismatch, both of which this part explores.

A. Stigma

For over thirty-five years, opponents to affirmative action programs have relied heavily on the claim of stigma to argue against race-conscious admissions in higher education. The stigma argument is quite simple: Affirmative action programs harm all students of color because (1) they create an environment in which others will assume that they are not deserving of admission,⁶³ and (2) admitted students of color will also doubt their own abilities and merit.⁶⁴ In market terms, stigma theorists contend that students of color will prefer race-neutral colleges, instead of race-conscious colleges, because their degree will be free from stigma and, thus, worth more. These conservative voices make claims of both internal stigma (the stigma that students of color place on themselves) and external stigma (the stigma that others place on students of color).

No one is more famous for the stigma claim as an argument against affirmative action than Justice Thomas. In *Adarand Constructors, Inc. v.*

59. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 240 (rev. ed. 2012).

60. See Bridges, *supra* note 58.

61. See *id.*

62. Gotanda, *supra* note 43, at 62–63.

63. There are many assumptions embedded in this argument regarding the relationship between merit and test scores that are and are worth challenging, but outside the scope of this Article. See generally Brief Amicus Curiae of Kimberly West-Faulcon in Support of Respondents, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

64. For an article examining the strength of this argument, see Onwuachi-Willig et al., *supra* note 3 (finding via surveys comparing law students at schools practicing and not practicing affirmative action that “1), minimal, if any, internal stigma felt by minority law students, regardless of whether their schools practiced race-based affirmative action; 2) no statistically significant difference in internal stigma between minority students at affirmative action law schools and non-affirmative action law schools; and 3) no significant impact from external stigma”).

Pena,⁶⁵ Justice Thomas condemns such race-conscious policies on grounds of internal stigma:

[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called “benign” discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are “entitled” to preferences.⁶⁶

Additionally, Justice Thomas strongly contends that external stigma is a worthy argument for the abolishment of affirmative action. In *Grutter v. Bollinger*,⁶⁷ a case upholding the consideration of race as a factor among many in college admissions, Justice Thomas dissents:

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the “beneficiaries” of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “otherwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.⁶⁸

Justice Thomas repeats this sentiment in *Fisher v. University of Texas at Austin*,⁶⁹ a more recent affirmative action case decided by the Supreme Court. He opines briefly, “Although cloaked in good intentions, the University’s racial tinkering harms the very people it claims to be helping.”⁷⁰

Justice Thomas’s consistent reliance on the stigma argument in affirmative action cases makes the stigma claim worthy of consideration

65. 515 U.S. 200 (1995).

66. *Id.* at 241 (Thomas, J., concurring). The *Pena* Court required the use of heightened scrutiny in determining whether the consideration of disadvantaged groups, including women and employees of color, in the awarding of government contracts was a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 237–39 (majority opinion).

67. 539 U.S. 306 (2003).

68. *Id.* at 373 (Thomas, J., dissenting) (citation omitted).

69. 133 S. Ct. 2411 (2013).

70. *Id.* at 2432 (Thomas, J., concurring) The Court remanded the case to the lower court so that a proper analysis of the narrow tailoring requirement of strict scrutiny can be applied. *Id.* at 2415 (majority opinion).

and analysis. Moreover, he is not alone in his disdain for race-conscious policies due to the supposed harm of stigma. Another black conservative to argue the stigma claim is political activist, and former member of the University of California Board of Regents, Ward Connerly.⁷¹ In his amicus brief in *Grutter*, Connerly contends that race-conscious admissions policies “treat black and Hispanic students differently,” and thus, “they will be marginalized and presumed to be inadequate.”⁷² Notice that the blame is always on the race-conscious policy and not on the people making accusations regarding qualifications. The stigma claim lets the accusers go unchecked, as if they have every right to make such an accusation. The underlying assumption that considering race means candidates of color are unqualified is simply not true.⁷³ Considering race in college admissions, as one factor among many, does not mean that admits of color are unqualified.

In deciding between a higher ranked college that practices affirmative action and a less reputable race-neutral college, stigma theorists would advocate that a student of color select the race-neutral college so that they avoid any hint of stigmatization.⁷⁴ This assertion, however, has very little faith in the intelligence of students of color, whom stigma theorists purport to be so concerned. By arguing that stigma should be the reason to end all affirmative action programs, stigma theorists assume that students of color are incapable of properly weighing their options and making an informed decision. It is as if stigma theorists think stu-

71. Connerly is the founder and chairman of the American Civil Rights Institute. *About Mr. Ward Connerly*, AM. C.R. INST., <http://acri.org/about-ward-connerly/> (last visited Sept. 20 2015).

72. Brief Amicus Curiae of Ward Connerly in Support of Petitioners at 13–14, *Grutter*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (quoting prior statement of Ward Connerly). Connerly states: Although the intentions of universities and professional schools may be benign, is there nonetheless a resulting stigma of inferiority on every black and Hispanic student, even those who don't need preferences? This is clearly a message that perpetuates, as opposed to eliminates, the most intractable source of racial inequality in America today, which is the small number of preferred minorities who sufficiently excel academically in order to apply and be admitted to the nation's universities and professional schools without the use of preferences.

Id. at 13; see also Brief Amici Curiae of the Center for Equal Opportunity et al. in Support of Petitioner at 17–18, *Grutter*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) (“[T]he liabilities attendant to the use of racial and ethnic preferences are substantial . . . they stigmatize the so-called beneficiaries in the eyes of their classmates, teachers, and themselves . . .” (footnote omitted)); Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 20, *Fisher*, 133 S. Ct. 2411 (2012) (No. 11-345) (“Racial preferences stigmatize recipient groups by implying that the recipients are inferior and need special protection, thus generating the ‘politics of racial hostility.’” (quoting PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 173–74 (2003))).

73. See Dennis O. Ojogho, *Affirmative Reaction*, HARV. CRIMSON (Mar. 13, 2014), <http://www.thecrimson.com/article/2014/3/13/ojogho-harvard-affirmative-action/> (“The fundamental problem with . . . [affirmative action critics] is that [they are] tragically misinformed about how affirmative action works. [They] assume[] that unqualified people of color are being admitted to this university in droves to meet some kind of quota. The implication is that there are not enough brilliant, young black and Latino minds in this country—that Harvard is forced to admit the first application it receives that has the correct ethnicity box checked. This is simply untrue.”).

74. See Kate L. Antonovics & Richard H. Sander, *Affirmative Action Bans and the “Chilling Effect,”* 15 AM. L. & ECON. REV. 252, 259 (2013).

dents of color are too naïve to know what is best for them in deciding whether to risk stigmatization or go to a less reputable school.⁷⁵

Stigma is not a convincing argument to end all affirmative action in higher education because students of color are well aware of the problem and are fully capable of determining for themselves what is in their best interest.⁷⁶ It is ridiculous to take away one of the options (of attending a higher ranked affirmative action school) because stigma theorists do not think that students of color are capable of making informed decisions.

B. Mismatch

A related claim to the stigma argument that has gained traction in the last decade is mismatch theory—primarily advanced by Richard Sander, law professor, and Stuart Taylor, journalist.⁷⁷ Sander and Taylor assert that students of color suffer academically in two ways when they attend race-conscious law schools. First, they argue that affirmative action at highly selective law schools admits students of color who are unqualified, and thus, these students suffer academically because they cannot compete against their more qualified classmates—they get worse grades and, thus, worse employment outcomes.⁷⁸ Sander and Taylor also argue that students of color learn less because they are unable to keep up with rest of the class and, therefore, underperform post-graduation on the bar exam and in career advancement.⁷⁹

An extension of the mismatch argument is that admitted students of color face both external and internal stigma because of their inability to compete academically. Sander and Taylor explain:

75. See JOHN K. WILSON, *THE MYTH OF POLITICAL CORRECTNESS: THE CONSERVATIVE ATTACK ON HIGHER EDUCATION* 151 (1995) (“Conservatives’ attacks on affirmative action often adopt a paternalistic tone. Critics say they are helping minorities escape the stigma that (they claim) is the inevitable result of affirmative action.”).

76. See *infra* Part III for more on student enrollment choices and comparative stigma.

77. See Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *supra* note 4, at 3–10; RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* 4–5 (2012); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STAN. L. REV.* 367, 449–54 (2004).

78. See sources cited *supra* note 77. It is important to note, there is a lot of published research and scholarship that refutes and disagrees with Sander and Taylor’s claim of mismatch. See, e.g., Ian Ayres and Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 *STAN. L. REV.* 1807, 1808–09 (2005); Cheryl I. Harris and William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander’s Affirmative Action Study*, *J. BLACKS HIGHER EDUC.*, http://www.jbhe.com/features/46_black_student_mismatch.html (last visited Dec. 3, 2015); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 *YALE L.J.* 1997 (2005); William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind “Mismatch,”* 92 *TEX. L. REV.* 895 (2014). Although I find the mismatch theory unconvincing, I am assuming its validity for the purposes of this Article.

79. See Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *supra* note 4, at 8–9.

Large preferences often place students in environments where they can neither learn nor compete effectively—even though these same students would thrive had they gone to less competitive but still quite good schools. We refer to this problem as “mismatch,” a word that largely explains why, even though blacks are more likely to enter college than are whites with similar backgrounds, they will usually get much lower grades, rank toward the bottom of the class, and far more often drop out. Because of mismatch, racial preference policies often stigmatize minorities, reinforce pernicious stereotypes, and undermine the self-confidence of beneficiaries, rather than creating the diverse racial utopias so often advertised in college campus brochures.⁸⁰

Moreover, Sander and Taylor argue that students of color would be better off going to less competitive race-neutral colleges and universities (even if a race-neutral college is not as prestigious as a race-conscious college).⁸¹ They advocate for affirmative action bans, not only because they believe students of color will do better academically, but they will also avoid the stigmatizing effects of underperformance at a race-conscious colleges.⁸²

Interestingly, mismatch and stigma theorists are not as concerned about unqualified legacy students.⁸³ One could also regard the students who are the sons and daughters of alumni, and receive additional consideration by way of a preference, unqualified.⁸⁴ Mismatch and stigma theorists conveniently do not discuss this group of students and are not concerned at all with their performance.⁸⁵ One could argue that by neglecting to discuss legacy students, mismatch and stigma theorists are not well-intentioned and are in fact making bad faith arguments about students of color.⁸⁶ Mismatch and stigma theorists like to argue that they are just looking out for the best interests of students of color. Though, if mismatch and stigma theorists really cared about the best interests of students, then they would also show concern for legacy students or even athletes.⁸⁷

80. Richard Sander & Stuart Taylor Jr., *The Painful Truth About Affirmative Action*, ATLANTIC (Oct. 2, 2012), <http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/>.

81. *See id.*

82. *See id.*

83. *Id.* (“The mismatch effect happens when a school extends to a student such a large admissions preference -- sometimes because of a student’s athletic prowess or legacy connection to the school, *but usually because of the student’s race . . .*” (emphasis added)).

84. *See* Kidder & Onwuachi-Willig, *supra* note 78, at 936.

85. *See* Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *supra* note 4, at 5.

86. *See* Kidder & Onwuachi-Willig, *supra* note 78, at 936 (pointing out how Sander and Taylor are only concerned with black student underperformance and not mismatched white students).

87. *See id.* at 936 n.178 (“In their brief supporting Supreme Court review of the Fisher case, Sander and Taylor begin a discussion of mismatch by briefly noting that ‘admissions preferences—

Further, mismatch and stigma arguments extend into an economic analysis. In financial terms, mismatch and stigma theorists contend that race-neutral colleges provide for better economic opportunity for students of color.⁸⁸ First, students of color will earn better grades at race-neutral colleges, which will lead to better job opportunities. Second, their degree will be free from stigma and thus translate into enhanced job opportunities.

