

No. 11-345

IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,
Respondents.

*On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

**BRIEF OF SCHOLARS OF ECONOMICS
AND STATISTICS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

KENNETH A. KLUKOWSKI
Counsel of Record
LIBERTY UNIVERSITY
SCHOOL OF LAW
1971 University Boulevard
Lynchburg, Virginia 24502
(434) 592-5300
kklukowski@liberty.edu

*Counsel for Amici Curiae
Scholars of Economics and
Statistics*

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QUESTION PRESENTED

Whether the University of Texas at Austin's use of race in undergraduate admissions decisions is lawful under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003).

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are twenty-two scholarly experts in economics and/or statistics, each holding a relevant advanced degree and either currently or formerly teaching this subject matter at the university level or employing these methods as professional analysts of public policy.

This case is important to *Amici* Scholars of Economics and Statistics because as academics and analysts each has a scholarly interest in seeing valid social science incorporated in law, and seeing scientifically invalid or doubtful propositions removed as a basis for legal judgments. *Amici* serve the interests here of assisting the Court in understanding empirical data that are relevant as an evidentiary matter as this Court assesses the critical-mass theory adopted by this Court in 2003 and applied by the lower court in this case.

The twenty-two scholars that have joined this brief as *amici curiae* are:

Doug Allen, Ph.D.

Burnaby Mountain Professor of Economics
Simon Fraser University, Canada

King Banian, Ph.D.

Professor of Economics
St. Cloud State University

¹ No counsel for any party authored this brief in whole or in part, and no one apart from *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

Edgar Kay Browning, Ph.D.
Senior Professor of Economics
Texas A&M University

Lloyd R. Cohen, J.D., Ph.D.
Professor of Law
George Mason University

Arthur De Vany, Ph.D.
Professor Emeritus of Economics
University of California, Irvine

Rodolpho A. Gonzales, Ph.D.
Emeritus Professor of Economics
George Mason University

Earl L. Grinols, Ph.D.
Distinguished Professor of Economics
Baylor University

Randall Holcombe, Ph.D.
Professor of Economics
Florida State University

Larry Iannaccone, Ph.D.
Professor of Economics
Chapman University

D. Bruce Johnsen, J.D.
Professor of Law
George Mason University

Stan J. Liebowitz, Ph.D.
Ashbel Smith Professor of Managerial Economics
University of Texas at Dallas

Luis Locay, Ph.D.
Associate Professor of Economics
University of Miami

- John R. Lott, Jr., Ph.D.
Economist
Coauthor, *Peer Effects in Affirmative Action*
- Carlisle E. Moody, Ph.D.
Professor of Economics
College of William & Mary
- Craig M. Newmark, Ph.D.
Associate Professor of Economics
North Carolina State University
- Mark Perry, Ph.D.
Professor of Economics
University of Michigan at Flint
- James Marvin Putilo, Ph.D.
Associate Professor of Computer Science
University of Maryland
- William F. Shugart II
Professor of Economics
Utah State University
- Richard G. Wilkins, J.D.
Robert Barker Professor of Law (ret.)
Brigham Young University
- Walter E. Williams, Ph.D.
John M. Olin Distinguished Professor
of Economics
George Mason University
- Gary Wolfram, Ph.D.
William Simon Professor of Economics and
Public Policy
Hillsdale College
- Benjamin Zycher, Ph.D.
Visiting Scholar, American Enterprise Institute
Senior Fellow, Pacific Research Institute

SUMMARY OF ARGUMENT

In holding the Equal Protection Clause permits racial preferences in the University of Texas' undergraduate admissions policy, the Fifth Circuit followed the "critical mass" theory narrowly adopted by five Justices in *Grutter v. Bollinger*, 539 U.S. 306 (2003). Under this theory, enrolling a critical mass of minority students achieves a compelling public interest benefiting those minority students and their classmates.

Subsequent evidence has come to light showing this adoption was error. State actions discriminating by race are subject to strict scrutiny, under which the University may only employ means that are narrowly tailored to achieve compelling public interests. The University bears the burden of proving strict scrutiny is satisfied, including proving the means precisely fit the need to achieve the compelling interest.

Strict scrutiny "smokes out" illegitimate uses of race by requiring the University to show that a "strong basis in evidence" supports its critical-mass theory. When discriminating on race, the University is constrained to employ only means that the evidence clearly shows achieves substantial educational benefits for minority students through diversity. Yet as Judge Garza found, the University's challenged policy results in no discernable educational benefits.

The Court extends no deference to the University when determining whether the critical-mass theory is narrowly tailored, as Justice Kennedy explained such deference is antithetical to strict scrutiny. Nonetheless, the Court of Appeals deferred to the

University's judgment and findings regarding its racially-discriminatory policy.

This denial of deference stems from the rule that government's reasons for discriminating due to race must be unquestionably legitimate. Yet as Judge Garza observed, the Fifth Circuit applied a "hopelessly deferential standard" in this case, which Chief Judge Jones noted the judiciary cannot countenance.

As Justice Kennedy said in *Grutter*, the Court's precedents require that empirical evidence supports the University's critical-mass theory. Yet the available empirical data instead go against the University's theory, data not available to the *Grutter* Court.

Students benefit from studying with peers. Research shows minority students often self-segregate when enrolled in sufficient numbers, which when affirmative action is employed results in less-prepared students sometimes foregoing benefits that would result from studying with better-prepared peers.

Although the University commissioned two studies on minority enrollment and performance, neither offers direct evidence supporting the critical-mass theory. Neither provides a "strong basis in evidence" to support a policy entailing a suspect class. The first study shows the University's classrooms have significant minority populations, so racially-diverse viewpoints are already present, and adding more minorities would provide decreasing marginal returns on diversity. The second is deficient as it is overly subjective, asking students regarding their feelings and perceptions rather than

examining empirical data verified through objective metrics.

The University thus presents no scientifically-valid literature supporting the critical-mass theory it invokes to justify its racial-preference system. *Amici* knows of only one published peer-reviewed paper directly testing this hypothesis, coauthored by John R. Lott Jr., J. Mark Ramseyer, and Jeffrey Standen ["LRS"]. In this study, the authors had access to every transcript for every student from two university law schools, as well as data from the applicant pool for one of those schools.

Neither the University of Michigan Law School nor the *Grutter* Court stated a verifiable test for critical mass. Justice O'Connor's opinion for the Court's narrow majority might suggest minority enrollment approximating minority applications in the applicant pool may be relevant to "critical mass," but still fails to give provide a usable test.

