

Shifting the Scope: How Taking School Demographics Into Account in College Admissions Could Reduce K-12 Segregation Nationwide

by Thomas Scott-Railton*

Deepening racial and socioeconomic segregation is producing unequal educational outcomes at the K-12 level, outcomes that are then reproduced in higher education. This is particularly true as rising competition among colleges has led many of them to focus increasingly on measures of merit that correlate with income and as parents and students adjust their behavior in light of those metrics. While existing affirmative action programs at colleges provide some counterweight to this dynamic, they are limited by institutional (and constitutional) constraints. Out of concern for revenue and rankings, many colleges are constrained in the number of students from low-income backgrounds they are willing to admit. Such a limited scope is not inevitable, however.

If colleges were to give a substantial admissions bonus to applicants who had attended K-12 schools with at least a certain percentage of low-income students, higher education could become a force for countering inequality at the K-12 level, instead of reproducing it. College admissions policies serve as a crucial reference point for parents, students, and educators on down through K-12. By rewarding applicants for attending socioeconomically integrated schools, colleges would mobilize the resources of private actors across the country towards integration. The benefits of this would be significant, especially for students from low-income families who would have an increased chance of attending integrated K-12 schools as a result. Such a policy would also help colleges better foster diversity on campuses, as more students would have had prior experience in integrated settings.

This Note explores the ongoing problem of K-12 re-segregation, argues that by adopting this policy colleges could work to promote integration, examines how such a policy could best be designed to do so, and addresses why such a policy would be constitutional. At a time when educational inequality is on the rise, there is an urgent need for new affirmative action proposals that can combat segregation and do so within colleges' existing constitutional and institutional constraints. The policy proposal advocated in this Note would do both, interrupting key elements of the present vicious circle.

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INTRODUCTION 220

I. HOW THIS PROGRAM COULD HELP REVERSE INCREASING K-12 SEGREGATION 226

 A. *The Re-segregation of K-12 Education*..... 226

 B. *Higher Education’s Role in Increasing Educational Inequality*..... 230

 C. *How This Policy Could Help Combat Re-segregation*..... 235

 1. Because College Admissions Express Norms, It Can Coordinate the Behavior of Otherwise Decentralized Actors 235

 2. Adopting this Plan Would Help Far More Students Than Just Those Who Were Admitted to Colleges as a Result..... 239

II. WHY SUCH A POLICY WOULD BE FEASIBLE FOR COLLEGES 251

 A. *By Adopting this Policy, Colleges Could Live Up to Their Social Responsibilities and Play a Positive Role in Reducing Educational Inequality Nationwide*..... 251

 B. *This Policy Would Help Promote Inclusion on Campus and Would Better Prepare Students for Future Leadership*..... 253

 C. *The Feasibility of Coordination Between Colleges*..... 258

III. HOW SUCH A POLICY COULD BE DESIGNED TO BEST PROMOTE K-12 INTEGRATION AND INCLUSION ON COLLEGE CAMPUSES 259

 A. *Finding an Appropriate Metric* 260

 B. *Why Other Metrics Would Be Less Effective at Promoting K-12 Integration*..... 266

 C. *Avoiding Intra-School Segregation*..... 268

 D. *How This Policy Would Interact with Current Affirmative Action Programs*..... 271

IV. WHY SUCH A POLICY WOULD BE CONSTITUTIONAL..... 274

 A. *The Legal Landscape Post-Fisher II: Stuck in the Grutter* 275

 B. *A Program Focused on SES Would Be Constitutional* 279

CONCLUSION 280

INTRODUCTION

After reaching a peak of integration in 1988, segregation at the K-12 level across the United States has deepened for many students along both economic and racial lines.¹ This re-segregation leads to unequal educational outcomes and

1. For deepening racial segregation, see Gary Orfield et al., *Brown at 62: School Segregation by Race, Poverty, and State*, UCLA C.R. PROJECT/PROYECTO DERS. CIVILES 3 (May 6, 2016), <http://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state/Brown-at-62-final-corrected-2.pdf>

can result in greater isolation between racial groups and socioeconomic statuses (SES).² Higher education compounds these problems.³ College⁴ admissions reproduce racial and socioeconomic inequality at the K-12 level by focusing on measures of merit that correlate with income.⁵ The resulting underrepresentation of students from low-income backgrounds on campuses means that these will tend to be less inclusive environments for such students.⁶ And the rising competitiveness in college admissions further accelerates segregation at the K-12 level.⁷ The relationship of colleges to rising educational inequality is

[<http://perma.cc/LJB3-9HSC>] [hereinafter Orfield et al., *Brown at 62*], which states that, “during the quarter century since the high point in 1988, the share of intensely segregated nonwhite schools (which we defined as those schools with only 0-10% white students) more than tripled, rising from 5.7% to 18.6% of all public schools.” For increasing economic segregation, see Ann Owens, Sean F. Reardon & Christopher Jencks, *Income Segregation Between Schools and School Districts*, 53 AM. EDUC. RES. J. 1159, 1181-83 (2016), which finds that for families with children enrolled in public school, segregation by family income *between* school districts increased by over 15 percent between 1990 and 2010, while family income segregation *within* the 100 largest school districts in the country increased by about 40 percent during that same time. The overlap of racial and economic disadvantage creates a situation of “double segregation.” Gary Orfield et al., *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, UCLA C.R. PROJECT/PROYECTO DERS. CIVILES ix (2012), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_complete_2012.pdf [<http://perma.cc/3MUM-N2ZT>] [hereinafter Orfield et al., *E Pluribus*], (noting, among other measures, that “[i]n the early 2000s, the average Latino and black student attended a school where a little over half of the students were low income (as measured by free and reduced price lunch eligibility), but now attend schools where low income students account for nearly two-thirds of their classmates”). However, while race and socioeconomic status are two of the most prevalent forms of disadvantage, they are not alone. Non-native English speakers suffer discrimination in educational settings. *Id.* at xv (describing discrimination by language as “deeply harmful triple segregation”). In addition, students with disabilities also face forms of educational segregation. See Wayne S. Sailor & Amy B. McCart, *Stars in Alignment*, 39 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 55 (2014) (describing the history of separate education for individuals with disabilities and recent efforts to provide for more inclusive educational environments).

2. See *infra* Section I.A.
3. See *infra* Section I.B.
4. I use the term “college” to refer to institutions of higher education in general.
5. See *infra* Section I.B.
6. See Tomiko Brown-Nagin, *Rethinking Proxies for Disadvantage in Higher Education: A First Generation Students’ Project*, 2014 U. CHI. LEGAL F. 433, 472.
7. See *infra* Section I.B.

therefore part symptom and part cause within the context of a broader educational system.

While colleges have adopted affirmative action programs to help increase racial and socioeconomic diversity on their campuses, the extent to which such programs counteract the unequal outcomes at the K-12 level is limited.⁸ This partly reflects boundaries imposed by the Supreme Court's jurisprudence on race-conscious affirmative action.⁹ But even outside of the constitutional limits on race-conscious affirmative action, there are deep institutional constraints on how willing colleges will be to admit students from low-income or first-generation professional (FGP) backgrounds.¹⁰

So while the Supreme Court's recent decision in *Fisher II*,¹¹ in which the Court upheld a race-conscious affirmative action program at the University of Texas, represented a victory for advocates of admissions programs that help students from historically underrepresented backgrounds receive college educations, the framework that the Court sanctioned remains limited in the same ways as before; so long as the pool of applicants reflects the considerable racial and economic disparities at the K-12 level, college efforts to promote diversity and reduce educational inequality by admitting individual applicants will necessarily be limited. Such a limited scope is not inevitable, however. There is greater room within existing legal and institutional constraints for colleges to reduce the contribution of higher education to rising inequality. This paper offers an example of such an approach. If colleges were to adopt an admissions program that rewarded applicants for attending a K-12 school¹² with a percentage of low-income students above a certain threshold, they could both promote K-12 integration¹³ nationwide *and* better foster an atmosphere of inclusion¹⁴ on their own campuses. The main focus of this paper will be the pressing problem this program aims to address, how such a program would work, and whether it would be legal.

In Section I, I will describe the problems that this policy seeks to address and in general terms how it would do so. This policy seeks to help turn the tide

8. See *infra* Section I.B.

9. See *infra* Section IV.A.

10. See *infra* notes 60-84 and accompanying text.

11. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016).

12. While I often use the term "K-12" as shorthand in this piece, this program could certainly be expanded to include pre-K as well.

13. By "integration," I refer to the degree to which these schools have meaningful percentages of students from different income backgrounds.

14. By "inclusion," I mean not just the numerical diversity on a campus, but also the amount of positive intergroup contact on that campus, particularly with regards to students from historically underrepresented backgrounds. For a more in-depth discussion of how recruiting students with a history of intergroup contact would benefit inclusion on college campuses, see *infra* Section II.B.

of deepening K-12 segregation. By shifting the unit from “applicant” to the “school the applicant attended,” colleges could systematically shift incentives in favor of integration at the K-12 level. College admissions articulate norms of educational merit and influence the decisions and values of millions of parents and students across the country. By using the admissions process to reward students who attended K-12 schools with over a certain threshold of low-income students, colleges would create an incentive in favor of integration at three levels: (i) it would create an incentive for middle-class-and-up parents to enroll their children in socioeconomically integrated schools, (ii) it would serve as an incentive pushing against the ongoing re-segregation of currently integrated school districts, and (iii) it would provide an incentive for private schools to enroll more low-income students.

Moreover, by stimulating integration at the K-12 level, colleges could improve the education of far more students than those who directly received an admissions boost, as students across the nation will benefit from more integrated educations. If it were to be successfully implemented, the primary beneficiaries of this plan would be low-income students who had a greater chance of attending K-12 schools with larger percentages of middle- and high-income students, the benefits of which can be significant.¹⁵ These students would also benefit at the college admissions level, as they would receive the admission boost in question. Others who would stand to gain would be the middle- and high-income students who attended K-12 schools with above a certain threshold of low-income students. They would benefit from both the admissions boost and the experience of attending a more integrated school.¹⁶

In Section II, I will explore how this program could best be designed to further the goals of encouraging K-12 desegregation and improving inclusion on college campuses. I will argue that the best way to structure this policy would be for colleges to grant an admissions bonus to applicants who, for over six

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15. Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1549-50 (2007) (describing the benefits for low-income students of attending schools at the level of peer effect, increased parental engagement, and greater ability to attract better teachers); *Fractured: The Breakdown of America's School Districts*, EDBUILD 8 (June 2017), <http://edbuild.org/content/fractured/fractured-full-report.pdf> [<http://perma.cc/6VRR-MJ9A>] (noting the benefits for low-income students of being educated in schools with higher income students, which extend well beyond “mere proximity” but also to the resources that often accompany such students); Orfield et al., *E Pluribus*, *supra* note 1, at 7, 9-11 (noting the positive academic peer effects for low-income students of being educated alongside middle-to-high income students); Amy Stuart Wells, Lauren Fox & Diana Cordova-Cobo, *How Integrated Classrooms Can Benefit All Students*, CENTURY FOUND. (Feb. 9, 2016), http://tcf.org/assets/downloads/HowRaciallyDiverse_AmyStuartWells.pdf [<http://perma.cc/PT5A-TUFW>] (describing the significant benefits, both cognitive and interpersonal, of attending socioeconomically integrated schools).
16. The benefits for these students of attending more integrated schools will be discussed at length in Section II.B.

years, attended a school at which over 40 percent of the students were eligible for Free or Reduced Price Lunches (FRPL), contingent upon the school meeting a context-specific standard for intraschool integration.

In addition to the benefits for these students, colleges also have an incentive to adopt such a policy, which I will discuss in Section III. Existing pipeline affirmative action programs are limited in their ability to create an inclusive environment on college campuses. Drawing students with lengthy experiences in integrated schools, by contrast, would help facilitate a more inclusive atmosphere on campus and in classrooms, as well as produce graduates better suited to leadership positions in an increasingly diverse and international economy.¹⁷ Colleges have long recognized these pedagogical benefits of diversity. Why then wouldn't colleges take into account these benefits when it comes to the K-12 educations applicants received? Surely these benefits are just as important at eight as at eighteen.¹⁸ Since such a program could help spur integration at the K-12 level, colleges would benefit again down the road, as a greater absolute number of applicants will have attended integrated schools. By implementing this program, colleges can show that they are serious about their wider social commitments. At a time when these institutions are under sustained criticism for failing to live up to those commitments,¹⁹ I suggest that they will find such a program particularly appealing. And unlike other proposals to increase inclusion on campus or to increase integration at the K-12 level—which would work symbiotically with this program—the approach advocated by this piece would cost very little, if anything at all.

