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NOTES

THE RELATIONSHIP BETWEEN EQUALITY AND ACCESS IN LAW SCHOOL ADMISSIONS

I. INTRODUCTION

Policymakers have employed — and courts have accepted — different conceptions of equality in their attempts to increase the participation of people of color within institutions of higher education in the United States. The two most prominent conceptions of equality have focused on opportunity and results. Yet, in decades of discussions about racial equality, commentators have rarely discussed or examined educational institutions' definition of merit.¹ It is the definition of merit that shapes an institution's admissions criteria, thus determining who will have access to the institution.

Access to law schools within the United States has become a high-profile issue since the elimination of race-based affirmative action programs in California's² and Texas's³ state law schools. Since the elimination of these programs, the number of African-American students admitted to the University of California at Berkeley, Boalt Hall, dropped from seventy-five to fifteen in one year,⁴ while the University of Texas Law School admitted only eleven African-American students, compared to sixty-five in the previous year.⁵

One assumes that the definition of merit used by a law school will fairly⁶ and accurately measure the skills and talents that are necessary for an individual to succeed in law school and within the legal profes-

¹ The role of the definition of merit has been examined in Lani Guinier, *Reframing the Affirmative Action Debate*, University of Kentucky Blazer Lecture (Feb. 1997), in 86 KY. L.J. 505, 514-19 (1997); and Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968-71, 997-1008 (1996).

² On November 5, 1996, the voters in California passed Proposition 209 (the California Civil Rights Initiative), which amended the state constitution to prohibit discrimination and preferences on the basis of race and gender in public employment, education, and contracting. See Corinne E. Anderson, Comment, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 209-10, 210 n.141 (1999) (Proposition 209 was enacted as CAL. CONST. art. I, § 31).

³ In 1996, the United States Court of Appeals for the Fifth Circuit decided *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which held that "the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny. . . . [T]he key is that race itself not be taken into account." *Id.* at 948.

⁴ See WILLIAM JULIUS WILSON, *THE BRIDGE OVER THE RACIAL DIVIDE* 100 (1999).

⁵ See *id.* at 100-01.

⁶ Admissions criteria fairly measure skills when "the standards governing the process [do] not arbitrarily advantage members of one group over another." Sturm & Guinier, *supra* note 1, at 981.

sion. Yet this assumption may be incorrect, and nothing within the current equality-as-opportunity paradigm requires it to be examined or made into a requirement. This assumption has not passed unchallenged in the employment context, but it continues to exist in the education context. Employers are allowed to use only bona fide occupational qualifications in evaluating potential employees.⁷ Creating a similar requirement for institutions of higher education generally, and law schools specifically, would provide more assurance that applicants would be selected based on the skills and talents necessary to enable a law school to achieve its primary mission — training good lawyers.

African-Americans and other students of color who applied to state law schools in California and Texas after 1996 acted as the “miner’s canary,” signalling problems with the law school admissions process, just as the canary signals a problem with the atmosphere in the mines.⁸ Based upon this experience, this Note argues that an effective equality paradigm must go beyond requiring similar law school admissions criteria to demanding similar admissions criteria that fairly and accurately measure the skills and talents necessary for success in law school and the legal profession. Law schools can meet this demand by reassessing their institutional missions, identifying the student qualifications necessary for the school to satisfy its mission, and then granting individuals access to the institution on the basis of those characteristics and skills.

Part II provides an overview of the two main conceptions of equality — equality as opportunity and equality as results — and their application to federal law regarding race, as well as their failure to examine critically the manner in which merit is defined. Part III argues that the equality-as-opportunity approach should include an examination of the ways in which merit is conceptualized within law school admissions. This section includes a discussion about a criteria audit — a process that would enable a law school to link its definition of merit and admissions criteria to its mission. It also discusses a framework for federal litigation that would enable private individuals to sue a law school if its admissions criteria have a disparate impact on a specific racial group.

⁷ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). The *Griggs* Court explained that Title VII of the Civil Rights Act of 1964 requires “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.” *Id.* at 431.

⁸ Guinier, *supra* note 1, at 505–07. Canaries were important to the miners because: [Miners] used to take a canary with them into the mine to alert them when the atmosphere in the mine was beginning to get dangerous-poisonous. The canary’s more fragile respiratory system was a signal to the miners, not just that it was dangerous for the canary to remain in the mine, but that the miners had better leave the mine, too. *Id.* at 506.

II. OPPORTUNITY OR RESULTS? LEGAL APPROACHES TO RACIAL EQUALITY

Throughout history, individuals and movements have employed a variety of equality theories to ensure the full participation of all individuals within this nation. Yet neither of the two most prevalent theories — equality as opportunity and equality as results — provides a critical examination of the way in which merit is conceptualized or defined. Within the education context each theory takes the status quo definition of merit for granted. Neither theory examines how an institution's definition of merit can legitimately and illegitimately limit access. The discussion below analyzes each equality paradigm and the manner in which each focuses on either allowing all individuals to compete based on the existing criteria or making exceptions to the existing criteria, but always assuming that the existing criteria are fair and legitimate.