Yet not only did *Grutter* not provide data to support its hypothesis, the Court never considered the possibility of self-segregation, to say nothing of examining empirical evidence regarding minority student performance.

The empirical data analyzed by LRS show no positive correlation between minority enrollment levels and the grades of minority students. The data instead suggest the opposite. Isolated preferred-minority students will more frequently study with non-preferred students, who as a matter of statistical averages are better-prepared, resulting in greater educational benefits. Although this analysis does not control for all factors, it is fatal to strict

scrutiny's requirement that the critical-mass theory have a "strong basis in evidence."

The lack of evidentiary support for the critical-mass concept is only exacerbated by two additional items. The foregoing material concerned the number of minority students and the fraction of the student body they comprise. Comparing the proportion of minorities admitted to their proportion in the applicant pool failed to show any positive correlation to student performance. Additionally, "stereotype threat"—a student's concern that they will perform poorly that can negatively impact their performance unless they have additional minority classmates—likewise fails to provide any supporting data.

Narrow tailoring requires that the means employed actually achieve the compelling interest required by strict scrutiny. *Amici* know of no empirical evidence supporting the critical-mass theory, and LRS provide data contradicting this theory. The University of Texas thus failed to carry its burden of proving that having a critical mass of minority students in classrooms actually benefits those students. Therefore the University's policy fails to satisfy strict scrutiny.

ARGUMENT

I. THE UNIVERSITY FAILS TO CARRY ITS BURDEN OF PROVING BY A STRONG BASIS IN EVIDENCE THAT THE CRITICAL-MASS THEORY ACHIEVES A COMPELLING PUBLIC INTEREST.

Central to the Fifth Circuit's judgment in this case was that the University of Texas' admissions policy is permissible under the Equal Protection Clause because it seeks a "critical mass" of minority

students to optimize the benefits of racial diversity. *See* Pet. Cert. App. 62a–70a. Such a critical mass is one that “realize[s] the educational benefits of a diverse student body,” meaning “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.” *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003).

The *Grutter* majority reasoned that achieving such a critical mass was so beneficial that it justified the use of racially-discriminatory action. *Id.* at 330, 340. In adopting this theory, a bare majority of the Court found that the benefits of having a critical mass of minority students are “substantial.” *Id.* at 330. Justice O’Connor added that Michigan Law School and its *amici* “show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workplace and society, and better prepares them as professionals.” *Id.* (citation and internal quotation marks omitted).

This adoption was error. The touchstone of equal-protection analysis is that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (footnote and citation omitted). As a result, state actions segregating persons based upon race are subject to strict scrutiny. *Johnson v. California*, 543 U.S. 499, 505–06 (2005). Under this demanding standard of review, government actions involving race will only be upheld if narrowly tailored to advance a compelling public interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224, 227 (1995).

This Court must pursue the “most searching examination” in scrutinizing the University’s purported rationale for this policy, *id.* at 223 (citation omitted), because such racial-preference schemes are “too pernicious” to be permitted unless the University can prove “the most exact connection between justification and classification,” *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

It is not enough that the government is pursuing a truly compelling public interest through its policies. “When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.” *Grutter*, 539 U.S. at 327. The social science presented in this brief shows that the University’s policy fails the narrow-tailoring prong of the constitutional analysis required in this case, as the challenged policy evidently works to the detriment of the very students it supposedly aids.

When strict scrutiny applies, it is the government actor that bears the burden of proving that the challenged action satisfies the ends-means requirements of compelling interests and narrow tailoring. *See Gratz*, 539 at 270; *Adarand*, 515 U.S. at 224. Thus Respondent University bears the burden of proving its racial-preference policy satisfies strict scrutiny, rather than Petitioner Fisher proving it does not. And the evidence discussed in Part II shows that the University failed to carry this burden.

A. Narrow tailoring requires a strong basis in evidence that the challenged state action actually accomplishes a compelling interest.

“[R]acial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.” *Grutter*, 539 U.S. at 342. More than just narrowness of scope, the narrow-tailoring prong of strict scrutiny also requires that the means employed by the government actually achieves the compelling public purpose asserted by the government. Strict scrutiny does not permit the University to employ any means it chooses to pursue its objectives, including a program premised upon a theory demonstrated to be scientifically unsound or unsupported by empirical evidence. The Court has never “signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by [] strict scrutiny.” *Gratz*, 539 U.S. at 275.

The impetus driving the critical-mass theory here must be that it ameliorates or eliminates the disabling effects of racial discrimination. *See Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). This racial-preference program’s primary purpose is to aid the preferred racial groups, and secondarily to aid the student body as a whole. To the extent the empirical evidence suggests it actually harms the principal population it is intended to benefit, the only theory the University offers in support of this program instead calls for its abolition. Part of the Court’s invalidation of the racial-preference program at the public university in *Bakke* was that the empirical

data did not show that the program aided its intended beneficiaries. *See id.* at 311 & n.47.

“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O’Connor, J.). This close judicial search for illegitimate uses extends not only to determining whether the government’s objectives are sufficiently compelling; this “smoking out” of illegitimate uses also ensures that the means employed advance the asserted interest with exacting precision. *See id.*

Therefore specifically in the context of university admissions, racial-preference policies must be effective in achieving a compelling interest to survive strict scrutiny. “Even in the limited circumstance when drawing racial distinctions is permissible to furthering a compelling state interest, government is still constrained in how it may pursue that end: The means chosen to accomplish the government’s asserted purpose must be specifically and narrowly framed to *accomplish* that purpose.” *Grutter*, 539 U.S. at 333 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)) (brackets and internal quotation marks omitted) (emphasis added).

Assuming *arguendo* that the purported interest is compelling and that the challenged measure is sufficiently narrow in scope, there must be a “strong basis in evidence” supporting the facts justifying the theory. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion). However, as shown in Part II of this brief, *infra*, there is significant contrary evidence casting into serious doubt the factual predicate underlying the critical-mass theory.

Narrow tailoring requires exactness between the means employed and the ends pursued—that the former begets the latter. The Court should not “find that [the University’s] use of race is narrowly tailored where the University’s highly suspect use of race provides no discernable educational impact.” Pet. Cert. App. 108a (Garza, J., specially concurring).