To be sure, even reversing re-segregation at the K-12 level cannot fully remedy the structural disparities in resources and opportunities experienced by low-income students and many students of color.²⁰ Increasing socioeconomic and racial integration is but one step in producing a more equitable educational

17. See *infra* Section II.B.

18. See *infra* notes 170-178 and accompanying text.

19. To give just one example, Yale's President recently stated in an interview about higher education and inequality: "There is no doubt that the distribution of wealth in this country is disturbing to this generation of students. But in my view, universities can and should be part of the solution." David Cole, *Race & Renaming: A Talk with Peter Salovey, President of Yale*, N.Y. REV. BOOKS, June 9, 2016, at 43. The willingness of institutions to address these concerns is reflected in the number of colleges who have signed on to projects that seek to coordinate efforts to improve access for low-income and first-generation professional students, including the University Innovation Alliance (which includes the Presidents of eleven major public universities, including Ohio State and the University of Texas at Austin) and the American Talent Initiative (which includes thirty "leading Ivy League, state flagship, private universities and liberal arts colleges"). See *Who We Are*, AM. TALENT INITIATIVE, <http://americantalentinitiative.org/who-we-are> [<http://perma.cc/VX7L-KS3D>]; *Who We Are*, UNIV. INNOVATION ALL., <http://www.theuia.org> [<http://perma.cc/Z2RZ-5RZD>].

20. See Orfield et al., *E Pluribus*, *supra* note 1, at xxi.

system and society. Yet it is a crucial one, with the potential for widespread improvement, as “[t]here is not a city or a region where diversity could not be fostered in some ways.”²¹ The policy advocated in this piece would thus be an ambitious move by colleges towards greater educational equality across the board.

Nonetheless, it also represents a compromise with some of the institutional constraints facing colleges. Part of what would make this policy feasible for colleges concerned about prestige and tuition dollars is that, particularly at the outset, the students colleges would admit from socioeconomically integrated schools would be more likely to be those from more affluent backgrounds. This is imperfect from the perspective of increasing equality in higher education. On the other hand, until colleges are willing to disregard the aforementioned institutional constraints, they will continue to admit sizeable numbers of affluent students—the difference being that with the policy advocated here, the resources and presence of these affluent students will have been channeled through integrated schools, with substantial benefits for a much greater number of low-income students than colleges are currently prepared to help directly.²² The fact that at the *college* level, many of the admissions benefits will flow initially to more affluent students is unquestionably a drawback. However, it is one that would make the benefits of such a plan, which I believe outweigh it considerably, possible.

And last, in Section IV I will address whether such a program would be constitutional. I conclude that, to the extent that it focused on income rather than race, it likely would be. Saving the legal question for last reflects a broader decision to step back from the primarily legal debates in the scholarship by examining affirmative action programs from the “outside in,” drawing on social science and education policy research.²³ The emphasis in much of the literature on the legal doctrine is essential in some ways but limiting in others.²⁴ While a focus on the legal framework has tended to overshadow broader policy discussions, recent scholarship, both legal and non-legal, has begun to explore what other programs might be possible within the space left by the Supreme Court’s affirmative action jurisprudence.²⁵ Yet much of this work has nonetheless remained within the limiting framework of pipeline mobility, in which equality is pursued primarily through the admission of individual students to institutions of higher education.²⁶ This paper contributes to this ongoing discussion by pre-

21. *Id.* at xxii.

22. *See infra* Section I.C.

23. Brown-Nagin, *supra* note 6, at 435-36.

24. *See id.* at 435 (“The furious legal debate over affirmative action tends to crowd out conversation about the overall direction of higher education and policy and how educational disadvantage fits within it.”).

25. *See infra* Section IV.

26. *See, e.g.,* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 144 (2003) (describing the idea of

senting a novel program that will pursue the original policy goals of affirmative action programs—promoting both diversity (and thus inclusion) and social mobility (and thus equality)²⁷—but doing so in a systematic way that aims to benefit many more students than simply those who are admitted to the colleges that adopt such a program.

I. HOW THIS PROGRAM COULD HELP REVERSE INCREASING K-12 SEGREGATION

A. *The Re-segregation of K-12 Education*

Overall, both racial and socioeconomic segregation in K-12 education are on the rise.²⁸ A recent report by the Government Accountability Office identified “a large increase in schools that are the most isolated by poverty and race.”²⁹ For example, from 2001 to 2014, the percentage of K-12 public schools

“contest” and “sponsorship” mobility and the limitations of both); Sarah E. Redfield, *The Educational Pipeline to Law School—Too Broken and Too Narrow To Provide Diversity*, 8 PIERCE L. REV. 347, 358-59 (2010) (containing an analogous discussion of why pipeline affirmative action programs are insufficient at the law school level given that the achievement gap for underrepresented students will have started so much earlier in their education).

27. Brown-Nagin, *supra* note 6, at 435-44 (citing “the national commitment to social mobility originally embraced by the Civil Rights Act, the Equal Opportunity Act, and early iterations of affirmative action”). As Professor Brown-Nagin describes, correcting for “disproportionate poverty caused by slavery and Jim Crow or the effects of discrimination in the labor market and in education” was a core element of both the civil rights movement’s demands and crucial civil-rights era legislation. *Id.* at 438. New government agencies, created and/or empowered by this legislation, along with activists, lawyers, and, for a time, the courts, pushed affirmative action as a means of furthering economic equality in both employment and education. *Id.* at 439-441. This conception of affirmative action, as a remedy for societal inequality, was forced into retreat by political and legal shifts. *Id.* at 443-66.
28. See *supra* note 1; see also Sarah Childress, *Report: School Segregation Is Back, 60 Years After “Brown,”* PBS (May 15, 2014), <http://www.pbs.org/wgbh/frontline/article/report-school-segregation-is-back-60-years-after-brown> [<http://perma.cc/8X7B-RQU3>] (describing how since 1988, “the overall trend has been toward re-segregation”); Erica Frankenberg et al., *Southern Schools More Than a Half-Century After the Civil Rights Revolution*, UCLA C.R. PROJECT/PROYECTO DERS. CIVILES (May 2017), http://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/southern-schools-brown-83-report/Brown_63_South_052317-RELEASE-VERSION.pdf [<http://perma.cc/7WJL-ZDSC>] (describing the re-segregation of southern schools).
29. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-345, K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 10 (2016), <http://www.gao.gov/assets/680/676745.pdf> [<http://perma.cc/K386-GZ2S>].

that were both high poverty³⁰ and comprised of mostly black and Hispanic students³¹ increased from 9 percent to 16 percent.³² And even beyond the trend lines, the absolute number of students in schools that are almost entirely black and Latinx and low-income is reason enough to be concerned: a recent report by the Civil Rights Project/Proyecto Derechos Civiles found that 43 percent of Latinx students and 38 percent of black students³³ are concentrated in “intensely segregated” schools where between 90-100 percent of the students are members of one or the other minority group.³⁴ These schools are also strongly correlated with concentrated poverty.³⁵ Such racially and socioeconomically isolated schools tend to offer fewer resources and opportunities to their students and to produce correspondingly unequal educational outcomes.³⁶ These schools also tend to have more trouble recruiting and retaining high-quality teachers, have higher rates of discipline and expulsion, and have lower graduation rates.³⁷ In addition to finding considerable overlap between the disadvantages facing students who attend majority-minority schools and those who attend schools with a predominantly low-socioeconomic-status student body, research indicates that attending either of such schools is a significantly stronger predictor of achievement outcomes than individual race or socioeconomic status.³⁸ This further supports the focus on schools as a particularly fitting locus of intervention against both racial and socioeconomic inequality.

This ongoing re-segregation is driven in part by the fact that affluent white and Asian parents often seek to send their children to schools with few low-income students and few black and Latinx students.³⁹ Such parents tend to as-

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30. “High poverty” is defined as having a student body in which over 75% or the students are eligible for free or reduced price lunches. *Id.*
31. The GAO defines “mostly black and Hispanic” to mean schools comprised of over 75% black and Hispanic students. *Id.*
32. *Id.*
33. Orfield et al., *E Pluribus*, *supra* note 1, at 9 (finding that “80% of Latino students and 74% of black students remained in majority nonwhite schools, while 43% of Latinos and 38% of blacks attended intensely segregated schools”).
34. *Id.* at 27.
35. *Id.* (finding a .85 correlation between the combined percentages of black and Latinx students and the percentage of poor students).
36. *Id.* at 6.
37. *Id.* at 6-9.
38. See Geoffrey D. Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman’s Equality of Educational Opportunity Data*, 112 TCHRS. C. REC. 1201, 1236 (2010).
39. See *infra* notes 107-111 and accompanying text. Increasing racial segregation is also caused in part by the increasing Latinx school-age population. See Orfield et al., *E Pluribus*, *supra* note 1, at 14-27 (detailing how the percentage of students in public schools who are Latinx has risen from 5.1% in 1970-71 to 22.8% in 2009-

sume that schools with significant numbers of low-income and black and Latinx students will have fewer resources, offer inferior teaching and facilities, and will be less safe, among other things.⁴⁰ And to the extent that re-segregation leads to racial and economic disadvantage becoming increasingly concentrated in segregated schools, with the effects noted above, this can create a self-reinforcing dynamic whereby increasing segregation creates its own justification. In contrast, affluent communities have the resources to provide extra money to schools to ensure that they meet parents' definitions of high quality.⁴¹

Nonetheless, it would be naïve to think that segregation is caused solely by parents objectively appraising the relative merits of schools. Indeed, there is some evidence that white parents weigh a school's demographics more than its academics, even when they have evidence on both.⁴² Affluent parents appear to be particularly concerned with social status when selecting schools for their children.⁴³ While each community, family, and individual makes their own decisions for their own reasons,⁴⁴ they have done so within a broader systemic context that includes residential white flight,⁴⁵ metropolitan fragmentation (the

10). While this demographic shift has also led to some predominantly white schools enrolling more Latinx students, as a whole Latinx students are considerably less likely to have white classmates than before. *Id.* at 23. And black and Latinx students are increasingly likely to be in schools where the vast majority of students are black or Latinx and low-income. *Id.* Thus, on the whole, the result has been increasing racial and economic segregation for black and Latinx students by most measures. *Id.* at 17-27.

40. *Id.*

41. See *infra* note 109; see also David Orentlicher, *Economic Inequality and College Admissions Policies*, 26 CORNELL J.L. & PUB. POL'Y 101, 104 (2016).

42. See note 138 and accompanying text.

43. See Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 179-81 (2002).

44. See, e.g., Kate Taylor, *Family by Family, How School Segregation Still Happens*, N.Y. TIMES (Apr. 28, 2017), <http://www.nytimes.com/2017/04/28/nyregion/school-segregation-nyc-district-3.html> [<http://perma.cc/YB5Y-E7NC>].

45. There is strong evidence that residential segregation contributes to school segregation. See Erica Frankenberg, *The Role of Residential Segregation in Contemporary School Segregation*, 45 EDUC. & URB. SOC. 548 (2013); Gary Orfield & Nancy McArdle, *The Vicious Cycle: Segregated Housing, Schools and Intergenerational Inequality*, HARV. U. JOINT CTR. HOUS. STUD. (Aug. 2006), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w06-4_orfield.pdf [<http://perma.cc/6Z8T-AL3N>]. However, in a troubling testament to the persistence of educational segregation, decreasing residential segregation has not led to aggregate decreases in school segregation, and certain areas that have become considerably more residentially integrated have simultaneously experienced rising school segregation. See Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*, 81 N.C. L. REV. 1563, 1575-80 (2003); Orfield et al., *E Pluribus*, *supra* note 1, at 10 ("Nationally, though

creation of smaller political units at the metropolitan level),⁴⁶ the retrenchment of legal and political efforts aimed at desegregation,⁴⁷ and changing demographics.⁴⁸ The effect in the aggregate has reversed many of the gains since *Brown v. Board of Education*.⁴⁹ There are several channels by which this re-segregation is taking place, including white flight to private schools,⁵⁰ increasing school choice,⁵¹ the lifting of desegregation orders,⁵² and the fragmentation of previously integrated districts.⁵³ This multiplicity of actors and mechanisms can

black-white residential dissimilarity had declined markedly, black-white school dissimilarity remains virtually unchanged as desegregation efforts are dissolved. In the South, black-white school dissimilarity has increased since 1990.”).