A. *Equality as Opportunity*

The Founding Fathers and the framers of the Reconstruction Amendments invoked the principle of equality to ensure greater societal participation for those on the margins of society.⁹ Alexander Hamilton advanced this idea in *The Federalist Papers*, writing: "There are strong minds in every walk of life that will rise superior to the disadvantages of situation and will command the tribute due to their merit The door ought to be equally open to all"¹⁰ During the Senate discussions on the resolution that would become the Fourteenth Amendment to the Constitution, Senator Howard emphasized the connection between equality and similar treatment. He stated that the Fourteenth Amendment "establishes equality before the law, and it gives to the humblest, the poorest, *the most despised of the race* the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."¹¹ These three aspects of equality — justification for greater inclusion, access for those who are qualified, and similar treatment — serve as the founda-

⁹ See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (proclaiming that "all men are created equal"); U.S. CONST. amend. XIV, § 1 (requiring states to provide all individuals with "equal protection of the laws"); see also Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1061 (1996) (noting that the equality language in the Declaration of Independence was meant to include enslaved persons).

¹⁰ THE FEDERALIST NO. 36, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

¹¹ CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (emphasis added) (statement of Sen. Howard). Senator Howard made these comments to the Senate when he presented the joint resolution for an amendment to the Constitution, which ultimately became the Fourteenth Amendment. See *id.* at 2764.

tion for the equality-as-opportunity paradigm that exists in America today.¹² This conception of equality prevailed in civil rights activists' arguments in the 1960s against racial segregation and discrimination¹³ and constitutes the perspective codified in the Civil Rights Act of 1964.¹⁴ The provisions of the Act ensured that all citizens would have similar and fair access to employment, public accommodations, education, and public facilities.¹⁵

Likewise, when interpreting the equal protection guarantees of the Fourteenth Amendment, the Supreme Court has discussed equality in terms similar to the equality-as-opportunity paradigm. In the early cases challenging racial segregation, for instance, the Court was asked to determine whether segregated facilities were constitutionally permissible. Cases such as *McLaurin v. Oklahoma State Regents for Higher Education*,¹⁶ *Gaines v. Canada*,¹⁷ *Sweatt v. Painter*,¹⁸ and *Brown v. Board of Education*¹⁹ established that the Fourteenth Amendment prohibits a state from offering unequal educational resources to white and black Americans.²⁰ The Court was interested in ensuring that black Americans had the same opportunity to receive the education being offered to white Americans.²¹ These cases furthered

¹² See TERRY EASTLAND & WILLIAM J. BENNETT, COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO *BAKKE* AND *WEBER* 143 (1979).

¹³ See Kendall Thomas, *The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.*, 5 COLUM. J. EUR. L. 329, 329-31 (1999).

¹⁴ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

¹⁵ See *id.*; HOUSE COMM. ON THE JUDICIARY, REPORT ON THE CIVIL RIGHTS ACT OF 1963, H.R. REP. NO. 88-914, pt. 2, at 8, 17, 26, 29 (1963).

¹⁶ 339 U.S. 637 (1950). G.W. McLaurin challenged the University of Oklahoma's segregation policies, which allowed him to enroll in the graduate education program but set him apart from his classmates in the classroom, library, and dining hall. See *id.* at 640. The Court ruled that this policy caused Mr. McLaurin to receive different training from his classmates, that the Fourteenth Amendment prohibited such differential treatment on the basis of race, and that the policy was therefore unconstitutional. See *id.* at 642.

¹⁷ 305 U.S. 337 (1938). In 1938, Lloyd Gaines challenged his denial of admission to the University of Missouri School of Law. See *id.* at 337. Mr. Gaines was denied admission because he was an African-American, but the state was willing to pay his tuition at a law school in a neighboring state. See *id.* at 337-38. The Court held that this arrangement denied Mr. Gaines the same access to a key privilege that white individuals had — namely, the privilege of attending law school within the state of Missouri. See *id.* at 349-50.

¹⁸ 339 U.S. 629 (1950). Henry Manor Sweatt challenged the legal equality of a new African-American law school created as an alternative to the University of Texas Law School. See *id.* at 631-33. The Court found no "substantial equality in the educational opportunities" because the law schools had different faculties, resources, and facilities. *Id.* at 633.

¹⁹ 347 U.S. 483 (1954).

²⁰ See *Brown*, 347 U.S. at 493; *McLaurin*, 339 U.S. at 642; *Sweatt*, 339 U.S. at 633; *Gaines*, 305 U.S. at 349-50.

²¹ See *Brown*, 347 U.S. at 493.

the three aspects of equality emphasized by the Founding Fathers and the framers of the Reconstruction Amendments.

B. Equality as Results

In the late 1960s, it became apparent that the removal of formal barriers to social, political, and economic resources was an insufficient means of achieving widespread social, educational, and occupational integration.²² Civil rights advocates thus began to argue for a results-oriented conception of equality.²³ This notion of equality privileges the similarity of a particular outcome; thus, treatment that enables the specific outcome is considered equal treatment.²⁴ In 1977, the Chancellor of Vanderbilt University best articulated this sentiment when he argued that "to treat our black students equally, we have to treat them differently."²⁵ It was this conception of equality that led to the creation of affirmative action programs.

President Johnson first presented the idea of "affirmative action" in 1965²⁶ when he issued an Executive Order that prohibited government contractors from discriminating against any employee or prospective employee on the basis of race, color, religion, or national origin and required the contractor to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."²⁷ In his commencement address at Howard University in 1965, President Johnson explained the need for affirmative action, stating:

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 of our citizens must have the ability to walk through those gates.

²² See EASTLAND & BENNETT, *supra* note 12, at 137 (noting failures in primary school integration, access to colleges and universities, and upward mobility for African-Americans).

²³ See Thomas, *supra* note 13, at 335.