Put together, stigma and mismatch theorists' claims lead to a remarkable economic assertion that a degree from a race-neutral college is worth more than a race-conscious college degree.⁸⁹ Considering these anti-affirmative action arguments of stigma and mismatch, it is worth investigating whether students of color would be better off, economically speaking, going to a race-neutral college.

III. THE MARKET SAYS RACE-NEUTRAL COLLEGES ARE STRUGGLING

One of the arguments invoked by stigma scholars is that students of color will avoid race-conscious colleges and instead prefer to attend race-neutral colleges. The argument is that students of color at public universities under affirmative action bans are free from stigma and will not have to face questions of whether they deserve to be there. In other words, affirmative action bans ensure that all students gained admission based on merit alone, and thus, stigma does not exist on race-neutral campuses. Kate Antonovics and Richard Sander write:

A black candidate deciding between Berkeley and Stanford, for example, might conclude after Proposition 209 that the signaling value of a degree from Berkeley, where there is little or no suspicion of racial preferences in admission, is greater than the signaling value of a degree from Stanford, where the suspicion of racial preferences in admissions is substantially higher.⁹⁰

Studies suggest, however, that this hypothesis is incorrect. Affirmative action bans have caused students of color to increasingly prefer race-conscious colleges to race-neutral ones.⁹¹ In addition, studies show that

regardless of whether these are based on race, 'legacy' considerations, or other factors' cause lower grades, but this is a rhetorical pivot and the thrust of their book and Supreme Court briefs focus on race/ethnicity." (citation omitted) (quoting Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *supra* note 4, at 5)).

88. *See id.* at 897–98.

89. *See* Antonovics & Sander, *supra* note 74.

90. *Id.*

91. *See* William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 70 (2013) ("Contrary to recent claims by groups opposing affirmative action, Proposition 209 triggered a series of educationally harmful 'chilling effects' [for underrepresented students of color]. Data on UC's freshman admit pools spanning a dozen years show that underrepresented minorities (more so for those with the strongest credentials, and especially for African Americans) are more likely to spurn an offer from UC than they were before Prop 209, and the difference compared to whites and Asian Americans has gradually widened under Prop 209."); Symposium, *From Proposition 209 to Proposal 2: Examining the Effects of Anti-Affirmative Action*

students of color face less racism, stigma, and hostility at race-conscious colleges because these colleges are more likely to have a critical mass of students of color.⁹²

A. Students of Color Prefer Race-Conscious Colleges

In an article, William Kidder took several data points from various studies and disproved stigma theorists' argument that banning affirmative action in California would encourage students of color to attend public universities (race-neutral colleges).⁹³ In fact, Kidder shows that in the years after Prop 209, black and Latino students increasingly preferred private colleges that had affirmative action admissions policies (race-conscious colleges).⁹⁴ When examining the enrollment percentages of admitted students of color, black and Latino students "were less likely to choose to enroll at the University of California in the years after Prop. 209."⁹⁵ Kidder notes that the "most pronounced case [was] African Americans at UCLA, where the yield rate in the top third of UCLA's admit pool dropped from 24% to 8%, a decline of two-thirds," after Prop 209.⁹⁶ To provide some context, "for White/Asian American/Other admits in the top third of the pool [for all UCs] the yield rate was essentially flat before and after Prop. 209 (57% versus 58%)."⁹⁷ Thus, Prop 209 had the opposite effects of what stigma theorists predicted. After Prop 209, black and Latino students increasingly spurned offers from UC schools and chose private universities with race-conscious admissions instead.

Not only are students of color increasingly choosing race-conscious colleges over race-neutral colleges, but the number of applicants of color has also decreased at race-neutral schools since Prop 209. In 1995, before the implementation of Prop 209, 21.5% of applicants to the UC sys-

Voter Initiatives, 13 MICH. J. RACE & L. 461, 478–79 (2008) [hereinafter Symposium] (transcription of welcome and introductory remarks).

92. See Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199 (2010) ("Underrepresented minority students in states that *permit* affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states. . . . One of the key arguments in support of affirmative action is that it can create a critical mass of minority students who are viewed not as a token aesthetic, but first and foremost as legitimate citizens of the classroom to be engaged with on their own terms. This research suggests that critical mass is more likely to occur in university settings that use race-based admissions and those students are the ones least likely to report stigma or overt racism. Conversely, those underrepresented minority students who are racially isolated bear the greatest burden of overt racism and external and internal stigma. Furthermore, they are most likely to be found in states that have adopted *anti*-affirmative action policies." (emphasis added) (footnote omitted)).

93. Kidder, *supra* note 91, at 70–85.

94. See *id.* at 78 ("[A]mong those in the top third of the UC admit pool African Americans are typically twice as likely as UC admits overall (39% average versus 18% overall) to attend a private selective college or university, and Latinos (25%) are also more likely to enroll at private selective institutions.").

95. *Id.* at 74–75.

96. *Id.* at 77.

97. *Id.*

tem were underrepresented students of color.⁹⁸ In 1998, after Prop 209, this percentage dropped to 17.5%.⁹⁹ In addition, “the evidence is unambiguous and consistent that affirmative action bans led to substantial drops in African American applications at the most selective law schools,” including UC Berkeley, UCLA, and UC Davis law schools.¹⁰⁰

Unfortunately, bans on affirmative action have significantly decreased the number of black and Latino students enrolling at race-neutral colleges. Kidder reports, “More than a decade after Prop. 209 took effect African Americans remained 3.7% of new freshman enrolling in the UC system, and the figures are lower at UC Berkeley (2.9%), UC Santa Cruz (2.6%), UC Irvine (2.1%), and UC San Diego (1.2%).”¹⁰¹ UC system-wide, black enrollment dropped from 7.8% to 3.9%.¹⁰² To provide a broader context, race-neutral colleges ranked last in the percentage of black freshman among the nation’s top twenty-nine colleges in 2011—(27) University of Michigan (4.6%); (28) UCLA (3.9%); (29) UC Berkeley (2.7%).¹⁰³ As for Latinos, in 1990 (before Prop 209), Latinos were 22% of the incoming class at UC Berkeley.¹⁰⁴ After Prop 209, Latinos have maintained around 12% to 13% of the freshman class at UC Berkeley.¹⁰⁵ UC system-wide, Latino enrollment dropped from 14.6% to 10.8%.¹⁰⁶ These numbers are even more depressing considering that in 1990, Latinos were only 23% of graduating public high school students in California, but in 2010, Latinos were 44% of public high school graduates in California.¹⁰⁷

Black student enrollment at UCLA particularly suffered after the implementation of Prop 209. In 2006, UCLA admitted just 210 black students (2%) out of 10,487 total admitted applicants.¹⁰⁸ That year, black student enrollment at UCLA dropped 57% from pre-Prop 209 average enrollment numbers.¹⁰⁹ In fact, in 2006, UCLA had the lowest percentage of black students, only 96 out of 4,852 entering freshman, since 1973.¹¹⁰

98. Symposium, *supra* note 91, at 474.

99. *Id.*

100. Kidder, *supra* note 91, at 86. Studies show that black applicants to UC Berkeley and UCLA law schools dropped two-fifths after Prop 209 went into effect. *Id.*

101. *Id.* at 88.

102. Symposium, *supra* note 91, at 475.

103. See *JBHE Annual Survey: Black First-Year Students at the Nation’s Leading Research Universities*, J. BLACKS HIGHER EDUC. (Dec. 5, 2011), <http://www.jbhe.com/2011/12/jbhe-annual-survey-black-first-year-students-at-the-nations-leading-research-universities/>. The top schools with the most black students were: (1) Columbia (12.5%); (2) Duke (11.1%); (3) North Carolina (10.7%); and (4) Stanford (10.7%). *Id.*

104. Kidder, *supra* note 91, at 89.

105. *Id.*

106. Symposium, *supra* note 91, at 475.

107. Kidder, *supra* note 91, at 89.

108. See Elaine Korry, *Black Student Enrollment at UCLA Plunges*, NPR (July 24, 2006, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=5563891>.

109. *See id.*

110. See Rebecca Trounson, *A Startling Statistic at UCLA*, L.A. TIMES (June 3, 2006), <http://articles.latimes.com/2006/jun/03/local/me-ucla3>.

Today, UCLA still struggles to enroll black students (in fall 2015, 4.3% of freshman) and has never fully recovered from Prop 209.¹¹¹ With so few black students, it is easy to see how these students will have classes in which they are the only black student, or just one of two. It is important to keep this perspective in mind when considering the hidden costs of attending race-neutral colleges (discussed *infra* Part IV).

B. Comparative Stigma

Two studies based on student surveys found that stigma theorists are incorrect in their hypothesis that affirmative action increases stigmatization. The first study involved students at seven law schools (four schools with affirmative action policies and three under affirmative action bans) and contained questions regarding stigma.¹¹² The study found that “among students of color at the four schools that do have affirmative action programs and the three that do not, there is *no* statistically significant difference in their responses to questions about feeling stigmatized.”¹¹³ In other words, the study found that the presence of an affirmative action ban had no statistically significant effect on whether students of color felt stigmatized.¹¹⁴ This at least suggests that race-conscious colleges are not more harmful to students of color than race-neutral colleges.

The second study surveyed undergraduate and graduate students at race-conscious colleges and schools subject to an affirmative action ban.¹¹⁵ This study included questions regarding racism, stigma, and hostility. With regards to “overt acts of racism from other students, students attending school in the states that ban affirmative action experienced overt racism at nearly twice the rate as students in those states that permit affirmative action.”¹¹⁶ It is regrettable that any student reported experiencing overt acts of racism, but it is notable that such a wide discrepancy exists between race-conscious and race-neutral college environments. It is also contrary to what some may believe—that students of color are more likely to experience overt racism in race-neutral environments.

The survey results for questions about stigma were also contrary to what stigma theorists would predict. As for internal stigma, the first two questions regarding stigma had no statistical difference between the students at the two types of schools.¹¹⁷ The third question, however, whether

111. See *Enrollment Demographics, Fall 2015*, UCLA OFF. ANALYSIS & INFO. MGMT., http://www.aim.ucla.edu/tables/enrollment_demographics_fall.aspx (last visited Dec. 19, 2015).

112. See Onwuachi-Willig et al., *supra* note 3, at 1325–26.

113. *Id.* at 1332 (emphasis added).

114. See *id.* at 1332–33.

115. See Bowen, *supra* note 92, at 1214–15.

116. *Id.* at 1221 (footnote omitted). 43.4% of students of color at race-neutral colleges reported experiencing overt racism from other students; compared to 20.9% of students of color from race-conscious colleges. *Id.* at 1222.

117. See *id.* at 1223.

students of color “felt pressure to prove themselves academically because of their race,” had a statistically significant result: “Almost three-fourths of students in states that *bar* race-based admissions reported feeling pressure to prove themselves because of their racial group membership compared to less than half of students who attend schools with race-based admissions.”¹¹⁸

As for external stigma, when asked whether white “students had questioned their qualifications to be at the school, surprisingly, only about one-quarter of students at affirmative action schools responded affirmatively to this question, while almost one-half of students who were admitted without race considerations answered ‘yes.’”¹¹⁹ In addition, when asked if professors “had lower expectations of them compared to their white peers One-third of students attending schools in states that ban race-based admissions answered ‘yes’ while only one-fifth of students in affirmative action states answered affirmatively.”¹²⁰ These results are directly opposite to what a stigma theorist would expect. More specifically, stigma theorists assume that race-conscious schools have more students of color experiencing stigma. Conversely, this study found the exact opposite: Students of color were more likely to experience stigma at race-neutral colleges. According to this study, race-neutral colleges are in fact harmful to students of color when compared to race-conscious schools.