46. See Genevieve Siegel-Hawley, *City Lines, County Lines, Color Lines: The Relationship Between School and Housing Segregation in Four Southern Metro Areas*, 115 TCHRS. C. REC. 1, 4-9 (2013); Orfield et al., *E Pluribus*, *supra* note 1, at xx.
47. See, e.g., Orfield et al., *E Pluribus*, *supra* note 1, at xviii-xx, 3-11 (noting effective mobilization of political opposition to desegregation as well as Supreme Court decisions weakening efforts to desegregate).
48. Part of the reason that more black and Latinx students attend schools with fewer and fewer white students is that the population of the United States has become increasingly non-white. *Id.* at 21-27. However, there is evidence that these changing demographics are not the whole story. For example, “[b]lack students’ average contact with whites gained until the late 1980s even though the proportion of white students in the country was declining.” *Id.* at 21. Furthermore, for white students, the gap between their percentage of the population as a whole and the average percentage of white students in schools attended by the typical white student has increased since 1991. *Id.* Thus, while at an absolute level more white students are experiencing racial diversity at the K-12 level, proportionally to their representation in the population as a whole they are becoming more segregated. And in the southern United States, the increases in segregation as a result of policy changes rather than simply demographic changes are stark. *Id.* at 23-25.
49. See *supra* note 1.
50. Reardon & Yun, *supra* note 45, at 1585-86 (“In 1980, 1990, and 2000, county-level white private school enrollment rates were tightly linked to the black proportion of the county school-age population: white private school enrollment rates are extremely high in predominantly black counties, despite decades of stable integration in the public schools. This suggests that private schools continue to serve as a segregative mechanism in the South.”).
51. See, e.g., GARY ORFIELD & ERICA FRANKENBERG, *EDUCATIONAL DELUSIONS? WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR* (2013).
52. Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, UCLA C.R. PROJECT/PROYECTO DERS. CIVILES 9-10 (2016), <http://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> [<http://perma.cc/Z57L-5567>](noting the role of lifting desegregation orders on re-segregation in the South).
53. See *infra* note 116 and accompanying text.

make curbing re-segregation quite difficult, as it often occurs in a nationwide yet decentralized manner at the city, school, and family level.

B. Higher Education's Role in Increasing Educational Inequality

"Merit"-focused college admissions, with its emphasis on tests and high school performance, will tend to replicate unequal K-12 outcomes.⁵⁴ As a result of this and other factors, the population of individuals who graduate from high school but do not attend college is becoming increasingly concentrated in families at the bottom of the income spectrum.⁵⁵ And at a systemic level, current college admissions practices will exacerbate K-12 re-segregation. The increasing competitiveness of college admissions pushes affluent parents to invest ever more resources in their children's educations.⁵⁶ This contributes to class segregation at the K-12 level, as these parents tend to seek out schools with few low-income students.⁵⁷ Part of the reason middle-class parents avoid integrated

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54. See, e.g., STEPHEN BURD, *NEW AMERICA, UNDERMINING PELL, VOLUME II: HOW COLLEGES' PURSUIT OF PRESTIGE AND REVENUE IS HURTING LOW-INCOME STUDENTS* (2014); Anthony P. Carnevale & Jeff Strohl, *How Increasing College Access Is Increasing Inequality and What To Do About It*, in *REWARDING STRIVERS: HELPING LOW-INCOME STUDENTS SUCCEED IN COLLEGE* 71 (Richard D. Kahlenberg ed., 2010), <http://tcf.org/assets/downloads/tcf-CarnevaleStrivers.pdf> [<http://perma.cc/U2P5-3JQZ>]; Brown-Nagin, *supra* note 6, at 467-72; Benjamin Wermund, *How U.S. News College Rankings Promote Economic Inequality on Campus*, *POLITICO* (Sept. 10, 2017), <http://www.politico.com/interactives/2017/top-college-rankings-list-2017-us-news-investigation/> [<http://perma.cc/AQH7-SZMT>] (noting that Princeton and Yale, among other top colleges, "admit more students from the top 1 percent of earners than the bottom 60 percent combined").
55. Carnevale & Strohl, *supra* note 54, at 72 ("In 1967, 25 percent of the nation's high school graduates who did not attain postsecondary education were concentrated in families in the bottom two deciles of family income, and almost 69 percent were in families in the middle five deciles in family income. By 2004, more than 37 percent of high school graduates were in families in the bottom two deciles of family income, and the amount in the middle five had dropped to 52 percent.").
56. See, e.g., Allison Roda & Amy Stuart Wells, *School Choice Policies and Racial Segregation: Where White Parents' Good Intentions, Anxiety, and Privilege Collide*, 119 *AM. J. ED.* 261, 280 (2013) ("[T]he high levels of inequality in the United States promotes anxiety as more advantaged parents worry that their children are susceptible to downward mobility if they do not have the 'right' educational credentials. This nervousness seems to have only worsened as educational policies have stressed outcomes and competition amid a highly unequal society."); see also DANIEL MARKOVITS, *MERITOCRACY AND ITS DISCONTENTS* (forthcoming) (describing the significant role of hyper-competition in education to rising inequality).
57. Roda & Wells, *supra* note 56; Natalie Lacireno-Paquet & Charleen Brantley, *Who Chooses Schools, and Why?*, *EDUC. & PUB. INT. CTR.* 18 (Jan. 2008), <http://epsl.asu.edu/epu/documents/EPSSL-0801-247-EPRU.pdf> [<http://perma.cc/K6PR-9Y5K>]; Wells et al., *supra* note 15, at 14.

schools is because the values rewarded in the college admissions process, primarily test scores but also counseling resources and prestige, will tend to valorize schools that are predominantly affluent and racially white or Asian.⁵⁸ Parents in a position to choose schools will therefore often see sending their children to a racially- or class-integrated school as necessarily entailing a “sacrifice,” both in terms of their education and of their college prospects.⁵⁹

It is true that in addition to contributing to educational inequality, colleges also seek to promote educational equality—primarily but not exclusively through affirmative action programs. These programs draw on what Professor Guinier terms “contest”⁶⁰ and “sponsorship”⁶¹ mobility, as opposed to the kind of “structural” mobility that aims to shift the operation of the educational system more broadly.⁶² There is a continual tension between the limited scope of incremental solutions, such as increasing what is called “pipeline mobility” by focusing on the admission and recruitment of individual students from disadvantaged backgrounds, and fundamental structural changes that seem well beyond what institutions are willing to contemplate or effectuate. There is a vicious cycle at work here. College admissions exacerbate inequality by judging students on metrics like standardized testing that correlate strongly with parental income.⁶³ These admissions policies are constrained by the influence of rankings, which reward schools for the selectiveness of their admissions, and by concerns about tuition.⁶⁴ And while parents and students may be more conscious of the stress of the college admissions process than anyone,⁶⁵ their awareness of the social and economic benefits of a college education in today’s econ-

58. Wells et al., *supra* note 15, at 29.

59. *Id.* (noting that when schools are evaluated “in a manner that strongly correlates to the race and class of the students, then efforts to create more racially/ethnically diverse schools are framed as though white and Asian families are ‘giving up something’”).

60. Guinier, *supra* note 26, at 144.

61. *Id.* at 151.

62. *Id.* at 159-71.

63. *Id.*

64. See SCOTT ANDREW SCHULZ & JEROME A. LUCIDO, U.S. CAL. CTR. FOR ENROLLMENT RES., POL., & PRAC., ENROLLMENT MANAGEMENT, INC.: EXTERNAL INFLUENCES ON OUR PRACTICE (2011); *Financial Aid: Examining the Thinking Behind the Policy*, EDUC. CONSERVANCY (June 2015), <http://www.educationconservancy.org/PresidentialThinking.pdf> [<http://perma.cc/BTU7-Y28T>].

65. See, e.g., Frank Bruni, *How to Survive the College Admissions Madness*, N.Y. TIMES (Mar. 13, 2015), <http://www.nytimes.com/2015/03/15/opinion/sunday/frank-bruni-how-to-survive-the-college-admissions-madness.html> [<http://perma.cc/SA4M-3BG4>]; see also *infra* note 99.

omy can lead them to fixate on these rankings.⁶⁶ This cycle will undermine reforms that target only one level of this process, such as programs that employ solely a pipeline model.⁶⁷

For example, recent proposals have advocated for adopting affirmative action for first generation professionals⁶⁸ or low-income students,⁶⁹ weighting standardized test scores to account for stereotype threat,⁷⁰ using applicants' ZIP codes to maximize geographic diversity,⁷¹ or ensuring that notions of "service" include activities like caregiving for a sibling or relative.⁷² Some commentators have made policy suggestions that have a certain overlap with the proposal outlined in this Note: that colleges take into account the poverty density of an applicant's school,⁷³ the racial composition of an applicant's school,⁷⁴ or the level

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66. See Carnevale & Strohl, *supra* note 54; Wermund, *supra* note 54. See also Lindsey Cook, *Is the College Admissions Bubble About to Burst*, U.S. NEWS & WORLD REP. (Sep. 22, 2014), <http://www.usnews.com/news/blogs/data-mine/2014/09/22/is-the-college-admissions-bubble-about-to-burst> [<http://perma.cc/6WE6-8686>].
67. On the limitations of the pipeline model in light of the prevalent segregation at the K-12 level, see, for example, Guinier, *supra* note 26, at 143-58, which discusses the shortcomings of sponsorship and conflict mobility; Redfield, *supra* note 26; and James Piereson & Naomi Schaefer Riley, *Getting More Poor Kids Into College Won't Fix Income Inequality*, WASH. POST (Oct. 23, 2014), http://www.washingtonpost.com/opinions/getting-more-poor-kids-into-college-wont-fix-income-inequality/2014/10/23/494e491a-4fc5-11e4-babe-e91da079cb8a_story.html [<http://perma.cc/8SSC-H6A2>].
68. See Brown-Nagin, *supra* note 6, at 435-36.
69. See Richard D. Kahlenberg, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, CENTURY FOUND. 26-52 (2012), <http://tcf.org/assets/downloads/tcf-abaa.pdf> [<http://perma.cc/ST44-DV5X>].
70. See Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 340 (2015); Gregory M. Walton, Steven J. Spencer & Sam Erman, *Affirmative Meritocracy*, 7 SOC. ISSUES & POL'Y REV. 1, 2-3 (2013).
71. Danielle Allen, *Talent Is Everywhere: Using ZIP Codes and Merit to Enhance Diversity*, in BEYOND AFFIRMATIVE ACTION 145, 145-59 (R. Kahlenberg ed. 2014).
72. See, e.g., MAKING CARING COMMON, *Turning the Tide: Inspiring Concern for Others and the Common Good Through College Admissions*, HARV. GRAD. SCHL. EDUC. 16 (Jan. 20, 2016), http://mcc.gse.harvard.edu/files/gse-mcc/files/20160120_mcc_ttt_report_interactive.pdf [<http://perma.cc/KRD7-QFCG>].
73. Gerald Fornwald, *Economic Considerations: An Affirmative Action Proposal*, 2 U. ST. THOMAS L.J. 199, 202 (2004) (stating that, among other economic variables, "the poverty density of an applicant's high school must be examined," and suggesting that the precursor program to FRPL be used as a measure).
74. Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1, 8 (2001).

of funding of the applicant's school;⁷⁵ or that they should undo the currently existing preferences for elite prep school students with the same SAT scores as public school students.⁷⁶ Such plans take into account the profound role of K-12 inequality in denying equal educational opportunity to historically underrepresented groups. Some colleges have heeded this call and are already taking certain economic features of an applicant's school into account.⁷⁷ However, these proposals see school profile as part of a laundry list of other items.⁷⁸ As such, school composition becomes "but a factor of a factor of a factor in the holistic-review calculus," to borrow Justice Kennedy's description.⁷⁹ Much of this work has also remained within the framework of "pipeline" or "sponsorship" diversity,⁸⁰ in which colleges promote diversity and equality in higher education by admitting individual students from underrepresented backgrounds.