²⁴ Results-oriented notions of racial equality could require that 12.8% of the nation's lawyers be African-American because African-Americans make up 12.8% of the national population, see U.S. Census Bureau, *Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin: April 1, 1990 to September 1, 1999* (1999) (visited Nov. 8, 1999) <<http://www.census.gov/population/estimates/nation/intfile3-1.5xt>>. Any measures taken to reach the 12.8% goal would be in furtherance of equal treatment because they would facilitate the goal of racial balancing.

²⁵ EASTLAND & BENNETT, *supra* note 12, at 13 (quoting Chancellor Alexander Heard) (internal quotation marks omitted).

²⁶ Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965); EASTLAND & BENNETT, *supra* note 12, at 131.

²⁷ *Id.* The Executive Order was amended to include gender in 1967. See Exec. Order No. 11,375, 3 C.F.R. 684, 685 (1966-1970).

... We seek not just freedom but opportunity ... not just equality as a right and a theory, but equality as a fact and as a result.²⁸

Affirmative action programs were created to ensure greater representation of women and people of color throughout the American workforce and in educational institutions.²⁹ These programs did not operate from the similarity of opportunity premise that had characterized the earlier antidiscrimination laws and segregation cases. A results-based model of equality — specifically a focus on numerical or statistical equality — drove affirmative action programs.³⁰

In the cases that challenged affirmative action programs between the 1970s and late 1980s, the Supreme Court upheld programs that conceptualized equality in terms of results, although it never supported quotas.³¹ The programs challenged in these cases appear to have been premised on the belief that achieving a proportional level of racial diversity was the desired means of ensuring equal access to employment and higher education for members of all racial groups.³² In 1995 in *Adarand Constructors, Inc. v. Peña*,³³ the Court rejected the idea that different criteria could exist for members of different racial groups even if these criteria led to more even results. The Court held that all racial classifications are subject to strict scrutiny,³⁴ thus significantly curtailing the use of race-based affirmative action programs.³⁵ The

²⁸ Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), in *THE NEGRO IN TWENTIETH CENTURY AMERICA: A READER ON THE STRUGGLE FOR CIVIL RIGHTS* 225, 226 (John Hope Franklin & Isidore Starr eds., 1967).

²⁹ See *EASTLAND & BENNETT*, *supra* note 12, at 131–32.

³⁰ See *id.* at 13–14.

³¹ See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 552 (1990) (holding that a race-based affirmative action program did not violate the Equal Protection Clause of the Fourteenth Amendment); *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980) (upholding a minority business enterprise program as a constitutionally permissible attempt to remedy past discrimination); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318–20 (1978) (holding racial quotas impermissible, but allowing educational institutions to use race in addition to other factors in the admissions process).

³² See, e.g., *Metro Broad.*, 497 U.S. at 553; *Fullilove*, 448 U.S. at 459; *Bakke*, 438 U.S. at 272.

³³ 515 U.S. 200 (1995).

³⁴ See *id.* at 227.

³⁵ In *Fullilove v. Klutznick*, Justice Marshall suggested that strict scrutiny was “strict in theory, but fatal in fact,” noting that in recent times, only two cases involving racial classifications had satisfied the strict scrutiny test and were thus upheld as constitutionally permissible. 448 U.S. at 507 (Marshall, J., concurring in the judgment). The cases upholding racial classifications are *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943). Both of these cases involved challenges to orders facilitating the internment of Japanese Americans during World War II. The Court held that because the “exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group,” the government had a compelling interest for its racial classification. *Korematsu*, 323 U.S. at 218. The *Adarand* Court took issue with Justice Marshall’s contention that strict scrutiny is “strict in theory, but fatal in fact.” See *Adarand*, 515 U.S. at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’ ... When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.”).

Court in *Adarand* understood the Fourteenth Amendment guarantee of equal protection to require treating people similarly by evaluating them with the same criteria and standards. In support of this notion, Justice O'Connor³⁶ invoked the words of Justice Stewart's dissent in *Fullilove v. Klutznick*: "[u]nder our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid."³⁷ The Court has returned to the equality-as-opportunity paradigm, focusing on ensuring that individuals of all races are judged by the same criteria with the same standards. Yet the Court's focus on opportunity still does not require institutions to use selection criteria that measure the skills and talents necessary for the opportunity at issue.

C. Challenges to the Conception of Merit Within the Equality Paradigms

As the previous two sections illustrate, both the equality-as-opportunity and the equality-as-results paradigms have been used to increase participation by people of color in society. However, neither paradigm challenged the definition of merit used by employers or institutions of higher education when determining who would have access. The equality-as-opportunity paradigm operated to ensure that people of color, specifically African-Americans, would have the chance to apply to colleges and universities and gain acceptance when they satisfied the standard admissions criteria. The definition of merit employed by the state educational institutions was not a matter of initial concern because African-Americans had been completely denied access.³⁸

In the 1960s, the definition of merit used for college and university admissions began to focus increasingly on standardized tests and IQ tests.³⁹ While the proponents of standardized testing never dreamed that "the results would be used to exclude [African-Americans]," this was in fact the effect.⁴⁰ In response, civil rights activists focused on advocating for affirmative action programs rather than challenge the validity of the tests as fair and accurate means of measuring the skills and talents necessary for success at a college or university and beyond.

³⁶ Justice O'Connor authored the majority opinion in the case. Only Justice Kennedy joined Part III.C., from which the following passage was taken.