“[W]hen it comes to the use of race, the connection between the ends and the means used to attain them must be precise. But here the flaw is deeper than that.” *Grutter*, 539 U.S. at 387 (Rehnquist, C.J., dissenting). Here, the University’s critical-mass theory is counterfactual, as the evidence discussed in Part II indicates that far from advancing the government’s purported interest, the University’s policy actually works against the interests of the very students it claims to benefit. Petitioner Fisher correctly argues that this critical-mass theory is not tethered to the educational benefits it purported to convey. Pet. Br. 28 (quoting *Grutter*, 539 U.S. at 333). It may be unprecedented to hold the University’s program satisfies strict scrutiny in the face of this contrary evidence. This racial-preference policy is “completely ineffectual in accomplishing its claimed compelling interest.” Pet. Cert. App. 106a (Garza, J., specially concurring).

B. No deference is owed to the government when applying strict scrutiny.

“The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.” *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment). Thus “any racial preference must face the most rigorous

scrutiny by the courts.” *Id.* at 519. There is “obvious tension between the pursuit of critical mass” and the guarantees of the Equal Protection Clause. *Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting). In the face of such tension, a court engaged in judicial review owes no deference to the governmental unit whose actions are being scrutinized.

While the fact-finding processes of policymaking bodies are generally entitled to a presumption of regularity, *see Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488–89 (1955), such general presumptions and deference are inappropriate when applying strict scrutiny, *see Croson*, 488 U.S. at 500 (citing *McLaughlin v. Florida*, 379 U.S. 184, 190–92 (1964)). “Deference is antithetical to strict scrutiny, not consistent with it.” *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). Consequently, a “government actor cannot render race a legitimate proxy for a particular condition merely by declaring the condition exists. The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.” *Croson*, 488 U.S. at 501 (citations omitted). Yet the Fifth Circuit erred by deferring to the University’s judgment regarding its racial-preference policy. *See* Pet. Cert. App. 36a–37a.

It is “because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and *unquestionably* legitimate.” *Croson*, 488 U.S. at 505 (quoting *Fullilove*, 448 U.S. at 534–35 (Stevens, J., dissenting)) (emphasis added). Deferring to the University’s policy judgments necessarily leaves

unresolved questions regarding the effectiveness of those reasons. Thus while such deference is appropriate under rational-basis review, it is inconsistent with requiring a “strong basis in evidence” under strict scrutiny. *See Wygant*, 476 U.S. at 277.

The Court’s precedents consistently deny deference when strict scrutiny is the standard of review. “*Grutter* does not countenance ‘deference’ to the university throughout the constitutional analysis.” Pet. Cert. App. 178a (Jones, C.J., dissenting from denial of reh’g en banc). Yet the Fifth Circuit nonetheless extended deference to the University of Texas. Indeed, so much so that Judge Garza characterized the panel as employing a “hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades.” Pet. Cert. App. 109a (Garza, J., specially concurring). Petitioner Fisher correctly applies this Court’s precedents in arguing that, contrary to the Court of Appeals’ approach in this case, “demanding a strong factual basis before allowing race-based governmental action ensures that [s]trict scrutiny remains . . . strict.” Pet. Br. 33 (quoting *Bush v. Vera*, 517 U.S. 952, 978 (1996)) (brackets in the original).

II. EMPIRICAL EVIDENCE DOES NOT SUPPORT THE CRITICAL-MASS THEORY ADOPTED BY *GRUTTER* AS APPLIED BY THE FIFTH CIRCUIT.

This Court’s “precedents provide a basis for the Court’s acceptance of a university’s considered judgment that racial diversity among students can further its educational task, *when supported by*

empirical evidence.” *Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting) (emphasis added). But the empirical evidence available does not support the critical-mass theory of racial diversity at universities.

Governmental use of affirmative action in universities raises questions about peer effects on student performance. By definition, under affirmative action minority students often enter post-secondary schools less prepared than their peers who did not receive preferential treatment. Minorities may also tend to self-segregate,² a possibility contemplated neither by the Court in *Grutter* nor by the Fifth Circuit below. Universities employing affirmative action must correlate peer effects and prospective self-segregation with academic performance.

As to peer effects, the University of Texas presumes that minority students in classrooms with fewer students from their ethnic group feel marginalized in ways that discourage them from succeeding, hence the University’s argument that it

² J. W. Schofield, *Maximizing the benefits of student diversity: Lessons from school desegregation research*, in DIVERSITY CHALLENGED: EVIDENCE OF THE IMPACT OF AFFIRMATIVE ACTION 103, 105 (G. Orfield & M. Kurlaender eds., 2001). This may occur by the actions of the students, Art McFarland, *Self Segregation in School Cafeterias?*, WABC-N.Y., Mar. 27, 2006, http://abclocal.go.com/wabc/story?section=our_schools&id=4029353&ft=print (last visited May 25, 2012), or by parents when they decide where to send their children to school, see Suhrid S. Gajendragadkar, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144, 153–55 (2006); cf. also Eric A. Hanushek, *Will Quality of Peers Doom Those Left in the Public Schools?*, in CHOICE WITH EQUITY 121–40 (Paul T. Hill ed., 2002).

is pursuing the “educational benefits” of achieving critical mass. *See* Pet. Cert. App. 33a–34a, 41a. According to this theory, the fewer minority students in a classroom, the lower those students’ performance.

On the other hand, self-segregation can have the opposite effect. In a classroom with a large number of minority students, those minority students might tend to study primarily with their less well-prepared peers of the same preferred population. If so, a classroom with fewer minority students might result in minority students performing at higher levels by inducing them to study (by necessity) with better-prepared non-affirmative action peers. Affirmative action might particularly impact the better-qualified minority students who could switch from studying with better-performing classmates to worse-performing classmates.

Ensuring that a class “better prepares [students] as professionals” not only involves the interactions between minority and non-minority students, *see* Pet. Cert. App. 9a (citation omitted), it also necessitates creating an environment where students—including minority students—can best learn the material. The better students learn and retain the material taught in their classes, the better they will succeed after graduation.

A. Neither the study nor the survey commissioned by the University of Texas demonstrates that minority students are benefited by a “critical mass” of minorities in the classroom.

In the case at bar, the University of Texas commissioned two studies to determine whether the

university was enrolling a “critical mass” of “underrepresented” minorities in undergraduate classes. However, neither study provides direct evidence that the number of “underrepresented” minorities in a classroom needs a “critical mass” to improve the performance of such minorities.