While such approaches may indeed be constructive, they are also necessarily limited by institutional considerations.⁸¹ Because of their reliance on the pipeline approach, these approaches will be constrained by such factors as administrators' inevitable awareness of commercial college rankings that reflect the test scores of incoming classes (which tend to correlate with parental income), of available financial aid, and of future alumni donor bases, to name just

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75. *Id.* ("Has the applicant attended primary or secondary educational institutions, or institutions of higher learning, whose enrolled students are predominantly students of one race, and whose funding levels, teacher assignments, facilities, extracurricular activities and transportation resources are consistently below the national or regional average?").
76. Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1090 (1996).
77. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2206 (2016). Certain county school districts have also sought to produce integrated schools without relying on race, generally by using neighborhood as a proxy. *See, e.g.*, Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1598-1603 (2013).
78. For example, in the holistic portion of its application program, the University of Texas takes into account the "socioeconomic status of the applicant's school" alongside "leadership experience, extracurricular activities, awards/honors, community service . . . socioeconomic status of the applicant's family . . . the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school, the language spoken at the applicant's home, and, finally, the applicant's race." *Fisher II*, 136 S. Ct. at 2206.
79. *Id.* at 2207 (referring to race, another item on the list, as "but a 'factor of a factor of a factor' in the holistic-review calculus" (quoting *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009))).
80. Guinier, *supra* note 26, at 143-58.
81. *See* Richard Pérez-Peña, *Efforts to Recruit Poor Students Lag at Some Elite Colleges*, N.Y. TIMES (July 30, 2013), <http://www.nytimes.com/2013/07/31/education/elite-colleges-differ-on-how-they-aid-poor.html> [<http://perma.cc/2U5N-ZF5X>].

a few.⁸² These limitations help explain why, despite colleges' commitment to affirmative action programs, socioeconomic diversity at selective schools remains quite low.⁸³ These constraints do not impose an absolute limit, and progress can certainly be made within them,⁸⁴ but they are unlikely to disappear any time soon. The policy proposal in this paper represents a potential new avenue for combating the lack of socioeconomic diversity at colleges and undoing segregation in the educational system as a whole, and doing so *within* existing institutional constraints.⁸⁵ This plan thus operationalizes Guinier's notion of structural mobility, under which "an institution . . . might measure its success, for example, not only by the students it admits but also by the changes it precipitates in educational opportunity at the K-12 level."⁸⁶ In taking a structural approach, this plan is similar to Danielle Allen's suggestions⁸⁷ or to a proposed nationwide Ten Percent plan,⁸⁸ although for reasons that I will discuss below, it is

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82. See SCHULZ & LUCIDO, *supra* note 64, at 4-5, 8-10, 19.
83. See, e.g., Danette Gerald & Kati Haycock, *Engines of Inequality: Diminishing Equity in the Nation's Premier Public Universities*, ED. TRUST 4-7 (2006), <http://edtrust.org/wp-content/uploads/2013/10/EnginesofInequality.pdf> [<http://perma.cc/PXC2-Y3E9>]; Carnevale & Strohl, *supra* note 54, at 73; Wermund, *supra* note 54. See also BURD, *supra* note 54 (describing how college financial aid practices harm and deter low-income students).
84. See Nicholas Hillman, *Economic Diversity Among Selective Colleges: Measuring the Enrollment Impact of "No-Loan" Programs*, INST. FOR HIGHER EDUC. POL'Y 10-11 (2012), http://www.ihep.org/sites/default/files/uploads/docs/pubs/brief_economic_diversity_among_selective_colleges_august_2012.pdf [<http://perma.cc/VR6L-9H AH>] (noting the correlation between test scores and income and that "greater selectivity is associated with less economic diversity"). Though there is considerable debate over how many more students from low-income backgrounds selective colleges could admit without changing their quantitative admissions standards, even the higher estimates remain limited. On the higher end, some researchers have estimated that selective colleges could increase the percentage of students from the bottom family income quartile from 11 percent to 17 percent. See WILLIAM G. BOWEN, MARTIN A. KURZWEIL & EUGENE M. TOBIN, *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION*, 255 (2005). Others offer a more modest appraisal, with a potential increase from 10 percent to 13 percent of students from the bottom two family income quintiles at the most selective colleges without changes in standards. See Gordon C. Winston & Catharine B. Hill, *Access to the Most Selective Private Colleges by High-Ability, Low-Income Students: Are They Out There?*, in *ASPEN SYMPOSIUM 2005: EXPLORING THE FUTURE OF HIGHER EDUCATION* 19.1-19.36 (Maureen E. Devlin ed., 2005), <http://www.educause.edu/ir/library/pdf/ffp06W.pdf> [<http://perma.cc/U8T6-SD3F>].
85. See *infra* text accompanying notes 153-155.
86. Guinier, *supra* note 26, at 160-61.
87. See Allen, *supra* note 71.
88. See Orentlicher, *supra* note 41.

SHIFTING THE SCOPE

likely to be significantly more effective at reversing K-12 segregation nationwide than either of those two options.⁸⁹

C. How This Policy Could Help Combat Re-segregation

1. Because College Admissions Express Norms, It Can Coordinate the Behavior of Otherwise Decentralized Actors

There are several reasons why college admissions would represent a particularly effective point of intervention in reducing educational inequality at the K-12 level nationwide. As noted above, part of what can make segregation so difficult to counteract is that it often takes place in a decentralized manner. College admissions would provide a way to coordinate these disparate actors spread across the country. Harnessing the norm-enunciating dynamic of admissions provides an inexpensive means to have a force-multiplying effect. The structural approach taken here seeks to harness the fact that college admissions serve a powerful role in articulating and expressing norms of educational value, which in turn trickle down and influence the decision-making processes of millions of parents and children.

An example of how this mechanism could work is the Harvard School of Education and the Education Conservancy's joint project, *Turning the Tide*.⁹⁰ Dozens of administrators and admissions officials endorsed the report, which advocates shifting admissions criteria to focus on community values. One example is prioritizing applicants who demonstrate a long-term commitment to community service.⁹¹ The changes in admissions policy recommended in *Turning the Tide* are in themselves laudable, and will presumably result in some shifts in the composition of the student body admitted by the colleges that signed on.⁹² But this was not the sole aim of the plan. Instead, the plan aimed to change pedagogical and educational values among an audience of parents and students across the country to emphasize values of collective responsibility and to reflect contemporary social science research on childhood development.⁹³ The college admissions process, the report notes, "is powerfully positioned to send different messages that help young people become more generous and

89. See *infra* Section III.B.

90. See MAKING CARING COMMON, *supra* note 72, at 3-6.

91. *Id.*

92. This would be the "pipeline" or "sponsored" mobility impact of the program.

93. See MAKING CARING COMMON, *supra* note 72, at 1, 8-9 (describing how the college admissions process "can motivate high school students to contribute to others and their communities in more authentic and meaningful ways that promote in them genuine investment in the collective good and deeper understanding of and respect for others, especially those different from them in background and character").

humane in ways that benefit not only society but students themselves.⁹⁴ By harnessing the norm-enunciating function of admissions as a force multiplier, the report aimed to influence the behavior and beliefs of a nationwide audience. While this approach is promising, the specific changes advocated in the report do little to address systematic racial and socioeconomic inequality head on. What is novel about the proposal advocated in the present paper is that it seeks to activate the admissions dynamic to address systemic inequality directly.

The main insight is not that the socioeconomic profile of an applicant's school is an important measure of the obstacles they have faced—though there is no question that it is. The crux is instead that coordination among a number of institutions to use this *specific* criterion in a highly visible manner has the potential to shift educational practices nationwide. This more structural approach is similar in certain ways to the Texas Ten Percent Plan, in that both seek to design college admissions to shift incentives at the K-12 level to undermine or blunt the force of existing K-12 segregation, in part by dramatically reducing the benefits of sending children to the most affluent and selective K-12 schools.⁹⁵

By their very nature, admissions processes express values and define in-groups. Perhaps nowhere is this truer at the society-wide level than in college admissions. The bundle of traits that colleges look for, beyond simple grades and scores—athletic prowess, prizes, musical ability, adversity overcome, and so on—express a conception of what these institutions understand to be constitutive of an applicant's value. One need only look at the myriad factors institutions claim to take into account, as well as how they describe the process, to reach this conclusion.⁹⁶ Of course, this list of traits is often shaped by institutional objectives as well: for example, recruiting a class that will not break the bank in student aid and that will become an alumni donor base that can be called upon to financially support the school down the road.⁹⁷ And the decisions colleges make about what to value in admissions do not take place in a

94. *Id.* at 1.

95. Guinier, *supra* note 26, at 162-171 (noting, among other things, that prior to the Ten Percent Plan, “ten percent of the state’s high schools—particularly those in the affluent, predominantly white areas of suburban or metropolitan Houston, Austin, and Dallas—had been providing fifty percent to seventy-five percent of the freshman class at UT Austin”).

96. See, e.g., *What We Look For*, HARV. C., <http://college.harvard.edu/admissions/application-process/what-we-look> [<http://perma.cc/5HVA-GR26>] (providing detailed lists of questions under categories such as “growth and potential,” “interests and activities,” “character and personality,” and “contribution to the Harvard community”).

97. See, e.g., BURD, *supra* note 54; SCHULZ & LUCIDO, *supra* note 64, at 2 (“It is apparent many enrollment practices have become more market-driven, oftentimes aiming to secure students who not only fill seats but fulfill myriad institutional goals, predominantly those with prestige and revenue implications.”).

vacuum. Colleges are rewarded for optimizing the classes they recruit in ways that will be recognized by the college ranking metrics.⁹⁸ These metrics would be irrelevant, of course, if parents and applicants did not take them seriously. There is thus a self-reinforcing cycle of communication at work here: colleges express an idea of what makes an applicant valuable; ranking organizations value the colleges based in part on their ability to successfully recruit applicants deemed valuable based on criteria gleaned from widespread admissions practices; and parents and applicants seek out the schools seen as best on these rankings, both for educational purposes and because a student's acceptance at a highly ranked institution will transmit the message that the student has the traits that are considered valuable. It is unsurprising, therefore, that parents and applicants adjust their behavior and make important decisions with an eye to optimizing chances at college acceptance.⁹⁹

As is characteristic of systems with a core expressive component, the message being broadcast is highly legible, public-facing, and presents itself and is understood as coming from a place of expertise.¹⁰⁰ It is legible across the actors most directly involved—colleges, rankings organization, and parents and applicants—as well as wider society—future employers, professional schools, and peers. There is no question that admissions are public and public-facing. And even beyond the modern development of enrollment consultants, it is hard to imagine a more quintessential site of recognized expertise than higher education.

There are two qualifications to emphasize at this juncture. First, there is no question that all three of these groups of actors are, at times, acting strategically or even cynically to optimize their results. While this may be true, it does not

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98. BURD, *supra* note 54; see also Wendy Nelson Espeland & Michael Sander, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 AM. J. SOC. 1, 12-13, 25-27 (2007) (describing a similar dynamic for law schools).
99. Suniya S. Luthar & Bronwyn E. Becker, *Privileged but Pressured? A Study of Affluent Youth*, 73 CHILD DEV. 1593, 1594, 1600-05 (2002) (describing the maladaptive effects of achievement pressures, in which children responding to the “ubiquitous emphasis on ensuring that children ensure admission to stellar colleges” can “come to believe that their parents value them more for what they do than for who they are”); Noelle R. Leonard et al., *A Multi-Method Exploratory Study of Stress, Coping, and Substance Use Among High School Youth in Private Schools*, 6 FRONTIERS. PSYCHOL. 9-11, 13 (July 23, 2015), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4511824/pdf/fpsyg-06-01028.pdf> [<http://perma.cc/T4M3-FVU9>] (describing the internalization of academic expectations focused on college admission, and stating “parental expectations, coupled with the demanding academic curricula offered by the private schools, appear to convey to students that the main purpose of their high school experience is admission to a selective college or university”); see also Espeland & Sander, *supra* note 98.
100. RICHARD M. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 179-81 (2015) (identifying legibility, public-facingness, and assertions of expertise as three basic features of the expressive power of law).

substantially undermine the idea that college admissions is a site of value expression. Social science research has indeed found that affluent parents and applicants are internalizing the values expressed—often with negative consequences.¹⁰¹ Furthermore, work on the concept of performativity can help us understand how, even outside of the question of individual intention, the repetitive performance of norms can be constitutive of identity (and constraining upon it).¹⁰² And indeed, even when certain ends are pursued strategically or cynically, to the extent that the individuals involved feel that they are playing by the rules, they will develop expectations that will inform their sense of what is fair or unfair in admissions.¹⁰³ Second, a longstanding critique argues that the college admissions process actually has little to do with educational merit or value, but is simply a process of credentialing. On this view, behind the façade of education lies a process by which well-to-do families reproduce and entrench cultural capital.¹⁰⁴ For the purposes of this paper, however, there is no need to take a position on the degree to which the system of higher education is about credentialing rather than education. It is possible to profoundly critique the existing system from either position. Both authors who doubt that there is much of a “*there there*” in admissions and those who argue that admissions draw on criteria that provide a relatively accurate proxy for certain forms of future economic productivity can nonetheless find that our current focus on these criteria is a deeply value-laden decision.¹⁰⁵ On either account, value choices are made, expressed loudly, and heard broadly.¹⁰⁶

The expressive nature of college admissions is at the core of this policy proposal. In effect, this program would seek to harness the influence and power of college admissions. By sending a message that promotes school integration and valorizes the pedagogical benefits of diversity at both K-12 and college levels, institutions of higher education could use their substantial influence to reduce educational inequality and produce greater inclusiveness.