³⁷ *Adarand*, 515 U.S. at 234 (quoting *Fullilove*, 448 U.S. at 523 (Stewart, J., dissenting)).

³⁸ See *supra* notes 16-20 and accompanying text.

³⁹ See NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 156-57 (1999).

⁴⁰ *Id.* at 157.

Affirmative action programs "evolved as a low-cost patch solution to the enormous problem of improving the lot of [African-Americans]."⁴¹

Part III proposes two courses of action that would enable law schools to ensure that their definition and measurement of merit, as evidenced by their selection criteria, fairly and accurately measure the attributes necessary for success at the institution as defined by the school's mission.

III. CONNECTING ADMISSION TO MISSION TO PROVIDE EQUAL ACCESS

The equality as opportunity notion of equal opportunity is too narrow to ensure that all people who have the capacity necessary to participate in a specific law school, for example, have an equal chance to do so.⁴² To achieve this goal, the institution must define merit in a way that enables the institution to create selection criteria that evaluate the skills necessary for participation within the institution. If the selection criteria identify and reward other attributes, access is granted arbitrarily because individuals are chosen based on something other than their capacity to engage in the activity at issue. Such a procedure not only prevents institutions from selecting the best candidates, but it can also have an unnecessary discriminatory effect on certain groups. Despite these potential problems, institutions rarely examine or reform their selection criteria to ensure that the criteria accurately identify individuals who will enable the institution to accomplish successfully its mission.

In the employment context, in contrast to the education context, Congress was aware of the potential discriminatory effect of neutral employment practices and passed Title VII of the Civil Rights Act of 1964 to address it.⁴³ Title VII prohibits employers from using employment practices that are not job-related, are inconsistent with business necessity, and have a discriminatory impact.⁴⁴ The Supreme Court confirmed this in *Griggs v. Duke Power Co.*,⁴⁵ holding that employers cannot use non-job-related criteria that have a discriminatory effect for employment decisions.⁴⁶ The *Griggs* Court declared that Congress wanted "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identi-

⁴¹ *Id.* at 164.

⁴² See Herman Belz, *Equality as a Constitutional Concept — Comments*, 47 MD. L. REV. 28, 30 (1987).

⁴³ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)).

⁴⁴ See 42 U.S.C. § 2000e-2(k) (1994).

⁴⁵ 401 U.S. 424 (1971).

⁴⁶ See *id.* at 431.

fiable group of white employees over other employees."⁴⁷ In light of this goal, the Court held that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."⁴⁸ Regardless of the intent motivating discriminatory employment practices, Congress prohibited their use because it was interested in ensuring equal opportunity for all those who were qualified.⁴⁹ The logic applied in the employment context should be applied to the selection criteria used in the law school admissions process. Individuals should be able to file disparate impact claims based on the implementing regulations of Title VI because they actualize Congress's broad goal of providing equal access for qualified individuals.⁵⁰

People rarely consider whether the definition of merit used to determine which opportunities are made available is fair or legitimate. Access to a societal resource might be equal in the sense that all individuals were judged by the same criteria, yet might simultaneously be unfair or illegitimate. For example, access to state universities could be determined by distributing numbered tickets, holding a drawing, and allowing the individuals with the winning numbers to gain admission.⁵¹ Although all participants would have an equal opportunity to gain admission, individuals would probably agree that this process is neither fair nor legitimate. Random but equal opportunity is unacceptable because of the strong argument that access to societal resources should be available to those who deserve them, with merit being measured by possession of the necessary skills. However, the question of which skills are relevant and how those skills should be measured is rarely addressed when equality is discussed and it is this fundamental question that has an enormous effect on the availability of and the legitimacy of that equality.

This section proposes a course of action for law schools that will allow each institution to evaluate its selection criteria in light of its mission so that it can determine whether the school's working definition of merit enables it to grant equal access to individuals with the necessary skills and talents. The procedures for ensuring greater access to American law schools could take the form of two complemen-

⁴⁷ *Id.* at 430-31.

⁴⁸ *Id.* at 430.

⁴⁹ *See id.* at 431.

⁵⁰ This proposal is discussed further in section III.B.

⁵¹ *See, e.g.,* Sturm & Guinier, *supra* note 1, at 1012. Sturm and Guinier note that "[a] weighted lottery may indeed be the fairest and most functional approach for some institutions. . . . However, in many contexts a lottery may not be a viable option." *Id.* They also note that "the lottery approach would not necessarily require an institution to engage in the process of defining its direction." *Id.*

tary avenues: a criteria audit and Title VI litigation. The following two sections demonstrate how these procedures would work in the context of law school admissions.

A. *Criteria Audit*

The purpose of this section is to illustrate one way in which a law school could reassess its admissions process so that it better identifies students that have the skills and talents necessary to become good lawyers and fulfill other aspects of the school's mission. The criteria audit consists of two basic steps: an assessment of the institution's mission and a determination of what criteria best identify candidates who would enable the school to fulfill that mission. The connection between admissions criteria and mission is one that William Bowen, president of the Andrew W. Mellon Foundation and former president of Princeton University, and Derek Bok, former president of Harvard University and former dean of the Harvard Law School, have advocated, stating that a school should admit students based on a complex set of rules "derived from the institution's own mission."⁵²

Individuals familiar with the admissions process and goals of the school should perform the criteria audit. This could be achieved by having a subcommittee of the school's admissions committee conduct the criteria audit. Including administrators or faculty members who are involved in institutional planning would also be important because they should understand the school's current mission and the directions that the mission might take in the future.