1. The first University study does not show minority enrollment that could constitute a “critical mass.”

One report raises concerns that the University of Texas was not “enrolling a critical mass of underrepresented minorities.” Examining small class sizes from between five and twenty-four students during the Fall of 2002, 88.6% of these smaller classes enrolled at most one black student, 51.6% had at most one Asian-American student, and 43% had at most one Hispanic student.³

But the University of Texas data also show that these small classes usually—over 80% of the time—have two or more students from at least one of these three minority groups.⁴ For example, in a class with fifteen students, the probability that none of the students will be a minority is only 3%. The probability that only one of the students will be a minority is 8.27% and the probability that two of the

³ Off. of Admissions, Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996–2002 (2003), App. 3, Fig. 1, [hereinafter “Diversity Rep.”], SJA 66a, 96a.

⁴ See *id.* *Amici* arrive at 80% probability by calculating $1 - (.886 * .5162 * .4302) = .803$. Similarly, the odds of a class having either two or more black students or two or more Hispanic students are 62%. If you include the possibility of both one black and one Hispanic student being in the same class, the odds rise to over 68%.

students will be a minority is approximately 19%. Otherwise stated, 70% of the classes with fifteen students will have three or more minority students.⁵

It is thus unlikely that white students will be able to attend many of these smaller classes and not have minority students comprise a significant percentage of the class. Across all classes, over 91% will have at least two students from any one underrepresented group.

This is not to suggest that exposure to varying viewpoints is unimportant. However, *amici* posit there should be diminishing returns to additional exposure. For example, if seven of the ten smaller classes enroll at least two minority students, the additional knowledge obtained by non-minorities from an eighth class with at least two minority students is at least questionable. But this principle

⁵ *Amici* premise this discussion on several assumptions: (1) The probabilities of a particular minority being in the class is independent of other minorities being in the class, (2) The probability of minorities being in a particular class is the same across all classes, and (3) classes with fifteen students in them have the same probability of minorities being in that class as shown for classes with five to twenty-four students in Diversity Rep., *supra* note 3. A class size of fifteen students was picked because it is the exact middle of the small class range used by the University of Texas.

The probability for zero minorities in the class is given by: $.6352 \cdot .2651 \cdot .1782 = .0300$. The probability for exactly one minority in the class is given by: $.2508 \cdot (.2651) \cdot (.1782) + .2511 \cdot (.6352) \cdot (.1782) + .252 \cdot (.6352) \cdot (.2651) = .0827$. The probability for exactly three minorities in the class is calculated using a method of moments type argument.

$$.03 + .0827 = (1 - P_{\text{estimate}})^{15} + 15 P_{\text{estimate}}(1 - P_{\text{estimate}})^{14}$$

$$(1 - P_{\text{estimate}})^{14}(1 - 14 P_{\text{estimate}}) - .1127 = 0$$

$$P_{\text{estimate}} = .2276$$

of diminishing marginal returns was never examined by the University. Under the second prong of strict scrutiny, the burden is on the government to prove how its use of race serves the compelling interest it asserts. *See Gratz*, 539 U.S. at 270. The University has not done so, as it has failed to account for diminishing returns, assuming *arguendo* that any benefits inure to the students in the first place. The Court is not obligated to make factual inferences in the University's favor when applying such a demanding judicial standard of review.⁶

⁶ It is also appropriate when applying strict scrutiny to note it is unclear why the University is only pursuing racial diversity, when the purported compelling interest flows from creating a diverse classroom experience. By contrast, students are much less likely to be exposed to a diversity of political viewpoints from their professors, a fact that most universities apparently do not consider sufficiently important to remedy. A 2003 survey of eleven California universities ranging from small, private, religiously-affiliated schools to large public, elite schools found that faculty members were 8.1 times more likely to be registered as Democrats than Republicans. Chris Cardiff & Daniel Klein, *Faculty Partisan Affiliations in all Disciplines: A Voter-Registration Study*, 17 *CRITICAL REV.* 237, 248 (2005). Ratios varied between academic disciplines, ranging from Democratic professors being 21 times more common than Republicans in Anthropology and Sociology, to 8.5 times more in History to 2.9 times more common in Economics. Daniel B. Klein & Charlotta Stern, *Professors and Their Politics: The Policy Views of Social Scientists*, 17 *CRITICAL REV.* 257, 264 (2005). A 2002 study in *The American Enterprise* magazine showed that at Cornell registered liberals (Democrat or Green Party) outpaced conservatives (Republican or Libertarian) by 166 to 6. Jeff Jacoby, *A Left-wing Monopoly on Campuses*, *BOSTON GLOBE*, Dec. 2, 2004, available at <http://www.highbeam.com/doc/1P2-7873393.html> (last visited May 26, 2012). At Stanford, the ratio was 151 to 17; University of Colorado at Boulder, 116 to 5; University of California Los

2. The University survey is fatally flawed due to its subjectivity.

The Fifth Circuit describes how the University “surveyed undergraduates on their impressions of diversity on campus and in the classroom. Minority students *reported* feeling isolated, and a majority of all students *felt* there was insufficient minority representation in classrooms for the full benefits of diversity to occur.” Pet. Cert. App. 22a (footnote and internal quotation marks omitted) (emphases added); *see also Grutter*, 539 U.S. at 318.

However, the relevant aspect of this survey is not science. The entire relevant discussion in the report involved merely two sentences: “The University also relied on anecdotal information from students—those who have the most direct interaction in the classroom. Their observations backed up what the study data revealed—that there was insufficient minority representation for the full benefits of diversity to occur.” Walker Aff. ¶ 12, JA 432a. But the University of Texas study on the percentage of classes with at least two minorities of the same race does not provide any evidence that there was “insufficient minority representation.” This study thus provides merely subjective opinion, not empirical evidence.

Thus the University did not provide *any* direct evidence, much less the requisite “strong basis in

Angeles, 141 to 9; and San Diego State University, 80 to 11. *Id.* Such political and ideological differences are not beset by the profound Fourteenth Amendment concerns present in this case by entailing a suspect class, and so these imbalances only highlight the constitutional concerns regarding the racial-preference policy.

evidence” to satisfy strict scrutiny, *Wygant*, 476 U.S. at 277 (plurality opinion), that minority representation was “insufficient.” It was only unsubstantiated “anecdotal information” from which the University inferred that minority and nonminority students alike would better succeed if the number of minority students increased.