101. See *supra* note 99.

102. Cf. JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* 2-3, 15-16, 94-95 (1993).

103. Guinier, *supra* note 26, at 150 (“Contest mobility reinforces the culture of meritocratic entitlement among its primary beneficiaries, upper-middle-class whites, who feel they have played by the rules and therefore deserve to win.”).

104. See, e.g., Pierre Bourdieu, *Cultural Reproduction and Social Reproduction* (1973), 351-68 in *MODERNITY: CULTURAL MODERNITY* (Malcolm Waters, ed., 1999).

105. Compare MARKOVITS, *supra* note 56, with Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968-80, 1003-08 (1996).

106. *Id.*

2. Adopting this Plan Would Help Far More Students Than Just Those Who Were Admitted to Colleges as a Result

The adoption of these admissions standards would have a far wider effect than its influence on the students admitted to colleges through the program. This is because the incentive offered by this program will be felt most strongly by more affluent parents, a group that has played an important role in the re-segregation of American education,¹⁰⁷ which has undone much of the progress of the past sixty years.¹⁰⁸ These parents have an outsized influence on the quality of schools, since they have the greatest ability to exercise “voice” through direct parental engagement, to show “loyalty” through parent organizations that funnel donations to schools,¹⁰⁹ and to deploy “exit” by shopping for school districts (the fact that much public school funding is tied to property taxes gives wealthier families increased importance)¹¹⁰ or lobbying for vouchers to enable them to place their children in private schools.¹¹¹ Their receptivity to this new incentive

107. On how parents seek to avoid schools with significant numbers of low-income students, see Lacireno and Brantley, *supra* note 57, at 12, 14, 18; Roda & Wells, *supra* note 56, at 277. On the role of affluent communities in splitting apart integrated school districts, see, for example, Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139 (2016), and EDBUILD, *supra* note 15.

108. See Section I.A.

109. See, e.g., Dana Goldstein, *PTA Gift for Someone Else’s Child? A Touchy Subject in California*, N.Y. TIMES (Apr. 8, 2017), <http://www.nytimes.com/2017/04/08/us/california-pta-fund-raising-inequality.html> [<http://perma.cc/JAL8-ZHZG>]; Laura McKenna, *How Rich Parents Can Exacerbate School Inequality*, ATLANTIC (Jan. 28, 2016), <http://www.theatlantic.com/education/archive/2016/01/rich-parents-school-inequality/431640> [<http://perma.cc/E776-TFTK>]; Rob Reich, *Not Very Giving*, N.Y. TIMES (Sept. 4, 2013), <http://www.nytimes.com/2013/09/05/opinion/not-very-giving.html> [<http://perma.cc/FSW6-NCRE>]; Jeremy Adam Smith, *How Budget Cuts and PTA Fundraising Undermined Equity in San Francisco Public Schools*, S.F. PUB. PRESS (Feb. 3, 2014), <http://sfpublicpress.org/news/2014-02/how-budget-cuts-and-PTA-fundraising-undermined-equity-in-san-francisco-public-schools> [<http://perma.cc/R8XG-H8VR>]; Catherine Brown, Scott Sargrad & Meg Benner, *Hidden Money: The Outsized Role of Parent Contributions in School Finance*, CTR. AM. PROGRESS 1 (Apr. 2017), <http://cdn.americanprogress.org/content/uploads/2017/04/18074902/ParentFundraising-report-corrected.pdf> [<http://perma.cc/BUB6-UF4L>] (noting that “[w]hile the millions of dollars parents raise is equivalent to less than 1 percent of total school spending, the concentration of these dollars in affluent schools results in considerable advantages for a small portion of already advantaged students”).

110. See, e.g., Holme, *supra* note 43; Siegel-Hawley, *supra* note 46.

111. The exit/voice/loyalty framework was pioneered in ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). For the ability of affluent parents to select and influence schools, see, for example, Harry Brighouse, *Educational Justice and Socio-economic Segregation in Schools*, 41 J. PHIL. ED. 575, 581 (2007), which notes how parents with re-

would come from the same desire currently motivating affluent parents to send their children to segregated schools: securing the educational and status benefits of having their children admitted to selective colleges.

As noted above, such parents may be concerned that sending their children to schools with a significant population of low-income students will harm them academically or hurt their college prospects. The former apprehension is largely empirically incorrect; studies show that middle-class students do not fare worse academically when placed in economically and racially integrated schools.¹¹² The

sources and high levels of education “raise funds through parent associations and private donations” and “are also more likely to vote, organise, and lobby for more public spending.” See also Jonathan Rothwell, *Housing Costs, Zoning, and Access to High-Scoring Schools*, BROOKINGS INST. 14 (April 2012), http://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf [<http://perma.cc/96EL-FAYS>] (“Across the 100 largest metropolitan areas, housing costs an average of 2.4 times as much, or nearly \$11,000 more per year, near a high-scoring public school than near a low-scoring public school.”); Aaron Traister, *American Schools Are Still Segregated*, FUSION (Dec. 29, 2015), <http://fusion.net/story/248866/public-school-segregation-inequality/> [<http://perma.cc/65U4-93QG>].

112. See Aprile D. Benner & Robert Crosnoe, *The Racial/Ethnic Composition of Elementary Schools and Young Children’s Academic and Socioemotional Functioning*, 48 AM. ED. RES. J. 621, 638 (2011) (finding that the academic achievement of white students increased in racially diverse schools, as well as noting various benefits in socioemotional functioning); Shelly Brown-Jeffy, *The Race Gap in High School Reading Achievement: Why School Racial Composition Still Matters*, 13 RACE, GENDER & CLASS 268, 290 (2006); Kahlenberg, *supra* note 15, at 1554 (describing how in the case of socioeconomic integration in one county, “there is no evidence that [middle class students] are being harmed academically by economic mixing”); Halley Potter & Kimberly Quick, *The Secret to School Integration*, N. Y. TIMES (Feb. 23, 2016), <http://www.nytimes.com/2016/02/23/opinion/the-secret-to-school-integration.html> [<http://perma.cc/HL94-FUPG>] (listing various instances of more integrated school districts being dismantled and stating that “[l]ow-income students’ achievement improves in integrated schools, and contrary to many parental concerns, middle-class students’ achievement does not suffer”); Roslyn Arlin Mickelson, *School Integration and K-12 Outcomes: An Updated Quick Synthesis of the Social Science Evidence*, NAT’L COAL. ON SCHL. DIVERSITY 2 (2016), <http://www.school-diversity.org/pdf/DiversityResearchBriefNo5.pdf> [<http://perma.cc/XJU6-LJQZ>] (“Students from all racial and SES backgrounds benefit from diverse schools. Middle class white youths experience benefits from diversity as well, although low-income and disadvantaged minority youth gain the most.”); Wells, *supra* note 15 at 12 (“Attending racially diverse schools is beneficial to all students and is associated with smaller test score gaps between students of different racial backgrounds, not because white student achievement declined, but rather that black and/or Hispanic student achievement increased.”); see also Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality of Adult Attainments* (Nat’l Bureau of Econ. Research, Working Paper No. 16664, 2015) <http://www.nber.org/papers/w16664.pdf> [<http://perma.cc/983J-8FNL>] (reporting positive long term effects for black students who attended integrated schools “sig-

latter, however, may be partly true, in that integrated schools may not always offer the prestigious name or the networking opportunities of affluent schools, or even the resources of middle-class schools.¹¹³ An admissions bonus could help counterbalance this. The program advocated in this Note would allow middle-class parents to learn firsthand that their children will benefit, not suffer, academically from attending an integrated school, and could substantially reduce the other college admissions advantages of attending a school whose attendees are uniformly from more affluent class families. Other concerns that more affluent parents might have, such as the social environment of schools with a substantial number of low-income students, are also belied by research showing that students who attended integrated schools report, among other benefits, improved intergroup understanding, tolerance, and ability to make friends.¹¹⁴

There are three principal avenues through which this incentive could curb re-segregation: encouraging affluent public and private schools towards greater socioeconomic integration, strengthening integrated public schools currently at risk of being broken up, and attracting affluent students to public and private schools currently enrolling a majority of non-affluent students.

Private and public schools currently enrolling primarily students whose backgrounds are middle-class and above would have an incentive to include more students from low-income backgrounds. Private schools would have an incentive to recruit more students from low-income families, and the local governments determining the district boundaries of public schools would have an interest in creating districts that included sizeable low-income populations alongside higher-income populations, the exact opposite of the current situation. The benefits of this would lie in the increased intergroup contact of both affluent and low-income students who would otherwise have been educated

nificantly increased both educational and occupational attainments, college quality and adult earnings, reduced the probability of incarceration, and improved adult health status” while “desegregation had no effects on whites across each of these outcomes.”).

113. See Orfield, *E Pluribus*, *supra* note 1, at 7-8; see also Sandra Black, Laura Giuliano & Ayushi Narayan, *Civil Rights Data Show More Work is Needed to Reduce Inequities in K-12 Schools*, OBAMA WHITE HOUSE ARCHIVES (Dec. 9, 2016), <http://obamawhitehouse.archives.gov/blog/2016/12/08/civil-rights-data-show-more-work-needed-reduce-inequities-k-12-schools> [<http://perma.cc/ZB3Y-BSDW>] (From 2013-14, minority students were 20 to 40 percent more likely than white students to be “one of the 1.6 million students who attend a school where there is a school law enforcement officer but no guidance counselor.”); *Key Data Highlights on Equity And Opportunity Gaps in Our Nation’s Public Schools*, U.S. DEP’T EDUC. OFF. FOR C.R. (2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [<http://perma.cc/EVJ9-Y66E>].
114. See, e.g., Orfield, *E Pluribus*, *supra* note 1, at 9; see also *infra* Section II.b for a more detailed discussion of the social benefits of receiving an education in a more diverse environment.

separately,¹¹⁵ as well as the wider benefit of increasing the number of low-income students who would gain access to the educational resources of more affluent schools.

A second place where the incentive of this program could play a role would be in protecting currently integrated school districts from being broken up. Certain districts that have been integrated are now being fractured through a process known as “secession.”¹¹⁶ In this process, predominantly affluent, white communities seek to break apart racially and economically integrated school districts to form smaller, breakaway schools districts that are more economically and racially homogenous. A recent report identified 71 such attempted secessions since 2000.¹¹⁷ The segregating results of these secessions can be striking. For example, in 2014, six school districts, predominantly white and affluent, broke off from the larger Shelby County School District, which includes Memphis, Tennessee.¹¹⁸ While initial attempts to secede had been blocked by a federal judge, successful lobbying of the state legislature resulted in a law making it far easier for these areas to secede.¹¹⁹ The breakaway school districts “have an average student poverty rate of 11%, lower than that of Beverly Hills.”¹²⁰ In contrast “one-third of the students in the shrunken Shelby County district live below the poverty line—a rate higher even than that of Compton, California.”¹²¹ The results for the Shelby County schools of losing the more affluent students (and the corresponding tax base) were disastrous: budget cuts of 20 percent, the closure of seven Memphis-area schools in 2014–15, and the laying off of almost 500 teachers in 2015 and 2016.¹²² Indeed, the fact that districts are often tied to tax revenue¹²³ is another reason why it is particularly important to prevent integrated districts from being broken apart, and to incentivize the creation of integrated districts.