When a school is in the process of assessing its institutional mission, it may decide to alter or retain its mission. This decision should be left to the parties most familiar with the institution and the type of education that it offers. Stage two of the criteria audit — defining the criteria — can be applied to whatever mission the institution chooses.

Derek Bok states that university admissions officers would like, in an ideal world, to "assemble a class that would allow their university to make the greatest possible contribution to its students and ultimately to the society as a whole."⁵³ He further claims that admissions officers would be interested in admitting students who would make "the greatest progress in improving their powers of analysis, their capacity for legal reasoning, their abilities of self-expression, [and] their capacities for management."⁵⁴ Law schools, as institutions that train

⁵² WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 278 (1998).

⁵³ DEREK BOK, *BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY* 95 (1982).

⁵⁴ *Id.*

individuals for a specific profession, have stated purposes ranging from training good lawyers — which includes enhancing analytical, professional, technical, and problem-solving skills,⁵⁵ and preparing individuals who are adaptable to changes in the future⁵⁶ — to training industry, national, and international leaders.⁵⁷ Selecting students who have attended certain undergraduate institutions, had specific experiences, or scored within a particular percentile on the Law School Admissions Test (LSAT) is not necessarily an effective means of identifying students who will fulfill these purposes and goals.⁵⁸

In studying the relationship between traditional college and university admissions criteria and the selection of students who graduate and fulfill the educational institution's mission, William Bowen and Derek Bok found that the two factors were not well correlated. They argue that students of color admitted to elite colleges and universities who may not have met the traditional admissions criteria have nonetheless experienced "considerable success in the workplace" and, more importantly, have stellar records of civic contributions.⁵⁹ Arguing that these achievements fulfill a college's mission,⁶⁰ Bok and Bowen conclude that an institution need not adhere strictly to traditional admissions criteria to achieve its goals.⁶¹

A university's refusal to rely on standardized tests can lead to the acceptance of individuals who enable the institution to fulfill its mission because test scores do "not reliably identify those applicants who

⁵⁵ See, e.g., Harvard Law School, *Harvard Law School Admissions — Introduction* (visited Dec. 30, 1999) <http://www.law.harvard.edu/Admissions/JD_Admissions/intro.html>; The University of Chicago Law School, *About the Law School* (visited Dec. 30, 1999) <<http://www.law.chicago.edu/prospective/index.html>>.

⁵⁶ See Stanford Law School, *Stanford Law School — Office of Admissions* (visited Dec. 30, 1999) <<http://www.law.stanford.edu/admissions/letter.shtml>>.

⁵⁷ See Columbia Law School, *Columbia Law School — Admission to the JD Program* (visited Dec. 30, 1999) <<http://www.law.columbia.edu/admissions/adm2.html>>.

⁵⁸ See, e.g., Sturm & Guinier, *supra* note 1, at 969–70.

⁵⁹ BOWEN & BOK, *supra* note 52, at 155, 192.

⁶⁰ See *id.* at 155, 190–92.

⁶¹ The career of Dr. Benjamin Solomon Carson demonstrates the limitations of traditional measures of success within our nation's professional schools. Dr. Carson graduated from Yale College and attended the University of Michigan Medical School. See Claudia Dreifus, *A Pioneer at a Frontier: The Brain of a Child*, N.Y. TIMES, Jan. 4, 2000, at D7. During his first year of medical school, Dr. Carson's faculty advisor told him that he was not "medical-school material" and advised him to drop out. *Id.* Dr. Carson is currently a professor of neurosurgery and director of pediatric neurosurgery at the Johns Hopkins Hospital and has an international reputation for successfully addressing difficult pediatric neurosurgical problems, such as separating conjoined twins. See *id.* He attributes his success within the medical profession to having good "eye-hand coordination," being able to think in three dimensions, and being "a very, very careful person." *Id.* If medical schools were to incorporate means of measuring these skills in addition to other attributes, they would not only identify qualified students from a wide variety of backgrounds, but might also train more individuals who would become instrumental in future medical breakthroughs.

will succeed in college or later in life, nor do they consistently predict those who are most likely to perform well in the jobs they will occupy.⁶² Consequently, reliance by law schools on standardized tests and the traditional admissions criteria does not provide individuals with the relevant skills and talents an equal opportunity to compete because merit is evaluated based on something other than the skills necessary to succeed in law school and the legal profession⁶³ or to fulfill the school's mission.⁶⁴ In light of these observations, each law school should assess its admissions criteria and individual mission to ensure that the criteria accurately identify students who will enable the institution to fulfill its purpose and meet its goals.

The criteria audit should be a continuous process of reassessing and reconceptualizing the institution's mission and the mission's relationship with the selection criteria. Neither the mission nor the selection criteria should remain static because the nature and purposes of education will change over time as the needs of society and of particular institutions change. Harvard College during the early 1930s provides a striking example of how a change in a school's mission caused a change in its selection criteria. Then-President James Bryant Conant and other Harvard administrators wanted to replace the undemocratic elite that existed in America with "brainy, elaborately trained, public-spirited people drawn from every background."⁶⁵ Accordingly, Conant sought to change the ethos at Harvard College to one that validated and encouraged strong academic performance.⁶⁶

In an attempt to begin training the new elite, Conant created a scholarship program to enable young male graduates from public schools in the Midwest to attend Harvard.⁶⁷ To select students for the scholarship program, Conant needed a means of identifying students who would "perform brilliantly at Harvard."⁶⁸ Conant was not satisfied with the then-current admissions screening process because it tested a mastery of the boarding-school curriculum with the "college boards,"⁶⁹ which Conant believed would put midwestern public school

⁶² Sturm & Guinier, *supra* note 1, at 969.