Even if an appropriately-designed survey had been conducted, the data would still be of limited usefulness. The primary limiting factor is that responses to such survey questions involve subjective judgments. There can be a difference between what the survey respondents think they are learning in class and what they are actually learning. Survey responses may also be biased by political beliefs and how students think they are expected to answer.⁷

⁷ Andrew Kohut, a director of the Pew Research Center for the People & the Press, wrote:

These findings suggest that for most topics, typical media polls do a good job gauging public opinion. But results based on questions about racial issues may be more problematic. In fact, the experiment suggests that accurately measuring racial antagonisms may be a problem in all survey research. This may help explain why pre-election polls have overestimated white support for black candidates in biracial elections.

Andrew Kohut, *Bias in polls: It's not political, it's racial*, Perspective on Polls, July 1998, <http://asne.org/kiosk/editor/98.july/kohut1.htm> (last visited May 28, 2012). A more recent similar discussion is provided by Scott Keeter et al., *Perils of Polling in Election '08*, PEW RESEARCH CTR. PUBLS., June 25, 2009, <http://pewresearch.org/pubs/1266/polling-challenges-election-08-success-in-dealing-with> (last visited May 28, 2012). See also Jason Carroll, *Will Obama suffer from the 'Bradley Effect'?*, CNN, Oct. 13, 2008, <http://articles.cnn>

B. Objective measures of student learning vary with the racial composition of classes.

The Fifth Circuit repeatedly invokes the concept of “critical mass.” Yet, despite its frequent invocations, apparently no direct evidence has been presented that such a thing as “critical mass” exists in reality. Indeed, to *amici*’s knowledge, there is only one published peer-reviewed paper that directly tests the hypothesis. That paper was coauthored by John R. Lott Jr., J. Mark Ramseyer, and Jeffrey Standen [hereinafter “LRS”].⁸

Using a unique data set, the LRS research tested whether minority students performed better with other students from their ethnic group in a class or school. To do so, they were provided data by two law schools on the ethnicity and performance of each student in all classes at those schools—for three years at one [hereinafter “School A”], and for sixteen years at the other [hereinafter “School B”]. LRS were given access to the entire transcript for every student who attended these schools over these two periods. This allowed tracking each student’s performance as they moved from one class to another through law school. Consequently, the data revealed whether performance varied as the number of students belonging to the same or different races changed in their classes, courses, or school.

[.com/2008-10-13/politics/obama.bradley.effect_1_bradley-effect-bradley-campaign-exit-polls?_s=PM:POLITICS](http://www.bradleyeffect.com/2008-10-13/politics/obama.bradley.effect_1_bradley-effect-bradley-campaign-exit-polls?_s=PM:POLITICS) (last visited May 26, 2012).

⁸ John R. Lott Jr., J. Mark Ramseyer, Jeffrey Standen, *Peer Effects in Affirmative Action: Evidence from Law Student Performance*, 31 INT’L REV. L. & ECON. 1 (2011).

This unique data set allowed a simple test to see whether students' grades changed as the racial composition of their classmates changed, after also accounting for differences in a student's ability, the difficulty of different classes, how different teachers grade, and possible grade inflation over time.

Justice O'Connor's opinion for the five-Justice *Grutter* majority endorsed the need to ensure a "critical mass" for minority students. *Grutter*, 539 U.S. at 316. It is plausible that lower scores among black students at some schools are the result of those schools not having enrolled a critical mass of black students. Some studies claim, for comparison, that black students learn better at historically-black universities.⁹ If these studies suggest minority students learn better in a school (or classroom) with a large number of other minority students, it is plausible that black students do not perform as well because they are still too few. Without other peers of the same skin color, minority students might find themselves isolated—unable to learn because they have less of a support system. But those studies do not address the question being asked here, and plausibility is not certainty.

Neither the University of Michigan Law School nor *Grutter* explicitly define what fraction or number of students constitutes a "critical mass." The admissions office explained the concept as "a number

⁹ *E.g.*, Walter R. Allen, *The Color of Success: Black College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 HARV. EDUC. REV. 26, 37–39 (1992); Lamont Flowers & Ernest T. Pascarella, *Cognitive Effects of College Racial Composition on African American Students After 3 Years of College*, 40 J. COLL. STUDENT DEV. 669, 676–77 (1999).

that encourages underrepresented minority students to participate in a classroom and not feel isolated.” *Id.* at 318. While not setting forth a clear rule, Justice O’Connor might have suggested that minority students had not attained “critical mass” if the fraction of “minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool.” *Id.* at 336. This is the only empirical factor articulated by the Court regarding the topic of critical mass, suggesting it is relevant in determining whether critical mass has been attained. This formulation would at least provide a testable implication: Part of students from a given ethnic group reaching “critical mass” is when their proportion of the student body approximately equals their proportion in the applicant pool.¹⁰

However, as previously mentioned, peer effects could just as plausibly have an opposite effect. *Amici* posit that anyone who has visited a university cafeteria could observe that students often segregate voluntarily, and do so naturally on the basis not only of race, but also of religion, political affiliation, athletic participation, common interests, or any other basis of commonality. But of these, adverse consequences would result only if that basis for self-

¹⁰ Since racial groups’ share of the applicant pool vary across groups and over time, Justice O’Connor’s hypothesis implies that “critical mass” must also vary across groups and over time. However, no explanation is offered for why this should be true. *Grutter* offers no rationale why Asian-Americans need the support of a certain number of Asian-Americans before they reach “critical mass,” but Hispanics require a different number, and American Indians yet another number.

segregation was also the basis for admitting less-prepared students.

At the university level, surveys document significant levels of self-segregation.¹¹ It is similar at the secondary school level. One literature review argues that black students form “peer groups that disengage from academic competition.”¹² Similarly, Seymour Martin Lipset and his colleagues conclude as “the proportion of black students enrolled at [an] institution rose, student satisfaction with their university experience dropped, as did assessments of the quality of their education, and the work efforts of their peers.”¹³

Such self-segregation carries implications for study patterns. By definition, a student admitted under affirmative action is less accomplished academically than that student’s classmates. If a law school enrolls few affirmative-action students, then those students may—by sheer lack of choice—study with *non*-affirmative-action students—and those students on average are academically better prepared than the students admitted as a result of racial-preference policies. By contrast, if a school enrolls more affirmative-action students, it is possible those students will choose to study with

¹¹ *E.g.*, Schofield, *Maximizing the benefits*, in DIVERSITY CHALLENGED, *supra* note 2, at 103.