The predominantly white and affluent communities that undertake these secessions are motivated by a number of factors, both financial and academic, which include a desire to improve their children’s chances of being accepted to a good college.¹²⁴ By offering a benefit to such parents for continuing to send

115. See *infra* notes 165–190 and accompanying text.

116. Wilson, *supra* note 107, at 164–75; EDBUILD, *supra* note 15, at 3–8.

117. EDBUILD, *supra* note 15, at 3–8.

118. *Id.* at 9–10.

119. *Id.*

120. *Id.* at 9.

121. *Id.*

122. *Id.* at 10.

123. See, e.g., Holme, *supra* note 43, at 6.

124. Potter & Quick, *supra* note 112; Kyle Spencer, *The Uncomfortable Reality of Community Schools*, PUB. BROAD. SERV. (July 15, 2014), <http://www.pbs.org/wgbh/frontline/article/the-uncomfortable-reality-of-community-schools/>

their children to integrated schools, this program could help slow the pace of this form of re-segregation.

Third, this policy would provide an incentive to parents with the ability to pick schools to send their children to schools with more low-income students. It is not always easy to discern with precision what mix of factors parents actually use to choose schools. Outside of instances of direct school choice, it may be difficult to pinpoint which decisions (such as neighborhood choice) were made for what reasons. And even when there are specific choice points between schools, there can be a distance between parents' stated preferences and the preferences revealed by their actual choices.¹²⁵ For example, while some white affluent parents claim that they value sending their children to a racially diverse school, their actions often seem to point in the opposite direction.¹²⁶ Nonetheless, it is clear that eligibility for future college admissions has a heavy influence on both affluent parents and students in secondary education.¹²⁷

There is also evidence that parents with the resources to choose are responsive to incentives to send their children to integrated schools—as long as they think there is something in it for their kids. For example, in response to a 1996 Connecticut Supreme Court decision mandating desegregation,¹²⁸ Hartford created a system of magnet schools under which at least 47.5% of students must be enrolled in schools that have under 75% minority enrollment.¹²⁹ These magnet schools, which boast impressive facilities, have been relatively successful at both creating desegregated schools by attracting white and Asian students (from 2007 to 2013, the percentage of Hartford students attending racially integrated schools rose from 11% to 42%), and at producing far more equal educational outcomes (the magnet schools “show very high levels of achievement and virtually no achievement gap by race” between Latinx and white students in several

[<http://perma.cc/NE5P-FX7N>] (“A lot of what is motivating these middle-class families is economic stress,” says Amy Stuart Wells, a professor of sociology and education at Columbia University’s Teachers College.”).

125. Roda & Wells, *supra* note 56, at 277-84 (“Therefore, as this and many other parents said, they would prefer a more ‘diverse’ school (e.g., not all white or all black/Latino students), but when it came time to choose, they chose schools/programs that were disproportionately white and higher income.”); Lacireno-Paquet & Charleen Brantley, *supra* note 57, at 18.
126. Roda & Wells, *supra* note 56, at 277-84.
127. *See supra* note 102.
128. *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996).
129. *See* Kimberly Quick, *Hartford Public Schools: Striving for Equity through Interdistrict Programs*, CENTURY FOUND. 38-39 (Oct. 14, 2016), <http://tcf.org/content/report/hartford-public-schools/> [<http://perma.cc/9J7T-4P95>]; Gary Orfield & Jongyeon Ee, *Connecticut School Integration: Moving Forward as the Northeast Retreats*, UCLA C.R. PROJECT/PROYECTO DERS. CIVILES 11-19 (Apr. 2015), <http://cca-ct.org/wp-content/uploads/2015/04/Civil-Rights-Project-Rpt-Sheff-April-2015.pdf> [<http://perma.cc/5EQT-XBWP>].

subjects and grade levels).¹³⁰ While the Hartford plan targeted racial segregation, it has also had the effect of creating schools that are more integrated by income and that produce significantly better results for low-income students.¹³¹ And lastly, studies of students in these integrated schools found significant improvements in intergroup attitudes.¹³²

While the Hartford system still faces challenges,¹³³ the success of its voluntary desegregation plan at inducing more affluent white and Asian families to send their children to these magnet schools provides encouraging evidence that substantial numbers of such families are indeed willing to choose racially and socioeconomically integrated schools for their children—given the right incentives.

There is also evidence that when it might improve their children's chances of college admission, more affluent parents are sometimes willing to send their kids to integrated schools with *aggregate* student academic performance levels lower than more affluent non-integrated schools. For example, studies of the Texas Ten Percent Plan have found that some more affluent parents have been willing to send their children to lower-performing school districts in exchange for improving their chances at college admission.¹³⁴ Looking to other school systems also indicates that there are indeed middle-class-and-up parents who value educational diversity and are willing to place their children in economically and

130. Orfield & Ee, *supra* note 129, at 16.

131. Orfield & Ee, *supra* note 129, at 7, 16.

132. Genevieve Siegel-Hawley & Erica Frankenberg, *Magnet School Student Outcomes: What the Research Says*, NAT'L COAL. ON SCHL. DIVERSITY 2-3 (Oct. 2011), <http://school-diversity.org/pdf/DiversityResearchBriefNo6.pdf> [<http://perma.cc/9KKY-79VR>] (finding that “[m]inority students in magnet city schools reported feeling significantly closer to whites and were more likely to have multiple white friends than minorities in non-magnet city schools” and “[w]hite magnet students felt more connected to minority students and were more likely to report multiple minority friends than white students from the non-magnet suburban schools”).

133. Even some strong supporters of the Hartford plan recognize that it is not a total solution. Orfield & Ee, *supra* note 129, at 6. And certain features of Hartford's plan, particularly the fact that it has led to the integration of these magnet schools but not of neighborhood schools, are indeed shortcomings. See Vanessa de la Torre, *Left Behind: 20 Years After Sheff v. O'Neill, Students Struggle in Hartford's Segregated Neighborhood Schools*, HARTFORD COURANT (Mar. 12, 2017), <http://www.courant.com/education/hc-sheff-left-behind-day-1-20170319-story.html> [<http://perma.cc/4DUF-J5VG>].

134. See Julie B. Cullen, Mark C. Long & Randall Reback, *Jockeying for Position: Strategic High School Choice Under Texas' Top-Ten Percent Plan*, 97 J. PUB. ECON. 32, 44 (2013) (finding “meaningful evidence” that “[s]tudents with varied chances of placing in the top ten percent at nearby high schools tend to ‘downgrade’ in peer quality by attending high schools with lower initial top ten percent thresholds”); see also Kalena E. Cortes & Andrew I. Friedson, *Ranking Up By Moving Out: The Effect of the Texas Top 10% Plan on Property Values*, 67 NAT'L TAX J. 51 (2014).

racially integrated schools, despite the fact that such schools may have relatively fewer resources.¹³⁵

Promoting integration through the use of an incentive not only provides a means to coordinate otherwise decentralized actors, but may also help improve buy-in from more affluent parents. An architect of Hartford's integrated magnet schools, John Brittain, recognized that successful integration would require that white families "want to integrate."¹³⁶ Indeed, without such buy-in from these parents, initiatives like school lotteries that are designed to increase equality can be undermined as prosperous parents use their resources to find ways to game the system.¹³⁷ Shifting incentives so that such parents are more likely to view the presence of low-income students as a benefit, rather than something to be avoided, would help counteract this problem. This is particularly important given the evidence that parents are quite conscious of school demographics, both in terms of race and socioeconomic status, when choosing schools for their children.¹³⁸ Furthermore, this program could act upon affluent parents' sensitivity to social status in school selection¹³⁹ by offering to help their child gain admission to a selective college. There is also evidence from some case studies to indicate that integration plans that incorporate a degree of choice can be effective at winning over support over time, even among communities whose more affluent members had previously massively opposed compelled integration.¹⁴⁰

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135. See Roda & Wells, *supra* note 56, at 283 (describing such parents in New York City); Paul Tractenberg, Allison Roda & Ryan Coughlan, *Remediating School Segregation: How New Jersey's Morris School District Chose to Make Diversity Work*, CENTURY FOUND. 24-26 (Dec. 12, 2016), <http://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2016/12/12191925/Remediating-School-Segregation.pdf> [<http://perma.cc/ST5W-SEGE>] (describing such parents in New Jersey).
136. This American Life, *The Problem We All Live With - Part Two*, CHI. PUB. RADIO (Aug. 7, 2015), <http://www.thisamericanlife.org/radio-archives/episode/563/the-problem-we-all-live-with-part-two> [<http://perma.cc/V8VH-UTBK>].
137. Roda & Wells, *supra* note 56, at 282; Smith, *supra* note 109 ("The district's 'lottery' system is supposed to keep schools racially and economically diverse by giving preference to students from disadvantaged backgrounds and neighborhoods when assigning spots. But data suggest it has largely failed at that task, perhaps since affluent parents have had the time and skills to game the system, and tend to cluster in certain schools.").
138. Lacireno-Paquet & Brantley, *supra* note 57, at 11-14 (indicating that in some school choice situations, parents appear to place a higher value on demographics than academics and that "[d]emographic information about schools appears to be a key factor parents consider in a variety of choice settings, even when other information directly related to academics is available.").
139. Holme, *supra* note 43.
140. See Gary Orfield & Erica Frankenberg, *Experiencing Integration in Louisville: How Parents and Students See the Gains and Challenges*, UCLA C.R. PROJECT/PROYECTO

The creation of the incentives outlined in this Note would also help reinforce existing integration efforts. A growing number of school districts and charter schools across the country are currently working to promote integration in their student bodies through the use of markers of socioeconomic status.¹⁴¹ This “new wave” of integration is under way in places as different as New York City¹⁴² and Eden Prairie, Minnesota.¹⁴³ As of 2016, such efforts reached districts accounting for some four million students.¹⁴⁴ This proposal would serve to multiply these efforts, providing advocates for integration with another argument and parents who are on the fence with another nudge.

The incentives of this program could thus meaningfully shift behavior in favor of integration. In addition to the scenarios above, this program could provide a boost to any efforts underway at the local, state, or federal level to promote integration, and will help push back against efforts at any of those levels to re-segregate. There are several paths to affluent parents sending their children to SES-integrated schools, without making many of the sacrifices that they imagine would ensue. It may take a long time (if ever), however, to win this battle against “commonsense” notions at the level of ideas alone. Parents who

DERS. CIVILES 10, 22-24, 28-29 (Jan. 2011), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/experiencing-integration-in-louisville-how-parents-and-students-see-the-gains-and-challenges/LOUISVILLE_finalV3_12711.pdf [<http://perma.cc/VCW2-FBH3>] (noting the significant support among Louisville parents for integrated schools in general and satisfaction with the outcomes for their own children, and majority support for the district’s specific integration plan and its implementation); Kimberly Quick & Rebecca Damante, *Louisville, Kentucky: A Reflection on School Integration*, CENTURY FOUND. 2, 4-11 (Sept. 15, 2016), <http://tcf.org/content/report/louisville-kentucky-reflection-school-integration> [<http://perma.cc/F5YC-BHFF>] (noting a considerable shift in attitudes from massive opposition to busing in suburban communities to widespread support for diverse schools and “one of the most integrated districts in the nation”); see also Richard D. Kahlenberg, *School Integration in Practice: Lessons from Nine Districts*, THE CENTURY FOUND. 5 (Oct. 14, 2016), <http://tcf.org/content/report/school-integration-practice-lessons-nine-districts> [<http://perma.cc/VXM9-ULQ6>] (discussing the question of building community support more generally).

141. See Halley Potter, Kimberly Quick & Elizabeth Davies, *A New Wave of School Integration*, CENTURY FOUND. (Feb. 9, 2016), http://tcf.org/assets/downloads/ANewWave_Potter.pdf [<http://perma.cc/JMS5-6AXV>].
142. See Suchi Saxena, *New York City Public Schools: Small Steps in the Biggest District*, CENTURY FOUND. (Oct. 14, 2016), <http://tcf.org/content/report/new-york-city-public-schools> [<http://perma.cc/8KYA-JB4>].
143. Kim Bridges, *Eden Prairie Public Schools: Adapting to Demographic Change in the Suburbs*, CENTURY FOUND. (Oct. 14, 2016), <http://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2016/10/13201138/EdenPrairiePublicSchools.pdf> [<http://perma.cc/DYV7-QPXB>].
144. See Potter, Quick & Davies, *supra* note 141, at 8.

might have been willing to pay a premium for private school on the theory that it would help their children in college admissions might now be willing to send their children to the nearby public school instead. The success of integration programs like those in Hartford demonstrates that while not all white and Asian middle- and high-income parents are willing to send their children to schools with substantial numbers of black and Latinx low-income students, enough families *are* willing to do so—again, when they perceive it to be in their interest—to increase the degree of racial and economic integration. By providing incentives to integrate, this program would accelerate the pace of current efforts and give rise to new ones.