Some might attempt to discredit these studies by arguing that the respondents are expressing false consciousness. That is, students of color at race-conscious colleges are attempting to justify their decisions by denying that they experience stigma, but deep down they may feel stigmatized; and students at race-neutral colleges may be invested in feeling stigmatized because it helps them excuse poor performance. Unfortunately, one can always make a claim of false consciousness for every survey because questioning motives and truthfulness is universal to the method of surveying. Nevertheless, there is no better way of getting this type of data, and there is no data to the contrary. Therefore, we should not discredit these studies out of concerns for false consciousness.

Another study on the racial climates of race-neutral and race-conscious colleges surveyed close to ten thousand black and Latino students at eight UC campuses and three race-conscious colleges, all similar

118. *Id.* (emphasis added). 74.1% of students of color at race-neutral colleges reported feeling pressure to prove themselves academically because of race; compared to 40.5% of students of color from race-conscious colleges. *Id.* at 1222. This question is very much related to stereotype threat, and will be further discussed in, *infra* Section IV.B.

119. *Id.* at 1224 (footnote omitted). 46.3% of students of color at race-neutral colleges reported experiencing their qualifications questioned by white students; compared to 25.5% of students of color from race-conscious colleges. *Id.* at 1222. These results were statistically significant.

120. *Id.* at 1224. 31.5% of students of color at race-neutral colleges reported faculty members had lower expectations of them compared to their white counterparts; compared to 19.2% of students of color from race-conscious colleges. *Id.* at 1222. These results were statistically significant.

in size and ranking.¹²¹ The survey asked students whether students of their race were respected on campus.¹²² Black and Latino students in the UC system agreed that students of their race were respected on campus at statistically significant lower rates than at all three of the race-conscious colleges.¹²³ One possible explanation for this phenomenon is the critical mass, or lack of critical mass, of students of color on campus.¹²⁴ All three of the race-conscious colleges had higher percentages of black students than seven of the UC schools.¹²⁵ The only UC school, UC Riverside, to have a higher percentage of black students (7.8% in 2010, more than any other school in the study) agreed that they were respected on campus at a higher rate than any other school.¹²⁶ The report concludes, “[H]igher levels of racial diversity are generally better for the campus climate faced by African American students, whereas racial isolation in combination with an affirmative action ban is associated with a more inhospitable racial climate.”¹²⁷ This study suggests that there is something different about the racial climates at race-neutral and race-conscious colleges, and racial isolation is a factor. I argue that racial isolation is just one of the several harms students of color face at race-neutral colleges. The next part uncovers what these potential harms are for students of color.

IV. THE HIDDEN COSTS OF RACE-NEUTRAL COLLEGES FOR STUDENTS OF COLOR

Considering that students of color are increasingly choosing to attend race-conscious colleges over race-neutral schools, an understanding of why this is will help to evaluate the worth of each college degree.¹²⁸ Stigma and mismatch theorists implicitly contend that a race-conscious college degree is worth less than a race-neutral degree. In contrast, college students of color do not seem to agree. This could be because there

121. See WILLIAM C. KIDDER, *THE SALIENCE OF RACIAL ISOLATION: AFRICAN AMERICANS' AND LATINOS' PERCEPTIONS OF CLIMATE AND ENROLLMENT CHOICES WITH AND WITHOUT PROPOSITION 209*, at 2, 5 (2012).

122. See *id.* at 11.

123. See *id.* (“The data revealed that across eight UC campuses only 62.2% of African American students in 2008-10 report feeling that students of their race are respected on campus, compared to over 92% of whites. At UT Austin in 2010-11 72.3% of African Americans reported feeling that students of their race are respected on campus. While the UT Austin data indicate a less than ideal racial climate for African Americans, the ten-point advantage over UC is nonetheless significant on both a statistical and a practical level. Across the UC campuses 77.2% of Latinos feel that students of their ethnicity are respected, compared to an impressive 89.9% at UT Austin. AAU University #1 likewise reports higher levels of African American (75.0%) and Latino (79.6%) students feeling respected on campus. The same is true at AAU University #2, where African American (76.3%) and Latino (90.0%) students are more likely to feel respected.”)

124. See *id.* at 12-14.

125. See *id.* at 12.

126. See *id.*

127. *Id.* at 13.

128. I acknowledge that some may contest the validity of the Kidder’s analysis and the studies that he cites. Even considering that there are criticisms of the Kidder article, it is still worthwhile to explore why students of color may want to choose a race-conscious college over a race-neutral college in order to contribute to and better understand the affirmative action debate.

are hidden costs to attending a race-neutral college. Race-neutral colleges have fewer students of color¹²⁹ and, thus, problems of racial isolation,¹³⁰ stereotype threat,¹³¹ racial microaggressions,¹³² identity performance,¹³³ and racial labor¹³⁴ are exacerbated. These costs are not only intrinsic but also cause economic harms to students of color.

Some may argue that during the admissions phase, high school students cannot possibly be aware of these hidden costs, and thus, these costs are not a part of the decision-making process between a race-neutral and a race-conscious college. High school students are actually more aware of these costs than some might assume.¹³⁵ High school students have experienced the world as a person of color for eighteen years and in various educational environments. This is plenty of time for a student to understand that these harms exist in educational settings. Not all high school students may fully understand these costs or be able to articulate them, but most will have felt these costs before.

Furthermore, social media greatly contributes to the reputation of a college's racial dynamics in the eyes of prospective students. For example, at UCLA (a race-neutral college due to Prop 209) there have been two widely publicized and viewed YouTube videos in recent years that have garnered a lot of attention regarding the school's racial climate. First, there was the infamous "Asians in the Library" video posted on YouTube by a white female student at UCLA.¹³⁶ In her video, she complains about Asian students talking on their cell phones in the library

129. See discussion *supra* Section III.A.

130. Racial isolation is the lack of having a critical mass of students of color on campus and, thus, resulting in the burdens of having to represent your entire race in class or being singled out based on your race. This concept is discussed further in, *infra* Section IV.A.

131. Stereotype threat is the added pressure of having to represent your race because there are so few people of your race in the educational setting. Stereotype threat often results in depressed academic performance and the student of color not performing to their true potential or understanding of the material. This concept is discussed further in, *infra* Section IV.B.

132. Racial microaggressions are forms of unconscious or colorblind racism that contributes to a hostile learning environment for students of color. Racial microaggressions are difficult to address because often it is impossible to prove intentionality on the part of the perpetrator. This concept is discussed further in, *infra* Section IV.C.

133. Identity performance is the energy that students of color expend on attempting to fit in or assimilate into white institutions. This concept is discussed further in, *infra* Section IV.D.

134. Racial labor is the extra work in which students of color must perform because they are students of color. This can be due to tokenism or increasing diversity efforts on campus, but this is extra work in which white students are not asked to perform at the same rate. This concept is discussed further in, *infra* Section IV.E.

135. Carla Rivera, *African American Students Weigh Campus Attitudes in Picking Colleges*, L.A. TIMES (Apr. 30, 2014, 9:20 PM), <http://www.latimes.com/local/la-me-college-choice-20140501-story.html#page=1>.

136. Alexandra Wallace, the creator of the original video, removed the video from YouTube. There are, however, various copies of the video on YouTube. For news coverage of the video, see Larry Gordon & Rick Rojas, *UCLA Won't Discipline Creator of Controversial Video, Who Later Withdraws from University*, L.A. TIMES (Mar. 19, 2011), <http://articles.latimes.com/2011/mar/19/local/la-me-ucla-speech-20110319>; Ian Lovett, *U.C.L.A. Student's Video Rant Against Asians Fuels Firestorm*, N.Y. TIMES (Mar. 15, 2011), <http://www.nytimes.com/2011/03/16/us/16ucla.html>.

after the tsunami in Japan and mocks Asian languages by imitating Asian students in saying, “Ching chong, ling long.”¹³⁷ The student goes on to say, “The problem is these hordes of Asian people that U.C.L.A. accepts into our school every single year, which is fine.’ . . . ‘But if you’re going to come to U.C.L.A., then use American manners.’”¹³⁸ When the student says “hordes of Asian people” and “our school,” she implicitly means that UCLA is for white students and Asian students do not belong, nor are they welcomed, at UCLA.

In 2013, another video contributing to UCLA’s racial climate reputation surfaced on YouTube and has over two million views.¹³⁹ The video includes a group of black male students providing embarrassing statistics regarding the lack of black male students at UCLA.¹⁴⁰ In addition, Sy Stokes, the creator of the video, performs a spoken word poem criticizing UCLA, while nine black male students stand silently behind him.¹⁴¹ The influential video sends a clear message that the black male students are

137. See Gordon & Rojas, *supra* note 136. For an interesting response to this video, see Jimmy Wong, *Ching Chong! Asians in the Library Song (Response to UCLA’s Alexandra Wallace)*, YOUTUBE (Mar. 15, 2011), <http://www.youtube.com/watch?v=zulEMWj3sVA>, which has been viewed over five million times.

138. Lovett, *supra* note 136.

139. Sy Stokes, *The Black Bruins [Spoken Word]*, YOUTUBE (Nov. 4, 2013), <http://www.youtube.com/watch?v=BEO3H5BOIFk>. For news coverage of the video, see Kendal Mitchell, *Student Posts Video to Spark Discussion About Lack of Diversity at UCLA*, DAILY BRUIN (Nov. 8, 2013, 1:42 AM), <http://dailybruin.com/2013/11/08/student-posts-video-to-spark-discussion-about-lack-of-diversity-at-ucla/>; Akane Otani, *Black UCLA Students Decry Lack of Diversity in Video*, USA TODAY (Nov. 19, 2013, 9:43 PM), <http://www.usatoday.com/story/news/nation/2013/11/14/youtube-ucla-lack-diversity/3518373/>; *UCLA has More NCAA Championships than Black Male Freshmen*, HUFFINGTON POST (Nov. 8, 2013, 5:07 PM), http://www.huffingtonpost.com/2013/11/08/ucla-black-enrollment-freshmen_n_4242213.html.

140. See Stokes, *supra* note 139.

141. Part of the spoken word lyrics are:

Now you tell me that I should be proud to be at UCLA?
 When only 35 of us are predicted to walk across that stage?
 When most of us are dropping out from the lack of financial aid
 While Judy Olian, Dean of Anderson School of Management just spent \$647,000 on first
 class flights and hotel stays
 But waiting for an apology is asking for the impossible
 Because no snowflake in an avalanche ever feels responsible
 But you tell me I should be proud to be a Bruin

When we have more national championships than we do black male freshmen
 It’s evident that our only purpose here is to improve your winning percentage
 So now black high school kids can care less about grades, just as long as the number on
 the back of their jersey doesn’t fade
 And you tell me I should be proud to be a Bruin

.....

Stop pretending that the wounds of our past have healed
 We’re not asking for a handout, we’re asking for a level playing field
 Those with less opportunity are fighting for their position trying to find their place
 But those with privilege are hitting triples when they were already born on third base

So with all of my brothers’ hopes and dreams that this university has tried to ruin
 How the hell am I supposed to be proud... to call myself... a Bruin

Id.

unsatisfied by the lack of diversity at UCLA. In turn, this message informs and influences prospective students of color in their decision to attend UCLA.