¹² Ronald F. Ferguson, *Teachers’ Perceptions and Expectations and the Black-White Test Score Gap*, in THE BLACK-WHITE TEST SCORE GAP 300 (Christopher Jencks & Meredith Phillips eds., 1998).

¹³ Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve University Education?*, 15 INT’L J. PUB. OPIN. RESEARCH 8, 15 (2003).

other affirmative-action students. To the extent that students learn from each other, the minority students in the school (or classroom) with more minority students may lose the benefit from studying with better-prepared peers. If so, it follows that the fewer the affirmative-action students in a school (or classroom), the better the performance of the remaining minority students.¹⁴ They would learn more effectively.¹⁵

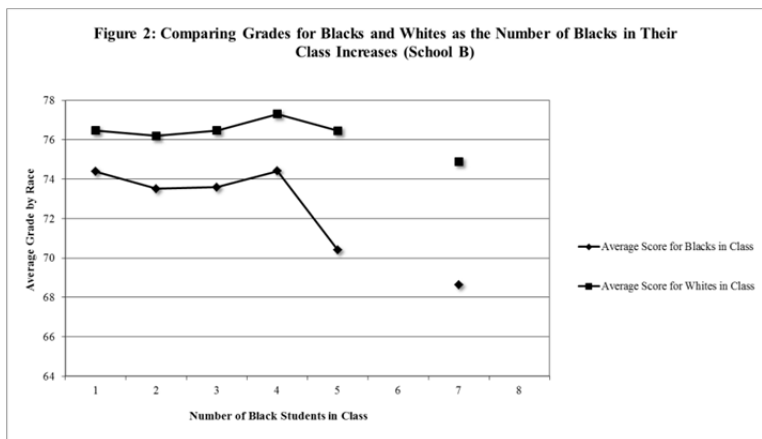
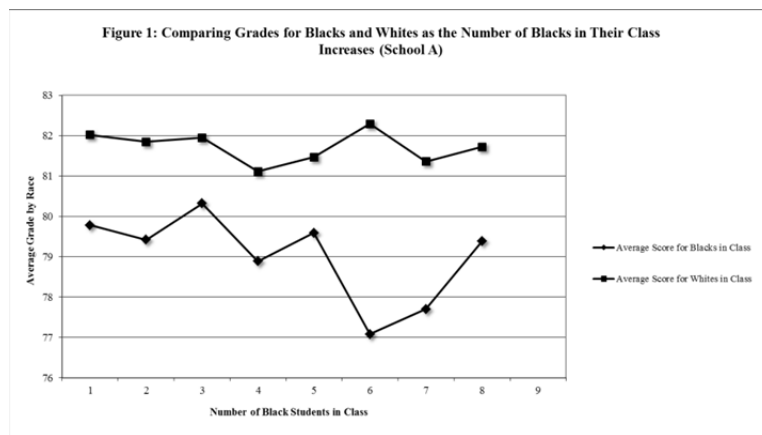
C. The empirical evidence does not demonstrate a positive correlation between the number of minority students and the grades of those students.

Some simple graphs illustrate how grades vary for black students and white students at the classroom level as the number of black students increases for the two law schools studied by LRS. The lower line shows the average grades for the black students (gaps in the lines appear when there

¹⁴ David J. Zimmerman, *Peer Effects in Academic Outcomes: Evidence from a Natural Experiment*, 85 REV. ECON. & STATS. 9 *passim* (2003). Zimmerman provides evidence that there is a small but statistically significant impact from having an academically better-prepared roommate. While this examines a different problem than that examined by LRS, the result is consistent with self-segregation of affirmative action students lowering their grades. *See also generally* IMPROVING MEASUREMENT OF PRODUCTIVITY IN HIGHER EDUCATION (Teresa A. Sullivan et al., eds. 2012).

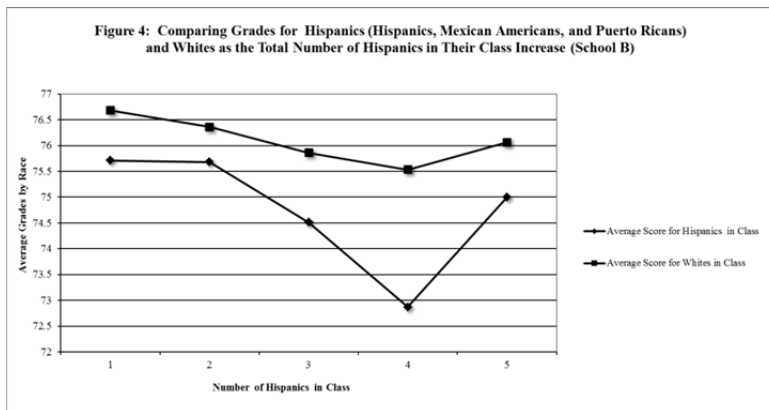
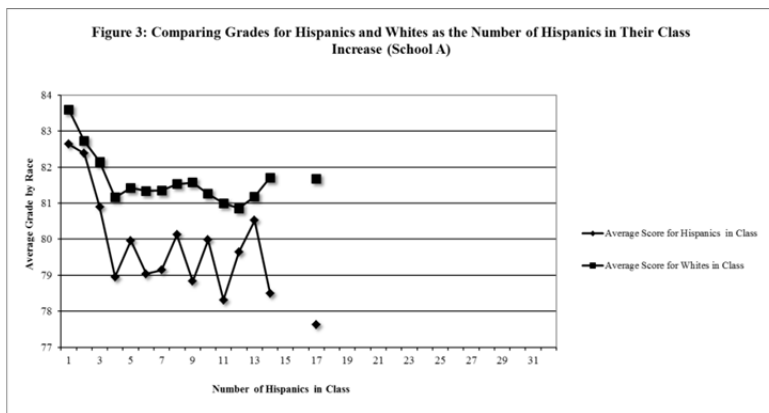
¹⁵ *See, e.g.*, Joshua D. Angrist & Kevin Lang, Does School Integration Generate Peer Effects?: Evidence from Boston's Metco Program, IZA Discussion Paper No. 976 (2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=491482 (investigating this possibility in the context of elementary school busing but finding limited evidence for it in one program).

are no observations for that number of black students in the classroom). In neither Figure 1 nor Figure 2 do black grades increase with the number of black students. Instead, if anything, they fall. While black students' performance drops as more black students are added to a class, there is no effect on white students' grades. *See App. 1a–2a.*



Figures 3 and 4 show a similar relationship between the number of Hispanic students in a

classroom or course and their grades. For School B, Figure 4 aggregates as “Hispanic” all individuals who identify themselves as either Hispanic, Mexican American, or Puerto Rican. Again, if anything, the relationship here is even more clearly negative for all eight lines, especially when going from one Hispanic student to more than one. *See App. 3a–4a.*



Of course, these figures do not control for other factors. As a result, the apparently negative relationship between the number of black students and their grades could simply reflect the fact that

the classes with the largest number of black students are first year classes—and grades in these classes are lower. Nevertheless, it is difficult to perceive any *positive* relationship between the number of students and their grades, even when comparing classes ranging from one to three or four blacks.