This program is not proposed, and should not be seen, as a replacement for other race- and class-conscious affirmative action programs. Efforts by colleges to increase the number of their students who are Pell grant-eligible, for example, are an essential part of increasing diversity on campus and reducing inequality in society. Yet insofar as there are institutional constraints on such pipeline programs, however, it is unlikely that many competitive colleges will admit classes of majority Pell-eligible students for the foreseeable future. This program offers a potential pathway both to increasing diversity and to reducing inequality, within known constraints and within a reasonable time frame. Over time, increased integration in K-12 schools will result in shifts in the socioeconomic makeup of the student bodies admitted by these colleges. But this program could have real benefits even if there was little to no such change in the short term.

Take the example of a hypothetical student, David. David is the son of two affluent professionals living in Connecticut. In Scenario 1, David's parents believe that the best way to ensure he will be admitted to an Ivy League college is to send him to a nearby private prep school, Prep Academy (PA), where they will pay \$40,000 a year in tuition. PA is a prestigious, though not top-tier, prep school, with a good teacher-to-student ratio and a forty-acre campus. The school's student population is twenty percent students of color, but only 3.8 percent are FRPL-eligible.¹⁴⁵ David thrives academically and is admitted to his first choice, Yale. In Scenario 2, David's parents hear¹⁴⁶ that the nearby city's

145. This school's profile is modeled after Greens Farms Academy in Connecticut. For the racial and ethnic diversity composition of the school, see *Student Life: Diversity*, GREENS FARMS ACAD., <http://www.gfacademy.org/page.cfm?p=580> [<http://perma.cc/DUA3-4RBE>]. For tuition costs for school year 2017-18, see *Admission: Affording GFA*, GREENS FARMS ACAD., <http://www.gfacademy.org/page.cfm?p=574> [<http://perma.cc/U3NU-L7QQ>]. For FRPL eligibility, *Connecticut Schools Participating in The National School Lunch Program*, CONN. STATE DEP'T EDUC. 18 (Oct. 2008), http://www.sde.ct.gov/sde/lib/sde/pdf/rfp/rfp978_oct08_fr_eligibility_percentages.pdf [<http://perma.cc/KS5W-SJXG>].

146. Social networks are often the primary means by which parents learn about schools. See Roda & Wells, *supra* note 56, at 279-81.

magnet school, Achievement Magnet (AM),¹⁴⁷ offers high-quality facilities and education in an integrated environment. Lifelong Democrats, they like the idea of integration (and of not paying \$40,000 a year), but are worried that by sending David to AM instead of PA, they would reduce his chance to get into the college of his choice. AM has a slightly worse student-to-teacher ratio than PA and doesn't have the same longstanding prestigious reputation as PA.

On their visit to the magnet school, after the admissions officer has shown them the planetarium, she asks David's parents what his first-choice college is. When they tell her Yale, she informs them that since AM has a student body that is majority FRPL-eligible, David will get an automatic boost on his Yale application. David attends AM, thrives academically, and is admitted to Yale. In both scenarios, Yale admits David (as well as many other students of similar backgrounds). However, the David in Scenario 2 has had significant experience interacting with others from different racial and class backgrounds. In classrooms and on campus, he will be more likely to seek out and feel comfortable in interactions with students from different backgrounds from his own.¹⁴⁸ In addition, the energy, resources, and effort David's parents put into ensuring that he gets a quality education will flow to and through AM rather than PA. Studies suggest that the presence of students like David will also improve the academic outcomes of students around him at AM, far more than they would have at PA.¹⁴⁹ Maintaining a sufficient number of students like David may also be a quid pro quo for maintaining certain levels of public funding to the magnet school. Finally, as more parents make decisions like David's, other parents learn of this pathway to success.¹⁵⁰ As a result, even Prep Academy will have an incentive to admit a larger number of low-income students.¹⁵¹

147. This school's profile is modeled after Mary Hooker Environmental Sciences Magnet in Hartford. For FRPL eligibility, see *Connecticut Schools Participating in the National School Lunch Program*, *supra* note 145, at 7.

148. See *infra* Section II.B.

149. Wells et al., *supra* note 15.

150. See *supra* note 146 and accompanying text.

151. To the extent that some private schools did so, this would have an important benefit for the low-income students who were admitted as a result, as well as offering the benefits of a socioeconomically diverse education to the other students at such schools. Yet given how few low-income students attend schools like Prep Academy, it may be that among the more expensive private schools, only those with the largest endowments would be in a financial position to admit sufficient numbers of low-income students to qualify for the admissions bonus. From the perspective of educational equality, this would not necessarily be a bad thing, as it would reduce the competitive advantage that affluent parents could gain by placing their children in elite K-12 schools with few low-income students. Making such schools less attractive unless they admitted sizeable numbers of low-income students would on the whole be a step in the right direction, as it would reduce the benefits of socioeconomic segregation.

This hypothetical illustrates how this policy could benefit considerably more students beyond the individual who was initially affected, that is, David. Indeed, those other students are the intended primary beneficiaries of this policy.¹⁵² In both scenarios, David ends up at Yale, but it is only in the latter that his attendance of a socioeconomically integrated school has substantial collateral benefits for a far greater number of low-income students than just himself.¹⁵³ This is part of why a plan whose effects could be so wide-ranging remains within the realm of feasibility for institutions concerned about prestige and revenue. At the extreme, even after adopting such a policy, Yale could continue to admit roughly seventy percent of its students from families in the top twenty percent of family income¹⁵⁴—though this would certainly be problematic in itself from the perspective of increasing equality in higher education—and yet still make a substantial contribution to reducing educational inequality at the K-12 level by having channeled those students into K-12 schools with significant numbers of low-income students.

The fact that this policy could operate within existing institutional constraints is part of what would make this plan palatable to status- and revenue-conscious colleges, but it also brings out one potential concern about this program. Particularly in the short term, such a policy could end up favoring middle-class white students from underrepresented schools over low-income or historically underrepresented students from those same institutions. Over time, however, increasingly integrated K-12 schools will tend to produce more equal outcomes than if they had remained segregated. Nonetheless, this risk highlights the importance of ensuring that this program is a complement to, rather than a replacement for, existing forms of racial and socioeconomic affirmative action. Preserving existing programs can help lessen this short-term effect. However, to the extent that income and race will continue to correlate with some of the quantitative measures of merit employment by colleges, the full positive potential of this plan will be to some extent blunted by those admissions criteria. This is indeed a drawback in terms of promoting equality, though

152. See Mickelson, *supra* note 112.

153. See *supra* note 15. I refer to low-income students as the primary beneficiaries, since in both scenarios David attends a highly selective college (his chances of admission relative to low-income applicants could remain the same in scenarios 1 and 2, but in scenario 2 he would have improved chances relative to affluent applicants who did not attend class-integrated schools), whereas it is only in Scenario 2 that a larger number of low-income students benefit from David and his parent's resources and efforts being channeled through an integrated school.

154. The Upshot, *Economic Diversity and Student Outcomes at Yale University*, N.Y. TIMES, <http://www.nytimes.com/interactive/projects/college-mobility/yale-university> [<http://perma.cc/M9LU-HJJL>].

it is worth noting that this drawback remains true of virtually all sponsored mobility and especially contest mobility programs.¹⁵⁵

Another critique that might be leveled at this program is that it involves large private and public institutions trying to change the behavior of millions of private actors to fit the values of these institutions. Such a program could be accused of “social engineering,” a criticism often leveled against affirmative action programs in general. Though it is reasonable to be concerned about colleges seeking to impose their values on society, this critique would seem to miss the fact that colleges are already very much doing so. The criteria that colleges select for in their admissions programs reflect what they consider to be a “good applicant.”¹⁵⁶ These are not value-neutral determinations,¹⁵⁷ and more importantly, they have the effect of articulating norms about what is “good” and “desirable” that are to a certain extent internalized by parents and students across the country. In this sense, colleges already engage in “social engineering.” Indeed, any large-scale education project will necessarily embody a vision of what kind of society it seeks to produce. Accusations of “social engineering” should be properly understood as concerned with the values pursued, not the mechanism itself. The question, therefore, is not whether higher education should promote values and thus incentives that will shape the larger educational system, but rather whether those values should be shifted in order to combat, rather than promote, racial and economic inequality.

Another concern is that such a program could have the unintended effect of resulting in the depopulation of poorer schools. If enough wealthier schools began admitting historically unrepresented students, then poorer schools might gradually lose students, and thus funding. The students remaining would perhaps be worse off still.¹⁵⁸ There are a few reasons to think that this would not be a necessary consequence of the program. First, since the withdrawal of both students and funding is the direct result of the district secession process described above,¹⁵⁹ to the extent that this policy would help counteract secession, it would help avoid the defunding and depopulation of K-12 schools with significant numbers of low-income students. Second, unless wealthier schools were to increase their size substantially, bringing substantially larger numbers of historically underrepresented students into wealthier schools would also have

155. Guinier, *supra* note 26, at 169 (noting how the Texas Ten Percent plan’s limitations are the same as those of sponsorship mobility programs).

156. See, e.g., Guinier, *supra* note 26, at 125-36.

157. *Id.*

158. There are analogous critiques of the desegregation program in Hartford and its effect on neighborhood schools. See de la Torre, *supra* note 133. In Hartford, however, this is partly the result of certain idiosyncrasies of the program—such as the “glass half full” approach that focuses on slightly under fifty percent of schools and the emphasis on magnets—that would not apply to a bonus that applied to *all* schools with over a certain level of low-income students.

159. See *supra* notes 116-124 and accompanying text.

the effect of distributing both higher-income and historically underrepresented students more evenly across a relatively stable number of slots in various schools (which would be limited by constraints on facilities, classroom size concerns, geography, etc.). Thus, if a community had two schools, one with a historically low-income student body (School A) and one with a historically high-income student body (School B), if 50 students from historically underrepresented backgrounds were recruited by School B, a roughly similar number of higher-income students might end up being displaced to School A. This would also be true if integration were achieved by redrawing school district lines.¹⁶⁰ There is no doubt that in this process, the students displaced (and their parents) might feel resentful of the process. However, this would be true of any program that sought to desegregate by more equitably distributing educational resources, which would inevitably mean dismantling certain relative privileges.

II. WHY SUCH A POLICY WOULD BE FEASIBLE FOR COLLEGES

As noted above, this policy would be feasible for colleges in part because it could operate within existing institutional constraints. Colleges would stand to gain on several fronts. First, many colleges understand (and present) themselves as bearing important responsibilities to the public and society at large. Adopting this policy would help colleges fulfill this mission by working to reduce educational inequality nationwide. Second, by increasing the number of students who attend integrated K-12 schools, adopting this policy could help promote inclusion on college campuses and better prepare students for leadership in an increasingly diverse society, goals that colleges have long recognized as central to their educational missions.

A. *By Adopting this Policy, Colleges Could Live Up to Their Social Responsibilities and Play a Positive Role in Reducing Educational Inequality Nationwide*

By rewarding middle- and high-income parents for sending their children to schools with greater numbers of low-income students, colleges can help promote K-12 integration nationwide. This would have significant educational benefits across society by affording a better education to more low-income students and exposing an even greater number of students to intergroup contact across class lines.¹⁶¹ Over the medium term, these benefits would be reaped indi-

160. See Bridges, *supra* note 143, at 34-36.

161. See, e.g., Orfield et al., *E Pluribus*, *supra* note 1, at 9-10 (summarizing consensus of research on desegregation indicating bias reductions, greater facility at intergroup communication, increased academic achievement for minority students without a corresponding decrease for white students, as well as long-term and even intergenerational effects); Wells et al., *supra* note 15, at 8-15 (summarizing research on the benefits for all students, including the cognitive benefits of attending SES-integrated schools, which include improved critical thinking and problem solving,

rectly by colleges once again, since both a larger total number of applicants will have received the benefits of an integrated K-12 education and a larger number of students from disadvantaged backgrounds will have become more competitive applicants on traditional metrics after attending schools with a higher proportion of middle-class-and-up students. Even beyond these second-order benefits, however, colleges should promote K-12 integration as part of their broader social responsibilities.