In addition, a high school student is usually not making this decision alone. There are often several adults (parents, older siblings, family members, mentors, counselors, and teachers) who share their opinions of certain schools. These adults not only bring their own life experiences and education to the discussion but may also be more aware of current news stories covering the racial climate of prospective colleges.¹⁴² For instance, many people in Los Angeles heard about the discrimination lawsuit filed by a black UCLA surgeon.¹⁴³ The surgeon alleged that “he was routinely publicly humiliated and once was depicted as a gorilla being sodomized in a slide show presentation during a resident graduation event.”¹⁴⁴ The UC Board of Regents ultimately settled the case for \$4.5 million.¹⁴⁵ Others may have heard about a prominent black judge who “filed a complaint against two UCLA police officers, accusing them of using excessive force when they pulled him over for not wearing a seat belt.”¹⁴⁶ In addition, some may have read about the several racist and sexist slurs posted about women of color.¹⁴⁷ One sign posted on the Vietnamese Student Union board read, “[A]sian women R Honkie white-boy worshipping Whores [sic].”¹⁴⁸ The next day, another a student found a sign in the library bathroom that said, “Asian Women are White-Boy

142. See Rivera, *supra* note 135.

143. See Hailey Branson-Potts, *UCLA Doctor Sues Regents, Alleging Racial Bias*, L.A. TIMES (Apr. 20, 2012), <http://articles.latimes.com/2012/apr/20/local/la-me-0420-ucla-lawsuit-20120420>.

144. Stephen Ceasar, *Black Surgeon to Get \$4.5 Million in Racial Bias Suit*, L.A. TIMES (July 18, 2013) [hereinafter Ceasar, *Racial Bias*], <http://articles.latimes.com/2013/jul/18/local/la-me-ucla-settle-20130719>. Interestingly, this lawsuit was followed by a study that found “UCLA’s policies and procedures are inadequate to deal with increasing complaints of racial bias among faculty—nearly all of whom surveyed said they had experienced some level of discrimination” Stephen Ceasar, *Study Faults UCLA’s Handling of Faculty’s Racial Bias Complaints*, L.A. TIMES (Oct. 18, 2013), <http://www.latimes.com/local/la-me-ucla-discrimination-20131019,0,2297269.story#axzz2mGLQBE6J>. Additionally, this incident has led to a petition on *Change.org* urging the California Attorney General, Kamala Harris, to investigate UCLA to see if any state laws were broken regarding claims of discrimination and retaliation by faculty members. As of August, 30, 2015, the petition was “Closed,” but had gathered 67,376 supporters. Ron Hasson, *CA Attorney General Kamala Harris: Investigate UCLA for Ignoring Discrimination and Retaliation Complaints by Faculty Members*, CHANGE.ORG, <http://www.change.org/petitions/ca-attorney-general-kamala-harris-investigate-ucla-for-ignoring-discrimination-and-retaliation-complaints-by-faculty-members> (last visited Nov. 23, 2015).

145. See Ceasar, *Racial Bias*, *supra* note 144.

146. Richard Winton, *Black Judge Says UCLA Cops Used Excessive Force in Seat-Belt Stop*, L.A. TIMES (Nov. 25, 2013, 1:44 PM), <http://www.latimes.com/local/lanow/la-me-ln-black-judge-ucla-police-20131125,0,7110117.story#axzz2mGLQBE6J>.

147. See Sara Gates, *UCLA Off-Campus Student Apartment Defamed with Racial Slurs*, HUFFINGTON POST (Mar. 1, 2012, 10:22 AM), http://www.huffingtonpost.com/2012/02/29/ucla-graffiti-racial-slurs_n_1311463.html; Kathleen Miles, *At UCLA, Racist, Sexist Signs Called Asian Women ‘White-Boy Worshipping Whores,’* HUFFINGTON POST (Nov. 29, 2012, 2:09 PM), http://www.huffingtonpost.com/2012/11/29/ucla-racist-sexist-signs-asian-women-video_n_2212311.html.

148. Miles, *supra* note 147.

Worshipping Sluts.”¹⁴⁹ Such racist stories signal to prospective students that UCLA is not a welcoming place for people of color, and thus, they may decide to go to another school.¹⁵⁰

In 2014, another highly publicized campaign recently took place at UCLA School of Law.¹⁵¹ The Black Law Students Association organized an awareness campaign called “33/1100”—the fraction is the number of black students out of the total number of students at UCLA Law.¹⁵² The goal of the campaign was to “raise awareness of the disturbing emotional toll placed upon students of color due to their alarmingly low representation within the student body.”¹⁵³ The campaign included a YouTube video of black law students describing what it is like to be black at UCLA Law.¹⁵⁴ The formidable video immediately went viral¹⁵⁵ and garnered significant news coverage.¹⁵⁶ Regrettably, the campaign also resulted in

149. *Id.*

150. Some may argue that although UCLA may have a racial climate problem, this is not common among most public universities banning affirmative action. I chose to focus on UCLA because I know most about this environment. These types of racial incidents, however, happen at various other UC campuses including UC Berkeley, UC Irvine, and UC San Diego. See Randal C. Archibold, *California Campus Sees Uneasy Race Relations*, N.Y. TIMES (Feb. 26, 2010), http://www.nytimes.com/2010/02/27/education/27sandiego.html?_r=0 (“Students at the University of California, San Diego, held an off-campus ‘Compton Cookout’ Feb. 15 to mock Black History Month, with guests invited to don gold teeth in the style of rappers from Los Angeles suburb of Compton, eat watermelon, and dress in baggy athletic wear.”); Jeremiah Dobruck, *Second Racial Incident at UC Irvine Roils Campus*, L.A. TIMES (May 11, 2013), <http://articles.latimes.com/2013/may/11/local/la-me-ln-second-racial-incident-at-uc-irvine-roils-campus-20130511> (“Police said Friday that someone put a note in a black student’s backpack that read, ‘Go back 2 Africa slave.’ . . . Police say they are unaware of any connection between the note and the fraternity YouTube video that was blasted for racial insensitivity two weeks ago. The parody music video featured a member of the Asian fraternity Lambda Theta Delta wearing black face.”); Tony Perry, *U.S. Ends Probe of Racial Bias at UC San Diego*, L.A. TIMES (Apr. 14, 2012), <http://articles.latimes.com/2012/apr/14/local/la-me-0414-ucsd-harassment-20120414> (“The university will take steps to prevent harassment after several incidents, including a noose left in the library and an off-campus ‘Compton Cookout’ fraternity party during Black History Month.”); Lee Romney & Larry Gordon, *Diversity Satire is a Little Too Biting*, L.A. TIMES (Sept. 26, 2011), <http://articles.latimes.com/2011/sep/26/local/la-me-berkeley-bake-sale-20110927> (“UC Berkeley Republican club draws nationwide protests and support with a bake sale in which items are priced according to a buyer’s race, ethnicity and gender.”).

151. See Samantha Tomilowitz & Sam Hoff, *UCLA Law Students Protest Lack of Diversity*, DAILY BRUIN (Feb. 10, 2014, 4:10 PM), <http://dailybruin.com/2014/02/10/ucla-law-students-protest-lack-of-diversity/>.

152. *Id.*

153. RecordtoCapture, 33, YOUTUBE (Feb. 10, 2014), <https://www.youtube.com/watch?v=5y3C5KBcCPI>.

154. *Id.*

155. See *id.* (gathering more than 400 comments and over 80,000 views).

156. See Rhonesha Byng, *Video Shines Light on the ‘Disturbing Emotional Toll’ of Being Black at UCLA Law School*, HUFFINGTON POST (Feb. 18, 2014, 5:59 PM), http://www.huffingtonpost.com/2014/02/14/ucla-law-school-diversity_n_4789763.html; Melissa Harris-Perry, *‘Hyper-Visible, but Also Invisible,’* MSNBC (Apr. 26, 2014), <http://www.msnbc.com/melissa-harris-perry/watch/hyper-visible-but-invisible-238007363694>; Julianne Hing, *How Does it Feel to Be a Black Student at UCLA Law School? [Video]*, COLORLINES (Feb. 10, 2014, 4:10 PM), http://colorlines.com/archives/2014/02/how_does_it_feel_to_be_a_black_student_at_ucla_law_school_video.html; Elie Mystal, *Racism Abounds at UCLA School of Law*, ABOVE THE LAW (Feb. 24, 2014, 6:18 PM), <http://abovethelaw.com/2014/02/racism-abounds-at-ucla-school-of-law/>; Tamara

racist backlash, including one black student receiving hate mail in her student mailbox and people tearing down posters for law school events sponsored by identity organizations.¹⁵⁷ The backlash only sparked even more national media coverage surrounding the events.¹⁵⁸ Undoubtedly, the negative publicity has influenced perspective students of color in their decision to attend UCLA Law. As a UCLA Law student of color, I received several emails from prospective students of color asking what was going on and whether they should attend UCLA Law. It is evident that the racial climate of a campus goes into the calculus for prospective students in deciding between schools.

Moreover, colleges also feel the need to appear nonracist by displaying and highlighting diversity as a means of attracting students of color.¹⁵⁹ In a recent study investigating the promotional materials of 371 colleges, researchers found that students of color were considerably overrepresented in photographs.¹⁶⁰ For example, Asians accounted for 3.3% of the student body but 5.1% of the students appearing in promotional photos; black students made up 7.9% of student enrollment but 12.4% of the photographed students.¹⁶¹ Some colleges have gone as far as to Photoshop pictures of students of color into promotional photos where the student was not actually present.¹⁶² Universities do this to attract students to their school and avoid appearing racist.¹⁶³ Clearly then, colleges understand that diversity issues and educational climate are important factors of the decision-making process for a prospective student of color—otherwise, why would they go through the trouble?

Tabo, *On Racism at UCLA Law and False Dichotomies*, ABOVE THE LAW (Feb. 27, 2014, 4:12 PM), <http://abovethelaw.com/2014/02/on-racism-at-ucla-law-and-false-dichotomies/>.

157. Rhonesha Byng, *Racial Tensions Grow at UCLA Law After Black Student Receives Hate Mail*, HUFFINGTON POST (Feb. 27, 2014, 11:59 AM), http://www.huffingtonpost.com/2014/02/27/ucla-law-school-racism-diversity_n_4860406.html.

158. See Jayson Flores, *UCLA Law Students Move to Improve Campus Culture After Racist Incident*, USA TODAY (Feb. 27, 2014, 10:05 AM), <http://college.usatoday.com/2014/02/27/ucla-law-students-move-to-improve-campus-culture-after-racist-incident/>; Jonathan P. Hicks, *Tense Times for Black Students at UCLA's Law School*, BET (Feb. 28, 2014, 6:41 PM), <http://www.bet.com/news/national/2014/02/28/tense-times-for-black-students-at-ucla-s-law-school.html>; Julianne Hing, *Racial Harassment Picks Up After Video About Being Black at UCLA Law School*, COLORLINES (Feb. 27, 2014, 12:39 PM), http://colorlines.com/archives/2014/02/racial_harassment_picks_up_after_the_release_of_video_about_being_black_at_ucla_law_school.html.

159. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2191–94 (2013).

160. Scott Jaschik, *Viewbook Diversity vs. Real Diversity*, INSIDE HIGHER ED (July 2, 2008, 4:00 AM), <http://www.insidehighered.com/news/2008/07/02/viewbooks>; see also Matthew Hartley & Christopher C. Morphew, *What's Being Sold and to What End? A Content Analysis of College Viewbooks*, 79 J. HIGHER EDUC. 671, 686–87 (2008).

161. Jaschik, *supra* note 160.

162. See William Claiborne, *School's Diversity Too Good to Be True*, SFGATE (Sept. 21, 2000, 4:00 AM), <http://www.sfgate.com/education/article/School-s-Diversity-Too-Good-to-Be-True-2737946.php>.

163. There are many other reasons why colleges and universities highlight students of color in their promotional material, but these reasons are outside the scope of this paper. For a more thorough discussion of this phenomenon, see Leong, *supra* note 159.

Even if one is still not convinced that a prospective student makes these calculations before accepting an offer, it is still an important exercise to uncover the costs associated with attending a race-neutral college. These intrinsic and economic costs are significant to the comparison of valuing a degree from a race-neutral and a race-conscious university. This part explores each of the costs, mentioned above.