Several sets of regressions were run using Ordinary Least Squares. The first is the simplest: the effect on grades of having more students of only one's own race in a classroom, course, or school. For example, a white student's grade in a particular class is regressed on the number of white students, a black student's grade on the number of black students, and so on. Note that LRS account for the number of students in the classroom, and use fixed effects for professors, students, classes, and semester. The results are mixed. For one school more black students in a class or a course lowered the grades of other black students; for the other school no statistically significant relationship was found.

Other regression specifications examined the cross-effects between races. But *amici* contend the results are usually statistically insignificant and inconsistent across schools. Even in the few cases where they are statistically significant, the impact tends to be extremely small—explaining less than 1% of the variation in a racial group's grades.¹⁶

¹⁶ Another potential cost from affirmative action was first raised by Thomas Sowell, who argued that minority students do better when they are placed in universities where they are not too far below the average student. According to Dr. Sowell's theory, the Ivy League schools recruiting of otherwise under-qualified minorities is a disservice to these selected minority

D. Additional evidence contradicts the critical-mass theory.

1. Data on the applicant pool contradict the critical-mass theory.

The foregoing evidence is inconsistent with the “critical mass” hypothesis. Nevertheless, even if having more classmates of the same race does not improve a given student’s school performance generally, the possibility remains that it might do so if the proportion of minority students exceeds a critical threshold. It is not obvious why the effect would be discontinuous in this fashion—and *Grutter* offers no explanation—but it is possible that the peer effects are different above and below this critical-mass level. Nonetheless, it is still possible to test this hypothesis.

For one of the two schools examined by LRS, racial information was obtained not only on students enrolled but also on its applicant pool. *Amici* conclude the results were similar: black and Hispanic students showed no benefit even when the number of those two minority groups in a class increases once they exceed their share in the applicant pool. Only for Asians was there evidence that increasing their share of the class after they

students since they are overmatched and fail. See Thomas Sowell, *The Plight of the Black Students in the United States*, 103 DAEDALUS 176 *passim* (Spring 1974). Richard Sander has argued that affirmative action for law schools has not only lowered how well black students have done in school, it has also adversely impacted their chances of passing bar exams. Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 442–53 (2004).

exceed their share of the applicant pool increased their grades, but the effect was exceedingly small.

2. The “stereotype threat” hypothesis also fails to support the critical-mass theory.

The so-called “stereotype threat”—the worry people have when they risk confirming a negative stereotype about their group and that they will perform poorly on tests—provides a hypothesis that is tested by the aforementioned LRS research. The claim is that the stigma confirming this negative stereotype should decline and test scores should rise as the number or share of minorities in a class increases.¹⁷ Several scholars write, “Black students show little evidence of stereotype threat at historically Black colleges, presumably because the risk of being stereotyped is low, as are race-based belonging concerns.”¹⁸ Others claim that the “stereotype threat” stigma is mitigated by even small increases in the number of friends in their field of study from about three to eight.¹⁹

Amici argue the problem with this literature is that the tests create artificial environments with small samples where the investigators try to control for the information obtained by those being tested. By contrast, the evidence provided by Lott,

¹⁷ See, e.g., Christine R. Logel et al., *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 *EDUC. PSYCHOLOGIST* 42, 44 (Jan. 2012); G. M. Walton & G. L. Cohen, *A question of belonging: Race, social fit, and achievement*, 92 *J. PERSONALITY & SOC. PSYCHOL.* 82, 87 (Jan. 2007).

¹⁸ Logel, *supra* note 17, at 44.

¹⁹ Walton, *supra* note 17, at 87.

Ramseyer, and Standen examines the most direct measure of student achievement, student's actual grades under real-world conditions, and sees how a particular student's grades change as the number of minorities in the class, course, and/or school changes.

Carneiro, Heckman, and Masterov are also critical of the stereotype threat. "No serious empirical scholar assigns any quantitative importance to stereotype threat effects."²⁰ They point out that substantial racial differences in test scores arise in early grades when it is unlikely that stereotype threat is important, *i.e.*, when children are too young to even appreciate that there could be a stigma, and that these differences in test scores have been present since the beginning of the twentieth century, long before this stereotype threat could have been important.

E. No reliable empirical evidence known to *amici* supports the critical-mass theory.

Amici are aware of no noteworthy evidence that adding more black students to a class increases the grades of black students or any other group. If anything, there is evidence that adding more black students to a class or course lowers the grades of other black students. While it is possible the two law

²⁰ Pedro Carneiro, James J. Heckman, & Dimitriy V. Masterov, *Understanding The Sources Of Ethnic And Racial Wage Gaps And Their Implications For Policy*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 117 (Laura Beth Nielsen & Robert L. Nelson eds., Springer 2005); accord Pedro Carneiro, James J. Heckman, & Dimitriy V. Masterov, *Labor Market Discrimination and Racial Differences in Premarket Factors*, 48 J. L. & ECON. 1, 16–17 (2005).

schools in the LRS study are different from other university settings, at the very least it can be concluded that no universal peer benefits exist to increasing minority enrollment.

That said, this unique data set represents a real-world setting and involved a direct, objective measure of affirmative action on how well students learned the material presented in school. Such data are superior to artificially-created data that are provided in psychological studies, which creates artificial events where it must be assumed that the participants are unable to determine the purpose of the study. The data from the law schools are also preferable to survey data that measure subjective judgments.

This new evidence demonstrates that the critical-mass phenomenon theorized by the *Grutter* Court, and followed by the Fifth Circuit, thus fails under a correct application of strict scrutiny. “[T]he concept of critical mass is a delusion used by the [University] to mask its attempt to make race an automatic factor in most instances” *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting).