⁶³ If law schools justify their reliance on a standardized test on the grounds that it predicts which students will perform at a particular level in law school, then it is important that the test actually measure this in a significant way. If the test does not, such reliance is an arbitrary means of granting access.

⁶⁴ See BOWEN & BOK, *supra* note 52, at 155, 192.

⁶⁵ LEMANN, *supra* note 39, at 5.

⁶⁶ See *id.* at 28-29.

⁶⁷ See *id.* at 28.

⁶⁸ *Id.*

⁶⁹ The "college boards" served as the admissions tests for the Ivy League colleges. The College Entrance Examination Board administered the tests, which consisted of "a weeklong battery of essay examinations in various subjects." *Id.* at 28-29.

students at a disadvantage.⁷⁰ Not only would the subjects tested be more difficult for this population, but it would also be difficult for these students to get to a place where they could take the test.⁷¹ Conant had several colleagues investigate an alternative means of identifying scholarship students, and the end result of that effort was the creation of the Scholastic Aptitude Test (SAT).⁷²

Conant was engaged in the type of criteria audit that this Note advocates. In an attempt to create a stronger institution and to identify students who would enable the College to meet its new goal, Conant adopted new admissions criteria use of the new criteria granted a different, but no less meritorious, group of students access to Harvard.⁷³ Members of this group were allowed to gain access because Conant believed in their ability and created admissions criteria that enabled admissions officers to assess their skills and talents more accurately.⁷⁴ By connecting the admissions criteria to the purposes and goals of the institution, Conant was able to bring about more equal access to Harvard than had previously existed, thereby building a stronger institution.

While Conant was in a position to alter the university's mission almost unilaterally, law school administrators and faculty members should work together with input from the community when reassessing their missions. Conant's desire to train a new elite may not be the mission a specific law school desires; however, all law schools should adopt his belief in the ability of non-traditional students to succeed within and beyond an institution of higher education. This belief, in addition to a commitment to training excellent lawyers, should form the core of any law school's mission.⁷⁵ Further details should be left to those familiar with the school and reassessed periodically to reflect the

⁷⁰ See *id.* at 29.

⁷¹ See *id.*

⁷² See *id.* at 29-32.

⁷³ See *id.* at 28-29.

⁷⁴ See *id.* at 29.

⁷⁵ Other factors that law schools should consider in developing their missions are those related to the skills necessary for becoming a good lawyer. Professors Guinier, Fine, and Balin have argued that within the current legal environment it is important for lawyers to integrate and synthesize information from a variety of sources, manage crises, prioritize issues, examine problems from multiple perspectives, and apply legal principles to different factual situations. See LANI GUINIER, MICHELLE FINE & JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 17 (1997). These professors have argued that, in light of these tasks, it is important for law students to be able to tackle difficult problems, engage one another, and use collective thinking to solve problems. See *id.* at 18. Law schools should take these types of factors into account when assessing the institution's mission during stage one of the proposed criteria audit. These factors will also be relevant in stage two — determining how to identify fairly and accurately students who will enable the institution to fulfill its mission.

most current ideas regarding the general role of legal education and the specific role of that law school.

The purpose of the criteria audit is to provide a means for continually engaging in a fundamental critique of the terms on which individuals have access to our nation's law schools. Under most affirmative action programs, when racial disparities were found to exist, efforts were made to rectify the disparity by bringing members of the excluded groups into the established structure by helping them meet the entrance criteria or altering those criteria; however, this adjustment was made without ever questioning the legitimacy of the operating definition of merit. The criteria audit is an effort to encourage institutions to examine existing definitions of merit and entrance criteria to determine whether these factors are illegitimately limiting opportunity.

This Note does not advocate statutory or regulatory mandates requiring law schools to take part in the criteria audit because it would be difficult for Congress or federal agencies to regulate the admissions process without trampling on the freedom that academic institutions need in order to fulfill their educational mission. Colleges and universities voluntarily adopted affirmative action programs in light of political pressure to diversify their student bodies.⁷⁶ The criteria audit provides an alternative means not only to promote racial diversity, but also to create stronger institutions and graduates, which would create a better society. Because colleges and universities might not voluntarily take part in the criteria audit and create new admissions criteria, this Note also proposes a means for private individuals to sue law schools on the grounds that their admissions processes have a disparate impact on applicants of color, thus violating Title VI of the Civil Rights Act of 1964.

B. Title VI Litigation

If private citizens do not believe that they have equal access to particular law schools, they should be able to file lawsuits challenging the validity of the admissions process used by those schools under the implementing regulations of Title VI of the Civil Rights Act of 1964.⁷⁷ Title VI prohibits racial discrimination in federally funded programs.⁷⁸

⁷⁶ See EASTLAND & BENNETT, *supra* note 12, at 137.

⁷⁷ See 34 C.F.R. § 100.3(b)(2) (1999); see also Daniel J. Losen, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 533-35 (1999) (discussing the potential use of Title VI's implementing regulations to support disparate impact claims of discrimination within educational institutions). The existence of a private right of action was questioned in *Guardians Ass'n v. Civil Service Commission of New York*, 463 U.S. 582 (1983), which involved a Title VI challenge to a "last-hired, first-fired" employment policy. The Court concluded that a private right of action did exist; however, it held that plaintiffs could obtain only injunctive, noncompensatory relief for disparate impact claims. See *id.* at 607.