A. Racial Isolation

As discussed earlier, race-neutral colleges tend to have lower percentages of students of color.¹⁶⁴ As such, race-neutral schools have a heightened risk of racial isolation for students of color because of the lack of a critical mass of students of color.¹⁶⁵ Racial isolation occurs when there are so few students of color that often a student of color may be the only student, or one among a very few, of their racial background that is present in class.¹⁶⁶ For example, during my first year of law school, my section had eighty students, but only one black student. This would qualify as racial isolation. The topic of racial isolation was of huge concern during oral arguments in *Fisher v. University of Texas at Austin*.¹⁶⁷ Both sides appeared to agree that racial isolation is a valid concern for a university to attempt to alleviate.¹⁶⁸ Part of this concern over racial isolation is due to the negative effects that it has on students of color.¹⁶⁹

There are several serious detriments to students of color that face racial isolation on campus and in the classroom.¹⁷⁰ Most of these psychological and academic consequences stem from feelings of distinctiveness or unbelonging.¹⁷¹ More specifically, racial isolation increases the likelihood that others will view students of color as a representative or spokesperson for their entire race.¹⁷² Experts often refer to this phenome-

164. See Sander & Taylor, *supra* note 80.

165. See Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents at 18–19, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

166. See *id.* at 18.

167. See Oral Argument, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345), http://www.oyez.org/cases/2010-2019/2012/2012_11_345.

168. Mr. Rein, Fisher's attorney, explained during oral arguments:

[T]o be within [the] Grutter framework, the first question is, absent the use of race, would we be generating a critical mass? To answer that question, you start -- you've got to examine in context the so-called soft factors that are in Grutter. You know, are -- is there an isolation on campus? Do members of minority [groups] feel that they cannot speak out?

Transcript of Oral Argument at 10, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345). The University's attorney affirmed, "[W]hat we look to, and we think that courts can review this determination, one, we look to feedback directly from students about racial isolation that they experience. Do they feel like spokespersons for their race." *Id.* at 46.

169. See Brief of Amicus Curiae the American Psychological Association in Support of Respondents at 5–11, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345).

170. *Id.*

171. *Id.* at 8.

172. *Id.* at 8–10

non as “tokenism.”¹⁷³ The American Psychological Association (APA) reports, “Tokenism heightens the undue attention paid to minorities, fosters stereotyping, and reduces perceptions of individuality. Further, tokenism can foment social stigma and inhibit student achievement.”¹⁷⁴ The effects of tokenism are not just theoretical, but rather, they are substantive and real for students of color at racially isolated campuses. Chrystal James, one of only two black students in her class at UCLA Law, describes:

I remember being upset almost every single day . . . I remember students feeling free enough that when anything was mentioned about color, to turn in their seat and stare at me . . . I had students sit there and turn to me, and stare at me, to wait for my reaction . . . I remember Lena [the other Black student] getting up and leaving the classroom, running out crying.¹⁷⁵

Racial isolation can also preclude a sense of belonging for students of color.¹⁷⁶ The APA explains:

Isolated members of minority groups also “experience relatively greater uncertainty about their belonging in school.” This uncertainty can be detrimental to “well-being and performance,” and it can ultimately discourage students from persisting in an academic setting. However, when minority students experience a greater sense of belonging and less sensitivity to racial rejection, their interpersonal relationships improve and they achieve higher grade point averages throughout college.¹⁷⁷

Even worse, daily experiences of discrimination can exacerbate a sense of unbelonging.¹⁷⁸ Research shows that students in racially isolated settings face increased overt and implicit discrimination.¹⁷⁹ For example, Marky Keaton, one of only five black students in his first-year class at UCLA Law, illustrates such discrimination in describing an incident from law school:

One day I was approached in the law school courtyard by a couple of UCLA campus police officers. One of the officers insisted repeatedly that I specifically had been identified by a student as being in the vi-

173. *Id.* at 10.

174. *Id.* (footnote omitted).

175. Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondents at 6, *Gutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (alterations in original) (quoting Jodie-Marie Masley, *Testimony of Chrystal Blossom James*, 12 BERKELEY LA RAZA L.J. 433, 436 (2001)).

176. See Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *supra* note 169, at 8–9.

177. *Id.* at 9 (footnotes omitted) (quoting Gregory M. Walton & Geoffrey L. Cohen, *A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students*, 331 SCIENCE 1447, 1448 (2011)).

178. See Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents, *supra* note 165, at 20–21.

179. *Id.*

cinity when some money was allegedly stolen from her two days earlier. Of course, when I asked the officer if the girl had said my name, he said no. Instead, she had merely described a Black male with white shoes and a long sleeve shirt. Apparently, since I'm one of the only Black males walking around this school, this was enough for the officer to say affirmatively that I was the male she had identified. It was around lunchtime so there were a lot of students in the courtyard who witnessed the incident. I was absolutely humiliated. I had been trying hard to fit in with the rest of my classmates and to get them to see me as more than just "the Black man in the class." Because I was the only Black man in the class, I felt that the police singled me out. I also felt like the other students were looking at me as if I was guilty. I was so emotionally distraught that I was not even able to go to class that day. It will be a long time before I am ever comfortable in the law school environment again.¹⁸⁰

As one can see, racial isolation can have very damaging and lasting effects on students of color. These consequences not only affect students emotionally but also academically.¹⁸¹ James describes how upsetting and uncomfortable it was for her to attend class, while Keaton describes how the effects of racial isolation made him unable to go to class.¹⁸² If students of color are distracted in class or incapable of attending class, they will suffer academically. Not only that, but racial isolation arguably exacerbates other harms (discussed herein) at race-neutral colleges.

B. Stereotype Threat

One of the most well researched effects of racial isolation is stereotype threat.¹⁸³ "Stereotype threat is the pressure that people feel when they fear that their performance could confirm a negative stereotype about their [racial] group," and as a result, "[t]his pressure manifests itself in anxiety and distraction that interferes with intellectual functioning."¹⁸⁴ This causes some students of color to not perform to their true academic potential on exams, resulting in test scores and grades that of-

180. Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondents, *supra* note 175, at 7–8 (quoting testimonial of Marky Keaton, UCLA School of Law, Class of 2003).

181. Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *supra* note 169, at 8–9 ("Social isolation also makes underrepresented minorities especially vulnerable to psychological impediments to performance. . . . Solo status 'lead[s] racial minorities to construe the self in terms of race and to perceive being seen as a race representative,' which can hinder intellectual performance." (quoting Denise Sekaquaptewa et al., *Solo Status and Self-Construal: Being Distinctive Influences Racial Self-Construal and Performance Apprehension in African American Women*, 13 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 321, 326 (2007))).

182. See Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondents, *supra* note 175, at 6–8.

183. See Brief of Experimental Psychologists as Amici Curiae in Support of Respondents at 6, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

184. *Id.* at 3.

ten underestimate their knowledge or ability.¹⁸⁵ Increasing the number of students of color in the classroom and on campus reduces stereotype threat because students of color are less likely to feel as though they are representing their racial group.¹⁸⁶

Stereotype threat is “one of the most widely studied topics of the past decade in social psychology,” and “a large body of work now testifies to the reliability and generalizability of stereotype threat effects on performance.”¹⁸⁷ Claude Steele and Joshua Aronson were the first to test stereotype threat under laboratory conditions.¹⁸⁸ Steele and Aronson gave the same test to groups of black and white students at Stanford University under two different conditions.¹⁸⁹ In one setting, researchers told students that the test was an evaluation of their intellectual ability, and in the other, researchers told students that the test was a mere problem-solving task.¹⁹⁰ Under the first condition, black students performed considerably worse than white students with the same incoming SAT scores.¹⁹¹ Under the second condition, however, in which researchers told students it was a mere problem-solving exercise, black students performed significantly better, almost closing the racial achievement gap.¹⁹² Steele and Aronson concluded that black students under the first condition “became anxious that a poor performance could seem to confirm the negative stereotype of intellectual inferiority, and this anxiety disrupted their test performance.”¹⁹³

Subsequent research has shown that stereotype threat also applies to other groups, including Latino students,¹⁹⁴ women on math tests,¹⁹⁵ and even white men, when researchers gave them a math test and told them that their performance would be compared to Asian men.¹⁹⁶ Interestingly, whites also succumb to stereotype threat when given tasks where they

185. *Id.* at 3–5.

186. Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *supra* note 169, at 8.

187. Toni Schmader et al., *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 *PSYCHOL. REV.* 336, 336 (2008).

188. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 *J. PERSONALITY & SOC. PSYCHOL.* 797, 797–99 (1995).

189. See *id.* at 799.

190. See *id.*

191. See *id.* at 800.

192. See *id.*

193. Brief of Experimental Psychologists as Amici Curiae in Support of Respondents, *supra* note 183, at 8.

194. See Patricia M. Gonzalez et al., *The Effects of Stereotype Threat and Double-Minority Status on the Test Performance of Latino Women*, 28 *PERSONALITY & SOC. PSYCHOL. BULL.* 659, 666 (2002).

195. See Diane M. Quinn & Steven J. Spencer, *The Interference of Stereotype Threat with Women’s Generation of Mathematical Problem-Solving Strategies*, 57 *J. SOC. ISSUES* 55, 57–58 (2001); Steven J. Spencer et al., *Stereotype Threat and Women’s Math Performance*, 35 *J. EXPERIMENTAL SOC. PSYCHOL.* 4, 16–17 (1999).

196. See Joshua Aronson et al., *When White Men Can’t do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 *J. EXPERIMENTAL SOC. PSYCHOL.* 29, 34–40 (1999).

are concerned with corroborating the stereotype that whites are racists.¹⁹⁷ Another study showed that under the threat of appearing racist, white participants distanced themselves more from black conversation partners.¹⁹⁸ Thus, although it seems counterintuitive, whites behave in more stereotype-affirming ways (racist) when they are concerned with appearing racist.¹⁹⁹

Stereotype threat occurs because the task at hand and concerns of being viewed stereotypically divide the student's attention.²⁰⁰ In an amicus brief filed in *Fisher*, experimental psychologists explain the cognitive effects of stereotype threat:

Research finds that anxiety about negative stereotypes can trigger physiological changes in the body and the brain (especially an increased cardiovascular profile of threat and activation of brain regions used in emotional regulation), cognitive reactions (especially a vigilant self-monitoring of performance), and affective responses (especially the suppression of self-doubts). These effects all divert cognitive resources that could otherwise be used to maximize task performance.²⁰¹

It is important to note that students do not need to believe that the stereotype is true, but rather only know that the stereotype exists and care about their performance.²⁰²

Some may argue that stereotype threat does not exist within the college setting because students are not primed in the same way that they are in the laboratory setting.²⁰³ Studies have shown, however, that even subtle communication of low expectations can result in stereotype threat effects.²⁰⁴ This is especially concerning for students of color at race-

197. See Cynthia M. Frantz et al., *A Threat in the Computer: The Race Implicit Association Test as a Stereotype Threat Experience*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1611, 1621 (2004).

198. See Phillip Atiba Goff et al., *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91, 104 (2008).

199. Considering that race-neutral colleges (largely white institutions made up of white leaders) are concerned with not appearing racist (see conversation earlier in this part about colleges over representing and photo-shopping in students of color in promotional material), I would hypothesize that race-neutral colleges suffer from white stereotype threat and exacerbate racial hostilities for students of color.

200. See Brief of Experimental Psychologists as Amici Curiae in Support of Respondents, *supra* note 183, at 10.

201. *Id.* (citing Schmader et al., *supra* note 187, at 342–46; Toni Schmader & Michael Johns, *Converging Evidence that Stereotype Threat Reduces Working Memory Capacity*, 85 J. PERSONALITY & SOC. PSYCHOL. 440, 451 (2003)).