The judiciary must “recognize and confront the [constitutional] flaws and injustices that remain [in public education programs]. This is especially true when we seek assurance that opportunity is not denied on account of race.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment). The Court should do so here by jettisoning the critical-mass theory from its equal-protection jurisprudence.

CONCLUSION

The Court should hold that the University of Texas has failed to carry its burden of proving that enrolling a critical mass of minority students achieves a compelling public interest of diversity-derived educational benefits, and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,
KENNETH A. KLUKOWSKI
Counsel of Record
LIBERTY UNIVERSITY
SCHOOL OF LAW
1971 University Boulevard
Lynchburg, Virginia 24502
(434) 592-5300
kklukowski@liberty.edu
Counsel for Amici Curiae
Scholars of Economics and
Statistics

May 29, 2012

APPENDIX

Figure 1: Comparing Grades for Blacks and Whites as the Number of Blacks in Their Class Increases (School A).....1a

Figure 2: Comparing Grades for Blacks and Whites as the Number of Blacks in Their Class Increases (School B).....2a

Figure 3: Comparing Grades for Hispanics and Whites as the Number of Hispanics in Their Class Increase (School A)3a

Figure 4: Comparing Grades for Hispanics (Hispanics, Mexican Americans, and Puerto Ricans) and Whites as the Total Number of Hispanics in Their Class Increase (School B).....4a

Figure 1: Comparing Grades for Blacks and Whites as the Number of Blacks in Their Class Increases (School A)

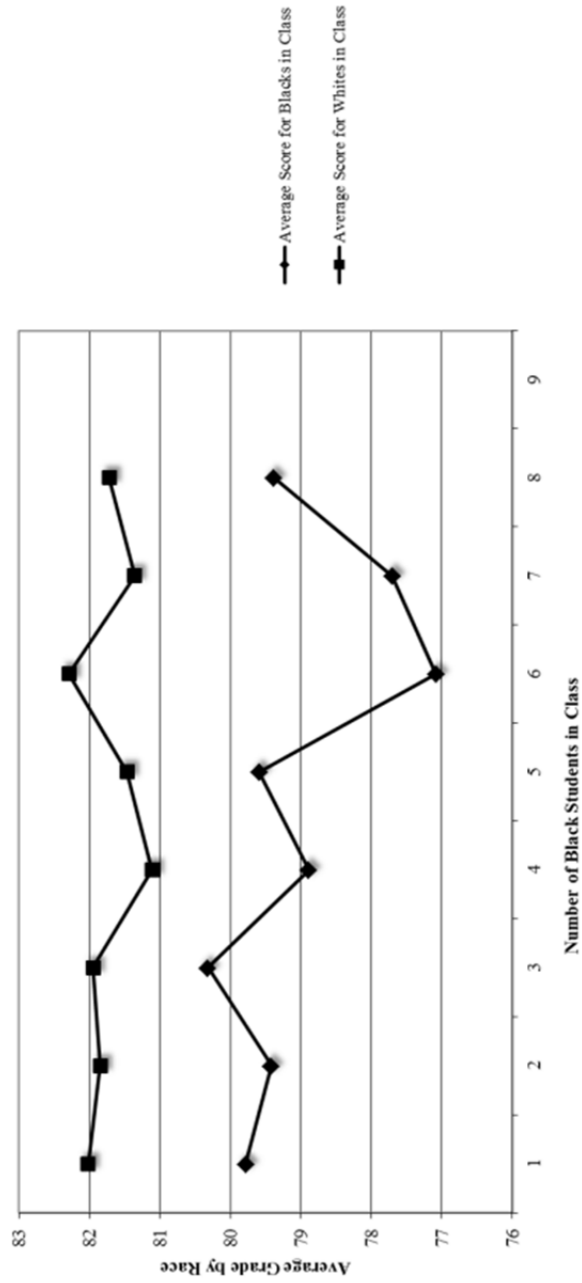


Figure 2: Comparing Grades for Blacks and Whites as the Number of Blacks in Their Class Increases (School B)

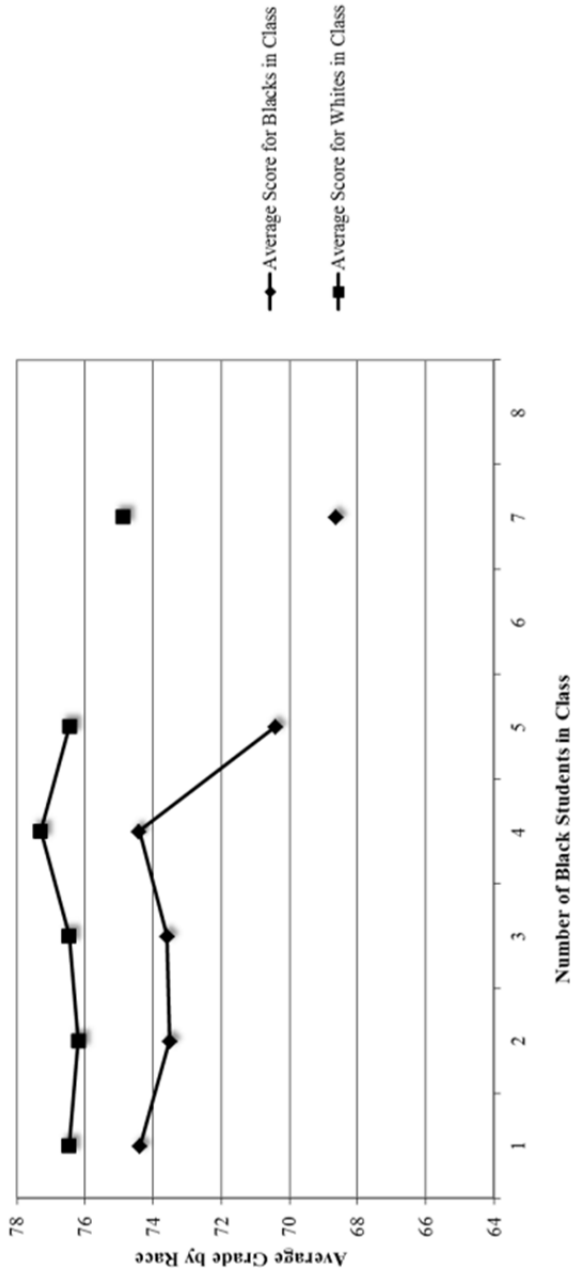


Figure 3: Comparing Grades for Hispanics and Whites as the Number of Hispanics in Their Class Increase (School A)