⁷⁸ See 42 U.S.C. §§ 2000d to 2000d-7 (1994).

The implementing regulations prohibit any program that receives federal assistance through the Department of Education from determining "the class of individuals to whom . . . services . . . will be provided . . . or the class of individuals to be afforded an opportunity to participate in any such program" by using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."⁷⁹ The Supreme Court has held that Title VI, absent the implementing regulations, reaches only intentional discrimination.⁸⁰ Yet proof of disparate impact will satisfy a claim of discrimination under the implementing regulations.⁸¹

The details of Title VI disparate impact cases⁸² are similar in form to those of disparate impact suits brought under Title VII, which prohibits employers from using employment practices that are not job-related, are inconsistent with business necessity, and have a discriminatory impact.⁸³ In *Griggs v. Duke Power Co.*,⁸⁴ the Supreme Court held that, under Title VII, employers are prohibited from engaging in employment practices that are "fair in form, but discriminatory in operation."⁸⁵ The employer's intent in adopting such employment practices is irrelevant because Title VII prohibits "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."⁸⁶ Congress placed the burden of demonstrating that an employment requirement has a "manifest relationship to the employment in question" on the employer.⁸⁷ Title VII's drafters believed that criteria that are fair in form can have a discriminatory effect, and that such an effect is con-

⁷⁹ 34 C.F.R. § 100.3(b)(2) (1999).

⁸⁰ See *Guardians Ass'n*, 463 U.S. at 591-92.

⁸¹ See *id.* at 592-93; see also *Alexander v. Choate*, 469 U.S. 287, 292-93 (1985) (delineating the Court's position on disparate impact claims brought under the implementing regulations of Title VI). It should be noted that the Court in *Guardians Ass'n* stated that it was not foreclosed from reviewing the administrative interpretation of Title VI that allowed disparate impact claims. See *Guardians Ass'n*, 463 U.S. at 617-18. Since the Court's 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts must defer to an agency's reasonable interpretation of a statute if the statute is silent or ambiguous on a particular question. See *id.* at 842-44. A court cannot "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. Because Title VI does not explicitly state whether disparate impact claims are allowed, courts should defer to the agency interpretation that allows such claims.

⁸² See, e.g., *Young v. Montgomery County Bd. of Educ.*, 922 F. Supp. 544, 549 (M.D. Ala. 1996) (addressing a disparate impact Title VI claim regarding a school transfer program for high school athletes).

⁸³ See 42 U.S.C. § 2000e-2(k) (1994).

⁸⁴ 401 U.S. 424 (1971).

⁸⁵ *Id.* at 431.

⁸⁶ *Id.* at 432.

⁸⁷ *Id.*

trary to the legal requirements of providing individuals with equal employment opportunities.

The Supreme Court examined another disparate impact claim in the employment context in *Wards Cove Packing Co. v. Atonio*.⁸⁸ The plaintiffs in this case argued that the low percentage of minorities in non-cannery positions compared to the high percentage of minorities in cannery positions established a prima facie case of disparate impact discrimination.⁸⁹ The Court disagreed, holding that evidence of racial imbalance, on its own, is insufficient to establish disparate impact discrimination — the plaintiff must also demonstrate that the racial imbalance resulted from a specific employment practice.⁹⁰ Translated into the higher education context, this holding could require plaintiffs to point to one specific admissions criterion or several specific criteria and show a causal connection to the racial imbalance in the school's student population.

Just as Title VII prohibits the use of unrelated employment criteria, Title VI and its implementing regulations should be used to prohibit the use of admissions criteria that do not measure the skills and talents necessary to further the law school's mission. The United States District Court for the Southern District of New York ruled on a case challenging the selection criteria for a merit scholarship in *Sharif v. New York State Education Department*.⁹¹ *Sharif* considered a Title IX⁹² challenge, rather than a Title VI claim; however, claims under the two titles are similar because they both use a Title VII disparate impact approach.⁹³ The court held that the sole use of the SAT for

⁸⁸ 490 U.S. 642 (1989).

⁸⁹ See *id.* at 650.

⁹⁰ See *id.* at 656–57.

⁹¹ 709 F. Supp. 345 (S.D.N.Y. 1989).

⁹² Title IX prohibits discrimination on the basis of sex in education programs receiving federal funds. See 20 U.S.C. § 1681 (1994).

⁹³ The *Sharif* court first asked whether the plaintiffs had made a prima facie case of disparate impact. The court held that the plaintiffs could prove such a case by demonstrating through "persuasive statistical evidence" and "credible expert testimony" that the facially neutral practice had a disparate impact. *Sharif*, 709 F. Supp. at 362. The burden then shifted to the defendants to prove that the neutral practice in question, in this case use of the SAT, was an "educational necessity." *Id.* Educational testing cases, including *Sharif*, have all used the "educational necessity" standard. See *Board of Educ. v. Harris*, 444 U.S. 130, 151 (1979) (declaring that "educational necessity" is analogous to "business necessity"); *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1418 (11th Cir. 1985) (requiring defendants to show that their practices had "a manifest demonstrable relationship to classroom education"). Yet it is possible that courts could adopt the less stringent *Wards Cove* standard of "legitimate employment goals." *Wards Cove Packing Co.*, 490 U.S. at 659. This standard would require defendants to prove only that their admissions practices had legitimate educational goals, rather than being educational necessities. Regardless of the standard courts adopt, plaintiffs may be able to prevail even if the defendants meet their burden. The court in *Sharif* stated that plaintiffs could win by demonstrating that the legitimate practices were a pretext for discrimination or by offering an equally effective alternative practice that had a less discriminatory effect. See *Sharif*, 709 F. Supp. at 361–62.