202. *Id.* at 4.

203. See Joshua Aronson & Thomas Dee, *Stereotype Threat in the Real World*, in STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION 264, 264–65 (Michael Inzlicht & Toni Schmader eds., 2011).

204. See e.g. Michael Inzlicht & Talia Ben-Zeev, *A Threatening Intellectual Environment: Why Females are Susceptible to Experiencing Problem-Solving Deficits in the Presences of Males*, 11 PSYCHOL. SCI. 365, 369–70 (2000); Jessi L. Smith & Paul H. White, *An Examination of Implicitly*

neutral schools, considering one of the studies²⁰⁵ discussed earlier in this Article, *supra* Section III.B, regarding the expectations of professors. When asked if professors had lower expectations of students of color compared to their white peers, “[o]ne-third of students attending schools in states that ban race-based admissions answered ‘yes’ while only one-fifth of students in affirmative action states answered affirmatively.”²⁰⁶ Believing that a professor has lower expectations for students of color would certainly be a primer for stereotype threat.

Admittedly, students of color face stereotype threat at all types of colleges, but stereotype threat is arguably more likely to occur at race-neutral colleges because those educational settings have smaller percentages of students of color. Just look to the study discussed earlier in this Article, *supra* Section III.B.²⁰⁷ When researchers asked students of color whether they “felt pressure to prove themselves academically because of their race,” there was a statistically significant result: “Almost three-fourths of students in states that *bar* race-based admissions reported feeling pressure to prove themselves because of their racial group membership compared to less than half of students who attend schools with race-based admissions.”²⁰⁸ This is an expected result when considering the dismal percentages of students of color at race-neutral colleges. Psychologists agree that “[o]ne way to mitigate stereotype threat is to provide a racially diverse environment, so that minority students do not feel that they are seen or evaluated as representatives of their group.”²⁰⁹ Until race-neutral colleges are able to create racially diverse campuses, where students of color do not feel pressure to represent their race, stereotype threat will continue to harm students of color on race-neutral campuses.

C. Racial Microaggressions

Another cost of attending race-neutral colleges has to deal with intense racial microaggressions on campus.²¹⁰ Racial microaggressions are a form of unconscious racism that is pervasive on college campuses.²¹¹

Activated, Explicitly Activated, and Nullified Stereotypes on Mathematical Performance: It's Not Just a Woman's Issue, 47 *SEX ROLES* 179, 179–81 (2002).

205. Bowen, *supra* note 92, at 1224–25.

206. *Id.* at 1224. 31.5% of students of color at race-neutral colleges reported faculty members had lower expectations of them compared to their white counterparts; compared to 19.2% of students of color from race-conscious colleges. *Id.* at 1222. These results were statistically significant.

207. *Id.* at 1220.

208. *Id.* at 1223 (emphasis added). 74.1% of students of color at race-neutral colleges reported feeling pressure to prove themselves academically because of race; compared to 40.5% of students of color from race-conscious colleges. *Id.* at 1222.

209. Brief of Experimental Psychologists as Amici Curiae in Support of Respondents, *supra* note 183, at 2–3; see also Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *supra* note 169, at 8–9.

210. See Daniel Solórzano et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 *J. NEGRO EDUC.* 60, 60, 62–63 (2000); Tanzina Vega, *Everyday Slights Tied to Race Add Up to Big Campus Topic*, *N.Y. TIMES*, Mar. 22, 2014, at A1.

211. Solórzano et al., *supra* note 210, at 60.

They are essentially “subtle insults (verbal, nonverbal, and/or visual) directed toward people of color, often automatically or unconsciously.”²¹² Students of color face various racial microaggressions on an almost daily basis—“[e]xamples of typical microaggressions include being ignored for service, assumed to be guilty of anything negative, treated as inferior, stared at due to being of color, or singled out in a negative way because of being different.”²¹³ Racial microaggressions are difficult to address because they often lack intentionality, but the effects of racial microaggressions can be devastating in creating a hostile learning environment for students of color. Although racial microaggressions happen all the time and in various settings, race-neutral colleges have an especially difficult time in responding to these acts of unconscious racism because they are confined to colorblind solutions and norms.

A perfect example of a notable microaggression happened at UCLA School of Law in the fall of 2013.²¹⁴ For an upcoming 1L section softball game, students in Professor Sander’s property class decided to make t-shirts that read “Team Sander” with a picture of Sander’s face.²¹⁵ Sander’s section was the only 1L section that created t-shirts and wore them to class, so when other students saw the shirts, they had no clue that the section had created the shirts for purposes of a softball game.²¹⁶ Instead, many students assumed that the shirts were in reference to Sander’s scholarship and opinions of mismatch and stigma theories.²¹⁷ Justifiably, the t-shirts greatly offended several students of color and allies.²¹⁸ Students of color interpreted the t-shirts as saying that they did not belong at the law school.²¹⁹ Reanne Swafford, a black law student, posted a picture of a student wearing the shirt on her Facebook page with the following caption:

So this is happening at the law school today . . . yes he & other 1Ls are wearing shirts that say “Team Sander” as in Richard Sander - - UCLA faculty who believes Black students can “neither learn nor compete effectively” at institutions such as UCLA. Thanks colleagues for yet ANOTHER signal of how I don't “belong” here.²²⁰

212. *Id.*

213. Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 16–17 (2002).

214. See Elie Mystal, *Racists’ T-Shirts on Campus? Only If You Bother to Think About It*, ABOVE THE LAW (Nov. 22, 2013, 1:05 PM), <http://abovethelaw.com/2013/11/racists-t-shirts-on-campus-only-if-you-bother-to-think-about-it/>; *Are You on Team Sander?*, ABOVE THE LAW (Nov. 22, 2013, 5:18 PM), <http://abovethelaw.com/2013/11/are-you-on-team-sander/>.

215. Mystal, *supra* note 214.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. Reanne Swafford-Harris, FACEBOOK (Nov. 20, 2013), <https://www.facebook.com/reanne.swafford>.

Online coverage of the incident shared the same sentiment. On *Above the Law*, a popular website covering all things related to law school and the legal profession, one contributor wrote in response to the incident:

In any event, if you are a 1L wearing a “Team Sander” t-shirt, you are making a pretty bold statement about how you view your African-American classmates. It’s not as overt as walking around in a pointy hood. But it’s a pretty ballsy statement on a campus full of educated black people. Black law students know that Richard Sander doesn’t think they belong.²²¹

Although some of the students wearing the shirts knew of Sander’s scholarship and the effects that wearing the shirts might have on other students, Sander’s section was able to go unpunished and hide behind unintentionally.²²² Because they could argue that the primary intention was to show support for the upcoming softball game, others could not accuse them of racism. Regardless of intentionality, however, the effects were still the same—the shirts were highly offensive to students of color and allies, and the microaggression contributed to a hostile learning environment.²²³ This example also shows the difficulty in responding to microaggressions.²²⁴ The contributor covering the “Team Sander” story on *Above the Law* explained, “All you can do in response to a microaggress-

221. Mystal, *supra* note 214.

222. See *id.*; Elie Mystal, *Racism at UCLA is Slightly Out of Control*, ABOVE THE LAW REDLINE (Feb. 26, 2014, 4:20 PM), <http://www.atredline.com/racism-at-ucla-is-slightly-out-of-control-1531867754>.

223. Another effect of this incident will be prospective students of color deciding not to apply or attend UCLA Law. On *Top-Law-Schools*, a website focusing on law school admissions, the “Team Sander” story hit the Underrepresented Minority 2013-2014 Cycle Thread. In response to the story, there were numerous posts regarding not even applying to UCLA Law. Some of them include:

- “I might not need to consider UCLA if this is the norm.” toshiroh (Nov. 25, 2013, 9:30 PM);
- “Yeah I’m probably gonna save my little dollars and not apply there.” mandyjay11 (Nov. 25, 2013, 10:49 PM);
- “I really hope black ppl stop applying to this school. I wouldn’t even feel comfortable being there . . . you can count the diversity on one hand.” NanaP (Nov. 25, 2013, 11:44 PM);
- “I can’t imagine the stress of finals compounded with racial BS. UCLA seems like a toxic environment for African Americans.” californiuser (Nov. 26, 2013, 12:23 AM);
- “UCLA is a great school . . . but this is too much even for me. There’s simply too much hostility with too much formal backing out way too far in the open for me to tolerate. I couldn’t imagine spending money to apply there, much less fly across the country and attend.” Futuregohan14 (Nov. 26, 2013, 12:45 AM).

URM 2013-2014 Cycle Thread, TOP-LAW-SCHOOLS.COM, <http://www.top-law-schools.com/forums/viewtopic.php?f=14&t=211454&st=0&sk=t&sd=a&start=3125> (last visited Nov. 24, 2015).

224. For a better response to a racial microaggression on another campus, see Peter Jacobs, *Two Kenyon Students Offered an Incredibly Sincere and Thoughtful Apology After Accusations of Racial Insensitivity*, BUS. INSIDER (Nov. 25, 2013, 5:44 PM), <http://www.businessinsider.com/two-kenyon-students-offered-an-incredibly-sincere-and-thoughtful-apology-after-accusations-of-racial-insensitivity-2013-11#ixzz2mZVBQjX4> (reporting on an apology given to the entire student body by two students who wore white sheets intending to dress up as ghosts, but mistakenly interpreted to be KKK members).

sion is bitch, and hope that one day people in the majority don't ignore you just because they're not personally affected by your struggles."²²⁵

Racial microaggressions also translate into very serious costs for students of color.²²⁶ In their study of racial microaggressions, Professors Daniel Solórzano, Miguel Ceja, and Tara Yosso found, "The sense of discouragement, frustration, and exhaustion resulting from racial microaggressions left some African American students in our study despondent and made them feel that they could not perform well academically."²²⁷ Additionally, racial microaggressions are particularly problematic at race-neutral colleges because these campuses endorse colorblind policies.²²⁸ Although white students and faculty cannot explicitly or intentionally discriminate against students of color, the school may have a more difficult time in encouraging interracial interactions or addressing microaggressions.²²⁹ Colorblind notions attempt to avoid the recognition of race, and thus, any school policy or program that recognizes race may be considered suspect. Solórzano, Ceja, and Yosso report that black students highly valued "counter-spaces" as a response to racial microaggressions.²³⁰ Counter-spaces are places where black students can receive validation and emotional and academic support;²³¹ for example, a Black Student Union or a Black Law Students Association. Unfortunately, creating exclusive spaces for black students can prove to be problematic at race-neutral schools.²³² Under colorblindness, opponents can equate counter-spaces for black students to preferential or special treatment.²³³

225. Mystal, *supra* note 214.

226. See Solórzano et al., *supra* note 210, at 69 ("Racial microaggressions in both academic and social spaces have real consequences, the most obvious of which are the resulting negative racial climate and African American students' struggles with feelings of self-doubt and frustration as well as isolation. This means that the African American students on the campuses studied must strive to maintain good academic standing while negotiating the conflicts arising from disparaging perceptions of them and their group of origin. Additionally, they must navigate through a myriad of pejorative racial stereotypes that fuel the creation and perpetuation of racial microaggressions.").

227. *Id.*

228. See discussion *supra* Section I.B.

229. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1285–86 (2000) ("Under a colorblind norm, whites cannot intentionally discriminate against people of color based on race. They cannot use racial slurs or otherwise engage in over racial conduct that creates a hostile work environment for people of color. The colorblind idea does not, however, place an affirmative duty on whites to interact with people of color, or a negative duty to dissociate and disidentify themselves from other whites.").