awarding merit scholarships likely disadvantaged women and therefore violated Title IX.⁹⁴

In a Title VI case, the plaintiff has the initial burden of showing by a preponderance of the evidence that "a facially neutral educational practice has a racially disproportionate adverse effect."⁹⁵ If the plaintiff meets the burden, the defendant must demonstrate a "substantial legitimate justification for the practice."⁹⁶ If the defendant demonstrates such a justification, the plaintiff can still prevail if she offers "an equally effective alternative practice which results in less racial disproportionality or [present] evidence that the legitimate practice is a pretext for discrimination."⁹⁷ Evidence illustrating a correlation between the low admission and enrollment level of certain racial groups in a specific law school and specific admissions criteria would enable a plaintiff to meet the first burden.⁹⁸ The burden would then shift to the law school to demonstrate that reliance on LSAT scores, grade point averages, personal statements, letters of recommendation, and general school and community involvement, to varying degrees, is tied to either an educational necessity or a legitimate educational goal of the law school. If the law school were able to meet this burden, the plaintiffs would still have an opportunity to demonstrate that an alternative, less discriminatory set of admissions criteria could be used that would similarly further the legitimate educational goals of the law school.

One of the earliest Title VI cases decided by the Supreme Court within the education context held that "proof of discriminatory impact could suffice to establish a Title VI violation," thus expanding Title VI claims beyond intentional discrimination.⁹⁹ The Court returned to this issue in *Regents of California v. Bakke*,¹⁰⁰ in which it held that Title VI proscribes only racial classifications that violate the Equal Protection Clause of the Fifth Amendment.¹⁰¹ In *Guardians Ass'n*, Justice White stated that, even if *Bakke* did not allow discriminatory impact claims under Title VI, such claims could be brought under the implementing regulations of Title VI.¹⁰² Because any lawsuit based on a

⁹⁴ See *Sharif*, 709 F. Supp. at 348.

⁹⁵ *Young v. Montgomery County Bd. of Educ.*, 922 F. Supp. 544, 549-50 (M.D. Ala. 1996).

⁹⁶ *Id.* at 550.

⁹⁷ *Id.*

⁹⁸ As in *Wards Cove*, a court would probably decline to prohibit a law school from using certain admissions criteria unless the plaintiffs proved that specific admissions criteria caused the low level of representation of individuals from certain racial groups. See *Wards Cove Packing Co.*, 490 U.S. at 657-58.

⁹⁹ *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 588 (1983) (citing *Lau v. Nichols*, 414 U.S. 563 (1974)).

¹⁰⁰ 438 U.S. 265 (1978).

¹⁰¹ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

¹⁰² See *Guardians Ass'n*, 463 U.S. at 591-93.

disparate impact claim would have to be brought under the implementing regulations of Title VI, a plaintiff might have to exhaust administrative agency procedures before bringing suit in federal court. However, a favorable administrative ruling could lead the federal government to withhold federal funds from the defendant law school.¹⁰³

Successful disparate impact arguments under Title VI's implementing regulations may cause courts or administrative agencies to rule that law schools' current selection criteria have a disparate impact on a variety of racial groups because they rely on factors that fail to measure accurately the necessary skills and attributes. Although plaintiffs could not obtain money damages, they may be able to obtain injunctive relief and threaten the federal funding of the institution.

IV. CONCLUSION

Examining equality solely in terms of opportunity prevents our society from examining and questioning the definitions of merit used to determine who will have access to our equalizing institutions¹⁰⁴ and therefore have the ability to maximize their distinctive capacities. African-Americans, Latino Americans, and Native Americans can serve as the "miner's canary," enabling society to see the limitations of the current law school admissions process, specifically how the current admissions criteria do not necessarily measure the skills and attributes that are relevant to becoming a good lawyer and enabling a law school to fulfill other aspects of its mission. In light of these observations, it is imperative that law schools engage in criteria audits or other, similar assessments that allow them to examine their mission and admissions criteria and to ensure that the two are meaningfully linked. To encourage this reexamination of the definition of merit, private citizens should be able to avail themselves of Title VI and its implementing regulations and sue a law school if its admissions criteria have a disparate impact on a particular racial group. By pushing law schools to focus on their underlying conceptions of merit, these procedures move toward ensuring that those individuals with the skills necessary to become good lawyers have access to the nation's law schools.

¹⁰³ See *id.* at 609-10 (Powell, J., concurring) (noting that Congress expressly provided for the withholding of federal funds as a sanction for discrimination). Institutions of higher education receive a significant amount of financial support from the federal government. In 1982, Derek Bok reported that even private institutions often obtain between one-fifth and two-thirds of their income from government grants for research and student aid. See BOK, *supra* note 53, at 64. Colleges and universities also receive financial assistance indirectly as a result of tax exemptions for private gifts and bequests. See *id.*

¹⁰⁴ William Julius Wilson adopts Frank Levy's use of the term "equalizing institutions" to refer to education, the welfare state, unions, and international trade regulations. WILSON, *supra* note 4, at 2.