230. See Solórzano et al., *supra* note 210, at 70; see also Meera E. Deo, *Separate, Unequal, and Seeking Support*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 9, 47 (2012).

231. See Solórzano et al., *supra* note 210, at 70.

232. See Christopher Metzler, *Banning Affinity Groups Shows Lack of Understanding*, DIVERSE: ISSUES IN HIGHER EDUC. (Apr. 29, 2008), <https://diverseeducation.wordpress.com/2008/04/29/banning-affinity-groups-shows-lack-of-understanding/> (discussing Arizona legislators attempts to ban affinity groups on college campuses).

233. See *id.* ("In the Ward Connerly tradition, [banning affinity groups] is an attempt to move to further advance the ideological argument that American college campuses should be color-blind and that the presence of organizations formed by students of color on campuses threaten[s] the myth of color blindness.").

D. Identity Performance

Identity performance is the way in which people of color negotiate and present their identity in order to fit in at predominately white institutions.²³⁴ Most of the scholarship in this area relates to workplace antidiscrimination law,²³⁵ however, it is a small step to transport that argument to students of color in higher education—students of color often face the same costs of identity performance while in college (largely white institutions).²³⁶ Students of color at race-neutral colleges, which often lack a critical mass of one or more racial groups, are likely to feel subject to negative stereotypes²³⁷ that result in “the need to do significant amounts of ‘extra’ identity work to counter those stereotypes.”²³⁸ This extra work takes away energy and focus that students of color might otherwise use towards studying.²³⁹ In competitive settings, such as law schools that use a curved grading system,²⁴⁰ white students have an advantage because the costs of identity performance do not distract them. White norms predominate the academy, and therefore, white students do not need to adjust their identity performance to succeed.²⁴¹

The costs of identity performance are both physically expressive and internalized. For instance, there are grooming costs in which students of color must present themselves in a way that is socially acceptable to whites.²⁴² This could include a black woman straightening her hair, instead of wearing it naturally.²⁴³ This could also include a Latino student trading in his comfortable basketball shorts for slacks out of fear that his peers and professors will not take him seriously. Other expressive costs are language and accent.²⁴⁴ Often, students of color must change the way they speak to adapt to white vernacular, or hide a certain accent as much as possible, out of concern for being considered intellectually inferior. In

234. See, e.g., DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA 1–4 (2013); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS ix–xii (2006); Carbado & Gulati, *supra* note 229, at 1262; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 879 (2002).

235. See Carbado & Gulati, *supra* note 229, at 1261–63, 1276–77.

236. See Bowen, *supra* note 92, at 1237–40.

237. See discussion *supra* Section IV.B.

238. Carbado & Gulati, *supra* note 229, at 1262.

239. See *id.* (“Depending on the context, that extra work may not only result in significant opportunity costs, but may also entail a high level of risk.”).

240. LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 2 (1997) (“Because law school’s educational mission is so intertwined with the goal of selecting students for entry into a competitive profession, much of its pedagogy, including examination formats, is designed to rank students. The idea is that those who succeed in this highly competitive and individualistic culture will do well as lawyers.”).

241. See Bowen, *supra* note 92, at 1238 (“Minority students are asked to assimilate to white codes of conduct. They are asked to examine their behavior for white conformity.”).

242. See Yoshino, *supra* note 234, at 889–96.

243. See, e.g., Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1112–15 (2010).

244. See Yoshino, *supra* note 234, at 896–900; see also CARBADO & GULATI, *supra* note 234, at 47–67.

this way, identity performance can be both monetarily and psychologically costly.

The internal costs of identity performance can be much harder to quantify. Internal identity performance “might be referred to as compromising moments of identity performance—moments in which a person’s performance of identity contradicts some political or social image that person has of herself.”²⁴⁵ For example, a student of color might hear a joke or comment that she finds racist. Instead of pointing out the offense, she might just laugh along with the rest of the group out of fear of appearing overly sensitive or a bitch.²⁴⁶ Nevertheless, the student of color may continue to feel angry or uncomfortable because she must hide her true opinions.

Race-neutral colleges particularly exacerbate the costs of identity performance because these environments practice and promote colorblindness.²⁴⁷ When colorblindness is the institutional norm, students of color bear the burden of conforming to or maintaining colorblindness.²⁴⁸ Colorblind norms work one-directionally in that whites are free to perform their identity without consequences because the colorblind status quo is based off of white norms,²⁴⁹ whereas, students of color are forced to think about and adjust their identity performance to the white hegemonic norms of colorblindness.²⁵⁰ Additionally, identity performance primarily caters to white students in making them feel comfortable in being around students of color.²⁵¹ Students of color must adjust and adapt (do the work of identity performance) so that white students will feel at

245. Carbado & Gulati, *supra* note 229, at 1289.

246. *See id.* at 1290–91.

247. *See discussion supra* Section I.B.

248. *See Carbado & Gulati, supra* note 229, at 1279 (“[T]he pervasiveness of a colorblind institutional norm might shape how an outsider attorney interacts with and performs his identity for insider associates. To the extent that an institution expects its workplace culture to be colorblind, people of color bear the brunt of the burden of maintaining this colorblindness. The reason is that the question of whether the workplace is colorblind will turn primarily on the racial associations that people of color (per)form at work, assuming few, if any, acts of intentional race discrimination will occur.”).

249. *See discussion supra* Section I.B.

250. Carbado & Gulati provide an example of this in phenomenon in discussing associations among colleagues at colorblind workplaces:

The colorblind norm does not require whites to avoid other whites or to associate with people of color. This norm does, however, require people of color to avoid other people of color (the negative racial duty) and to associate with whites (the affirmative racial duty). In fact, the colorblind norm operates as a color conscious burden. Colorblindness, therefore, does not actually mean colorblindness. Specifically, it racially regulates the workplace association of people of color, but not those of white people. A colorblind workplace norm requires people of color, but not white people, to think and be careful about their racial associations. The question of whether the workplace norm of colorblindness is violated turns on whether people of color associate with each other or with whites. Consequently, white-with-white and white-with-people-of-color associations are perceived as colorblind. People of color-people-of-color associations are not.

Carbado & Gulati, *supra* note 229, at 1287–88 (footnotes omitted).

251. *See id.* at 1288.

ease.²⁵² Identity performance also reminds students of color that “they are outsiders who must be socialized into the institution.”²⁵³

E. Racial Labor

Another phenomenon that I witnessed during law school is the additional work performed by students of color, which I have called racial labor. Racial labor is extra work that colleges ask students of color to perform, but not white students. For example, in an effort to convince prospective black students to attend the college, the admissions office may ask a black student to perform additional recruiting activities. This could entail meeting with the prospective student, hosting her for an overnight stay, or conducting campus tours. Although the admissions office may also ask white students to perform these recruiting tasks, white students do not feel the added pressure to do the recruiting efforts because there are plenty of other white students who can do it. Whereas, the black student feels pressure to do the recruiting activities because she knows that there are only a few black students on campus. In addition, the black student may feel that it is her responsibility to increase black student enrollment since she is just one of a few black students.

Another example of racial labor is the public relations office asking students of color to pose for promotional materials. As discussed earlier, college promotional materials disproportionately represent students of color.²⁵⁴ Although some of these photos are candid shots taken at various events, many others are staged photo shoots that take a student’s time away from her studies. Again, no one forces students of color to take part in this work, but they may feel pressure to do it. For example, I have a friend of color who received a scholarship from his law school.²⁵⁵ The school was developing materials to send to donors to encourage scholarship donations, and of course, the school wanted to represent a diverse student body of scholarship recipients. My friend reported that he felt pressured to do the photo shoot as a gesture of gratitude and out of concern for renewing his scholarship for the following year.²⁵⁶ Although a school may also ask white students to perform this type of work, schools ask students of color at disproportionate rates so that schools appear more diverse.²⁵⁷

Another form of racial labor is the school asking students of color to address issues of diversity or enhance diversity efforts on campus. For illustration, on the day of the “Team Sander” incident, discussed *supra*

252. *See id.*

253. Bowen, *supra* note 92, at 1238.

254. *See supra* note 160 and accompanying text.

255. This was a classmate of mine at UCLA School of Law.

256. My friend did in fact participate in the photo shoot, and UCLA Law prominently featured him in development materials.

257. *See Jaschik, supra* note 160.

Section IV.C, I was in the library studying for my next class when one of my professors called me. She said that she was reaching out to student leaders who could spread the word that there would be a meeting the next day to discuss the matter. I believed that the school community needed to address this racial incident, so I felt that it was my duty as a student of color to help galvanize students to attend the meeting. Thus, instead of reading for my next class, I drafted an email to my fellow classmates and responded to their questions. This was an act of racial labor.

Racial labor occurs at all colleges, but the work is likely to be more of a burden at race-neutral colleges in which there are fewer students of color to do the work. When schools lack a critical mass, there is an enhanced pressure to perform racial labor because students know that there is not an abundance of students of color to share the workload.

V. RACE-CONSCIOUS COLLEGES INCREASE THE VALUE OF A DEGREE FOR STUDENTS OF COLOR

This part argues that, to a student of color, a degree from a race-conscious college is actually worth more than a degree from a race-neutral college. As discussed in the previous part, the costs of attending a race-neutral college have very serious academic harms. These real academic consequences translate into economic harms. If a student attends a race-neutral college with few students of color, the chances of racial isolation, stereotype threat, racial microaggressions, identity performance, and racial labor are immense. Students of color at race-neutral colleges must feel like a representative or a spokesperson for their race, and they likely feel uncomfortable in class and on campus.²⁵⁸ As a result, students of color at race-neutral schools probably perform worse than had they attended a race-conscious school, where the costs discussed above would not be as prominent. Therefore, higher academic performance at a race-conscious school would likely transfer into better job opportunities, making the race-conscious degree worth more in both economic and intrinsic value.

Additionally, even when students of color attend colleges that ban affirmative action, they still face the costs of stigma and assumptions that they do not deserve to be there.²⁵⁹ After the “Team Sander” incident, discussed *supra* Section IV.C, Reanne Swafford, a black second-year law student, posted this comment to her Facebook page:

258. See *supra* Section IV.A.

259. See Alexia Boyarsky, *Findings by Law Professor Suggest That UCLA Admissions May Be Violating Prop 209*, DAILY BRUIN (Oct. 23, 2012, 1:21 AM), <http://dailybruin.com/2012/10/23/findings-by-law-professor-suggest-that-ucla-admissions-may-be-violating-prop-209/>.

To attend a public institution as a minority student in a state that banned Affirmative Action, your merits and accomplishments are still diminished because you are told by some professors and peers that you do not belong here. Everyday you live and carry the added pressure of ‘proving yourself’ when your white colleagues simply do not.²⁶⁰

Two studies support this sentiment, discussed *supra* Section III.B, which found that students of color face stigma at equal or higher levels at race-neutral schools.²⁶¹

A few years ago, Sander produced a report positing that UCLA was violating Prop 209 by accepting less qualified students of color based on their lower holistic admissions scores (as compared to white students).²⁶² In an interview with the UCLA student newspaper, *The Daily Bruin*, Sander contends, “‘What seems to be happening is that there is discrimination [against white applicants] after the holistic scores are generated’ ‘(Admissions officials) seem to be making discriminatory decisions with lots of black and Hispanic students with poor holistic scores being admitted.’”²⁶³ The article also cited a study published by UCLA sociology Professor Robert Mare, who makes the same contention that “‘the university admitted more than 100 black students who would not have been admitted based on the holistic admissions process alone.’”²⁶⁴ The article points out that this is around one-third of the total number of admitted black students.²⁶⁵ Mare states, “‘There are some extra African-American students on campus that we can’t account for’”²⁶⁶

Importantly, scholars have since discredited Sander’s methodology in drawing his conclusions.²⁶⁷ Even still, this type of rhetoric only perpetuates stigmatic harms against students of color and, in particular, black and Latino students. In a statement in response to the news article, a coalition of various student organizations described the article as “‘making the broader statement that certain communities of color do not deserve to be on this campus.’”²⁶⁸ The numerous comments left on the arti-

260. Reanne Swafford-Harris, FACEBOOK (Nov. 22, 2013), <https://www.facebook.com/reanne.swafford>.

261. See Bowen, *supra* note 92, at 1223–25; Onwuachi-Willig et al., *supra* note 3, at 1343.

262. See RICHARD SANDER, THE CONSIDERATION OF RACE IN UCLA UNDERGRADUATE ADMISSIONS 6 (2012), <http://www.seaphe.org/pdf/uclaadmissions.pdf>.

263. Boyarsky, *supra* note 259 (second alteration in original).

264. *Id.* (quoting statement by Professor Robert D. Mare, UCLA); see also ROBERT D. MARE, HOLISTIC REVIEW IN FRESHMAN ADMISSIONS AT UCLA 74–75 (2012), <http://www.senate.ucla.edu/committees/cuars/documents/UCLAReportonHolisticReviewinFreshmanAdmissions.pdf>.

265. See Boyarsky, *supra* note 254.

266. *Id.* (quoting statement by Professor Robert D. Mare, UCLA).

267. Ricardo Vazquez, *External Reviews Cast Doubt on UCLA Professor’s Analysis of Campus Admissions Practices*, UCLA NEWSROOM (Feb. 25, 2013), <http://newsroom.ucla.edu/stories/two-external-reviews-cast-doubt-243753>.

268. ‘How Close to Zero Do They Want Us to Get?’ *Students of Color Under Attack! We Will Not Be Silenced!*, LA GENTE (Oct. 26, 2012), <http://lagente.org/?p=4100>.

cle's *Daily Bruin* website only support this contention. One online user, going by the name Elizabeth Warren, questions whether President Obama deserved to go to Harvard Law:

We need to STOP AFFIRMATIVE ACTION. Barack Obama got into Harvard Law despite being a mediocre student. He didn't even graduate with honors from undergrad and he only applied to Harvard, Stanford, and Yale, and Columbia Law school. Which student applies only to those schools even with a low GPA? Answer: A minority who is playing the system.²⁶⁹

Another commenter posts, "As an American, I don't care what a student's race is, as long as they *earned* their spot. That's the point of [Sander's] work: UCLA is making admissions decisions off of race when it appears to be impossible to sort by merit"²⁷⁰ One more writes, "We need diversity on campus to bring those midterm/final curves down!"²⁷¹ These types of comments go on for pages, but the point is that even at UCLA, which is under an affirmative action ban, people still make students of color feel as though they do not deserve to be there. One black student, going by BlackBruin, felt the need to defend his place at UCLA by commenting, "I have a 3.7 GPA, I study well."²⁷²

Considering students of color at race-neutral colleges still encounter claims that they do not deserve to be there, the supposed costs of race-conscious admissions (in particular, stigma) are not really costs of affirmative action. The stigmatization of students of color is prevalent in all educational settings because of racist notions of inferiority. Thus, the stigma problem is not affirmative action; the problem is racism.²⁷³ Moreover, if students of color have to face the cost of stigma at both race-neutral and race-conscious colleges, then clearly the benefits of a race-conscious college are going to outweigh the costs because the stigma costs are present in both settings.

As for the mismatch theorists who contend that students of color at race-conscious colleges are not prepared to adequately compete with their more qualified colleagues (presumably admitted based on nonracial factors), a race-conscious college experience is still worth more than facing the harms exacerbated at race-neutral colleges. Although I disagree with the underlying assertion made by mismatch theorists, for the purposes of this Article, I will suppose that mismatch is valid. The proposed harms of mismatch are that students of color at race-conscious schools will place at the bottom of their class because they are not quali-

269. Boyarsky, *supra* note 259.

270. *Id.*

271. *Id.*

272. *Id.*

273. See WILSON, *supra* note 75, at 151 ("But it is racism, not affirmative action, that stigmatizes minorities.").

fied for the rigors of the university. As the APA explains, however, “The academic mismatch hypothesis . . . ignores alternative explanations for minority underperformance in certain academic settings, such as stereotype threat and uncertainty about belonging.”²⁷⁴ Mismatch theorists fail to recognize that students of color at race-neutral schools still have to confront threats of underachievement because of intensified harms at race-neutral schools that affect academic performance.

In addition, race-conscious schools can provide targeted academic support or opportunities to students of color if they are truly concerned with mismatch. Whereas, a race-neutral college will be required to remain colorblind and may have a more difficult time in directly addressing concerns for students of color. For instance, mismatch theorists would contend that mismatch prevents students of color from effectively competing for law review membership at highly selective law schools. If a law review wanted to increase members of color, a race-neutral college cannot consider race in the application process nor can they directly recruit or provide extra training to students of color.²⁷⁵ If a race-conscious college were in the same position, however, they could easily consider race during the application and recruiting process. Some may contend that people will stigmatize law review members of color at race-conscious schools as not qualified for law review membership. Nevertheless, as discussed above, law review members of color are assumed unqualified even at race-neutral schools. As a former law review member of color at a race-neutral law school, I can attest that each year there are always rumblings that the law review favors students of color. Even though the law review forbids the consideration of race and only a small handful of students of color even make the law review,²⁷⁶ others still questioned whether the students of color “deserved” to be on law review.²⁷⁷

274. Brief of Amicus Curiae the American Psychological Association in Support of Respondents, *supra* note 169, at 31.

275. See generally Adriane Kayoko Peralta, *The Underrepresentation of Women of Color in Law Review Leadership Positions*, 25 BERKELEY LA RAZA L.J. 69 (2015).

276. See N.Y. LAW SCH. LAW REVIEW, 2012-2013 LAW REVIEW DIVERSITY REPORT 3, 5, 13 (2013), <http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/12/Law-Review-Diversity-Report-2013.pdf>; David Lat, *Minorities and Women and Law Reviews, Oh My!*, ABOVE THE LAW (Aug. 17, 2010, 1:53 PM), <http://abovethelaw.com/2010/08/minorities-and-women-and-law-reviews-oh-my/>.

277. My class year at UCLA Law, 55 students made the *Law Review*: one Latino student, one Native American student, one black student, fourteen Asian/Asian American students, and 38 white students. *UCLA Law Review Volume 61 2013-2014*, UCLA L. REV., <http://www.uclalawreview.org/?p=4228> (last visited Sept. 11, 2015). Some students thought that this was a high proportion of students of color and there was no way that so many of us made the *Law Review* without race-conscious selection. See also *Law Review and Diversity, WHO OWNS THE FOX?* (Mar. 14, 2008, 1:43 AM), <http://uclaw.blogspot.com/2008/03/law-review-and-diversity.html> (speculating, in a blog post by an anonymous UCLA alum, whether the *UCLA Law Review* violated Prop. 209 when for the first time all five chief positions are occupied by students of color).

Race-conscious schools are also better situated to address the emotional needs of students of color because colorblind ideals do not influence race-conscious settings. For example, during the fall semester of 2014, the police killings of Michael Brown, Eric Garner, and Tamir Rice affected many students of color. Students of color at Harvard Law School, Columbia Law School, and Georgetown Law Center petitioned school administrators to allow for those affected to postpone their final exams.²⁷⁸ Columbia granted the students' request and extended deadlines for those affected.²⁷⁹ Harvard and Georgetown allowed those affected to petition on an individual basis.²⁸⁰ "Columbia and Harvard also . . . offer[ed] students special sessions with trauma counselors, mental health professionals and professors to talk about the lack of indictments in the Brown and Garner cases."²⁸¹ If a race-neutral school were to grant such requests, colorblind activists would certainly accuse them of providing an unearned advantage to students of color and potentially violating bans on considering race.

Meanwhile, during the same time, a professor at UCLA Law drew criticism for using an insensitive prompt during his final exam.²⁸² Students reported that the exam prompt asked students to write a memorandum to the district attorney "on the constitutional merits of indicting Michael Brown's stepfather for advocating illegal activity when he yelled 'Burn this bitch down,' after [the district attorney] announced the grand jury's decision."²⁸³ The exam question was not only an example of poor judgment on the part of the professor but also displayed how these types of situations unfairly burden students of color. As one reporter puts it, "[T]his particular question places an unfair burden on African-American students to emotionally detach from still-recent acts of essentially legalized terrorism against the African-American community."²⁸⁴ Shyrisa Dobbins, a law student who took the final exam, said, "Daily I think about Michael Brown and Eric Garner, and I have a challenge. . . . Every day I think about this injustice and how I'm in a law school that won't even make a statement about it."²⁸⁵ Hussain Turk, another law student

278. Philip Marcelo, *Law Schools Delay Exams for Students Upset by Ferguson, Eric Garner Decisions*, HUFFINGTON POST (Dec. 10, 2014, 9:59 AM), http://www.huffingtonpost.com/2014/12/10/law-schools-exams-ferguson_n_6301282.html.

279. Jacob Gershman, *Columbia Law School Lets Students Postpone Exams Due to Grand Jury Decisions*, WALL ST. J.L. BLOG (Dec. 8, 2014, 1:03 PM), <http://blogs.wsj.com/law/2014/12/08/columbia-law-school-lets-students-postpone-exams-due-to-grand-jury-decisions/>.

280. Marcelo, *supra* note 278.

281. *Id.*

282. Shreya Maskara, *Law School Exam Question on Ferguson Shooting Draws Criticism*, DAILY BRUIN (Dec. 11, 2014, 2:01 AM), <http://dailybruin.com/2014/12/11/law-school-exam-question-on-ferguson-shooting-draws-criticism/>.

283. Elie Mystal, *Controversial Exam Question at UCLA Law Sparks Outrage*, ABOVE THE LAW REDLINE (Dec. 9, 2014, 6:00 PM), <http://www.atredline.com/racist-exam-question-at-ucla-law-sparks-outrage-1668856105>.

284. *Id.*

285. Maskara, *supra* note 282.

who took the exam, said, “These kinds of questions create a hostile learning environment for students of color, especially black students who are already disadvantaged by the institution.”²⁸⁶

Race-neutral schools are more susceptible to claims of hostile learning environments for students of color because they are restricted in their ability to respond to racism. Affirmative action bans instill a value system that schools must treat all students the same. These colorblind notions prevent race-neutral schools from adopting policies with the needs of students of color in mind. Race-conscious schools, on the other hand, can target policies and support systems that are particular to students of color. As a result, race-conscious schools can better support students of color.

The costs of stigmatization and mismatch are the same in both race-conscious and race-neutral settings. Race-conscious schools, however, are able to better counterbalance these costs through academic opportunities, support programs, and race-conscious policies. Race-conscious colleges can also consider race when awarding scholarships and financial aid. This is another financial advantage to attending a race-conscious college. Furthermore, the hidden costs of racial isolation, stereotype threat, racial microaggressions, identity performance, and racial labor are greater in race-neutral settings because there are fewer students of color. Considering all of these factors, a student of color has a better chance at thriving at a race-conscious college.

CONCLUSION

Considering what I know now, I second-guess whether I made the right decision by attending a race-neutral law school. I wonder if I might have had a more enjoyable experience or better academic performance at a race-conscious law school with a critical mass of students of color. I certainly know that I have experienced huge costs in attending a race-neutral university, and I know that these costs have translated into lost opportunities (both intrinsic and economic). It is understandable that students of color increasingly prefer race-conscious colleges. A market analysis of the costs and benefits associated lean in favor of race-conscious environments. A degree is simply worth more from a race-conscious college for students of color.

286. *Id.*