Higher education occupies a special place in our society, and this is reflected by how our society, government, and laws treat colleges. Part of this is that such institutions are seen as serving a significant and valuable public role. It is also a core part of their self-conception, as is reflected in the (admittedly generic) language of their mission statements.¹⁶² But mission statements aside, in truth many college presidents do express a broader educational responsibility that extends outside the walls of their individual institutions.¹⁶³ The fact that their public mission is not their only one, and the imperfect ways in which they serve it is, of course, becoming increasingly visible. Colleges have faced increased criticism for their role in reproducing economic inequality, primarily for rising tuition and admissions criteria that heavily privilege children from affluent and well-educated families.¹⁶⁴ Adopting this policy would help them meaningfully respond to these critiques.

and the social benefits, which include reduced implicit bias and increased comfort with intergroup contact, as well as the importance of school integration for reducing socioeconomic educational inequality).

162. In their mission statements, many colleges state that they see their role as serving the public interest quite broadly defined. *See, e.g., Brown's Mission*, BROWN U., <http://www.brown.edu/about/mission> [<http://perma.cc/5JZT-B948>] (“The mission of Brown University is to serve the community, the nation, and the world.”); *Mission and Integrity*, U. MICH., <http://www.accreditation.umich.edu/mission/> [<http://perma.cc/MJF2-SSLZ>] (“The mission of the University of Michigan is to serve the people of Michigan and the world.”); *see also In Service of Humanity*, PRINCETON U., <http://www.princeton.edu/meet-princeton/service-humanity> [<http://perma.cc/ADZ5-CWBM>] (quoting the President of Princeton University Christopher Eisgruber that Princeton’s “informal motto” is “Princeton in the nation’s service and the service of humanity”); *Mission & Values*, U. TEX., <http://www.utexas.edu/about/mission-and-values> [<http://perma.cc/7U3G-ZSVM>] (“The university preserves and promotes the arts, benefits the state’s economy, serves the citizens through public programs and provides other public service.”).
163. EDUC. CONSERVANCY, *supra* note 64, at 4-7 (detailing the tension many college presidents feel between pursuing competition between institutions and their educational mission).
164. *See, e.g., BURD, supra* note 54, at 7, 34 (summarizing for both private and public colleges how merit-based aid practices are reducing accessibility for low-income students); Brown-Nagin, *supra* note 6, at 468-72 (describing both the financial and sociocultural impediments to college admissions for poorer students); Carnevale & Strohl, *supra* note 54, at 94-95 (describing how certain metrics of academic achievement correlate with income); Zachary Goldfarb, *These Four Charts Show*

B. *This Policy Would Help Promote Inclusion on Campus and Would Better Prepare Students for Future Leadership*

In addition to helping colleges fulfill their broader social commitments, there are two further ways that colleges would stand to benefit in the short-term from adopting this program. First, students admitted in part because of this bonus will have benefitted from an integrated education, which will, among other things, help contribute to greater inclusion on campus. Second, the policy should result in a student body better prepared to fill a growing number of leadership positions that require experience interacting with individuals from diverse backgrounds. Both of these are concrete benefits colleges have long sought to pursue. And both were recognized by the Supreme Court's decision in *Fisher II* as values central to the educational mission of these institutions.

The concept of "critical mass," which has played a central role in litigation over affirmative action,¹⁶⁵ is predicated on a recognition of the importance of inclusion beyond just numerical diversity. Promoting diversity on college campuses is not limited to the quantifiable diversity of the student body; it is integral that this diversity exist within an environment of inclusion. The importance of focusing on inclusion, and the progress that remains to be made, has emerged with renewed urgency in the wake of protests by students of color on college campuses across the country. Institutions have responded with a variety of plans, which include steps like increasing faculty diversity and providing more funding to cultural centers.¹⁶⁶ At the level of admissions, however, inclusion is mostly fostered by some variant on the quantitative notion of a "critical mass." This is unlikely to be sufficient in itself. Given the existing economic seg-

How the SAT Favors Rich, Educated Families, WASH. POST (Mar. 5, 2014), <http://www.washingtonpost.com/news/wonk/wp/2014/03/05/these-four-charts-show-how-the-sat-favors-the-rich-educated-families> [<http://perma.cc/K52R-X5WN>]; Evan J. Mandery, Opinion, *End College Legacy Preferences*, N.Y. TIMES (Apr. 24, 2014), <http://www.nytimes.com/2014/04/25/opinion/end-college-legacy-preferences.html> [<http://perma.cc/X8UJ-CVYX>] (describing the unequal effects of legacy in college admissions); Josh Zumbrun, *SAT Scores and Income Inequality: How Wealthier Kids Rank Higher*, WALL ST. J.: REAL TIME ECON. (Oct. 7, 2014), <http://blogs.wsj.com/economics/2014/10/07/sat-scores-and-income-inequality-how-wealthier-kids-rank-higher> [<http://perma.cc/8MJ9-KJ25>].

165. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2210-13 (2016); *Grutter v. Bollinger*, 539 U.S. 306, 335-41 (2003).

166. See *Pathways to Diversity and Inclusion: An Action Plan for Brown University*, BROWN U. (Feb. 1, 2016), <http://brown.edu/web/documents/diversity/actionplan/diap-full.pdf> [<http://perma.cc/3XHR-DJ48>]; *Yale Launches Five-Year, \$50 Million Initiative to Increase Faculty Diversity*, YALENEWS (Nov. 3, 2015), <http://news.yale.edu/2015/11/03/yale-launches-five-year-50-million-initiative-increase-faculty-diversity> [<http://perma.cc/S5TD-YFSH>].

regation of K-12 schools in this country,¹⁶⁷ so long as colleges continue to admit primarily applicants from middle- and high-income backgrounds,¹⁶⁸ their campuses will be populated with a majority of students who spent their K-12 years in schools with few low-income students, and a minority of students who spent their K-12 years in schools with predominantly low-income students. This will tend to lead to greater social distance between these two groups of students, to the detriment of inclusion.¹⁶⁹ In contrast, this program offers a new way of promoting integration on campus through admissions: by admitting a student body with a larger proportion of students with long-term experience in class-integrated educational settings.

The benefits of such experience are manifold. Most of the pedagogical benefits of diversity served by the affirmative action programs of colleges, graduate schools, and professional schools would also be served just as well, if not considerably more effectively, at the K-12 level.¹⁷⁰ Some of the benefits of an integrated education, such as academic improvements in grades and test scores, may already be captured by existing metrics. This program aims to capture the others.

Chief among these are the reductions in implicit prejudicial attitudes and beliefs that result from sustained intergroup collaboration, for which there is considerable social science evidence. In the most comprehensive study to date,¹⁷¹ a meta-analysis of data from 515 studies,¹⁷² authors Thomas Pettigrew

167. See, e.g., Owens et al., *supra* note 1; Reed Jordan, *A Closer Look at Income and Race Concentration in Public Schools*, URB. INST. (May 13, 2015), <http://www.urban.org/features/closer-look-income-and-race-concentration-public-schools> [<http://perma.cc/584C-HJUC>] (“Nationwide about 40 percent of students in low-income families (10 million) attend high-poverty schools, where more than 75 percent of students come from low-income families. Only about 6 percent of students in low-income families attend low-poverty schools, where less than 25 percent of students come from low-income families. So, students in low-income families are over six times more likely to attend a high-poverty school.”); Orfield et al., *E Pluribus*, *supra* note 1, at 25-27.

168. See Carnevale & Strohl, *supra* note 54, at 73 (“[O]nly 7 percent of high school youth from the bottom quartile of SES, as measured by parental income, education, and occupational status, get baccalaureate degrees.”); see also Jason DeParle, *For Poor, Leap to College Often Ends in Hard Fall*, N.Y. TIMES (Dec. 22, 2012), <http://www.nytimes.com/2012/12/23/education/poor-students-struggle-as-class-plays-a-greater-role-in-success.html> [<http://perma.cc/ZQ3R-Z29R>]; Pérez-Peña, *supra* note 81 (noting that at competitive colleges “only 14 percent of students come from the lower 50 percent of families by income”).

169. Brown-Nagin, *supra* note 6, at 472 (listing difficulties faced by students from less affluent backgrounds on campuses, including greater social anxiety and distance).

170. See Wells et al., *supra* note 15, at 11-15.

171. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL., 751, 752-54 (2006). This research builds on a previous meta-analysis by the same authors, and represents a signifi-

and Linda Tropp concluded that “[t]he meta-analytic results clearly indicate that intergroup contact typically reduces intergroup prejudice.”¹⁷³ The consensus around the findings of this research is reflected by the American Psychological Association’s amicus brief in *Fisher II*.¹⁷⁴ This effect obtains across many in-group/out-group distinctions, ranging from race and ethnicity to class and disability.¹⁷⁵ And the prejudice-reducing benefits typically “generalize beyond participants in the immediate contact situation,” thus being carried forward over time.¹⁷⁶

The benefits of intergroup contact are already recognized as important pedagogical benefits at the college level.¹⁷⁷ Moreover, studies in social psychology give us reason to believe that the earlier and longer-term this exposure to intergroup contact, the more powerful and long-lasting the positive effects of bias reduction.¹⁷⁸ Exposing students to intergroup contact early may serve to help

cant improvement over previous meta-studies, which had used considerably smaller and in other ways incomplete samples, lacked strict inclusion rules, and utilized primarily non-quantitative assessments of past scholarship. Pettigrew and Tropp’s meta-analysis represents an improvement on all of those terms, and also controls for potential publication bias.

172. The studies cumulatively represent a total participation of 250,089 individuals from thirty-eight nations. *Id.* at 753.
173. *Id.* at 766.
174. Brief of the American Psychological Association in Support of Respondents as Amicus Curiae, *Fisher v. Univ. of Tex. at Austin*, 136 S.Ct. 533 (2015) (No. 14-981), 2015 WL 6735840 at *34 [hereinafter APA brief].
175. Pettigrew & Tropp, *supra* note 171, at 766 (“These results support the recent extension of intergroup contact theory to a variety of intergroup contexts, beyond its original focus on racial and ethnic groups. In sum, our meta-analytic results provide substantial evidence that intergroup contact can contribute meaningfully to reductions in prejudice across a broad range of groups and contexts.”).
176. *Id.*
177. Grutter, 539 U.S. at 330.
178. Nilanjana Dasgupta, *Implicit Attitudes and Beliefs Adapt to Situations: A Decade of Research on the Malleability of Implicit Prejudice, Stereotypes, and the Self-Concept*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY*, 233, 240 (Patricia Devine & Ashley Plant eds., 2013) (noting that inversely, prejudice unchallenged by intergroup contact early on can be persistent, and may be carried from context to context: “Once aroused, negative emotions can unwittingly carry over from one local environment to another and increase implicit prejudice against specific social groups”); Nilanjana Dasgupta & Luis M. Rivera, *When Social Context Matters: The Influence of Long-Term Contact and Short-Term Exposure to Admired Outgroup Members on Implicit Attitudes and Behavioral Intentions*, 26 *SOC. COGNITION* 112, 119-21 (2008) (finding that in the case of implicit bias against gay and lesbian individuals, long-term contact predicted significantly less implicit prejudice and would also render new contacts more likely to reduce implicit bias).

“inoculate” individuals against prejudicial attitudes,¹⁷⁹ which may be particularly important given that such attitudes can develop at a young age.¹⁸⁰ Thus, it may be an even more effective path to what the *Grutter* Court called the “important and laudable”¹⁸¹ educational benefits of intergroup contact than exposure that occurs only later in life on college campuses. This is not to imply that the search for diversity on campus should be replaced by integration at the K-12 level. Instead, it is to highlight how taking past experience of intergroup contact into account in admissions can *further* colleges’ goal of creating a diverse and inclusive campus.

Colleges’ long-standing commitment to the pedagogical benefits of diversity in overcoming group stereotypes and increasing intergroup understanding, and the policies they have instituted as a result, will be substantially furthered by adopting this program. Admitting students with significant lived experience of intergroup contact will better foster inclusion on campus. College students who attended class-integrated (and thus more likely to be racially integrated as well) K-12 schools will have more experience of and greater receptivity to intergroup contact, which will have an effect through interactions both large and small. This would tend to make campuses more welcoming and less alienating places for individuals from underrepresented backgrounds. Of course, an inclusive atmosphere is certainly not the entirety of the value of diversity, and this program’s benefits on campuses also depend on the existence of quantitative diversity within the student body.¹⁸²

Colleges have also long recognized that diverse student bodies are necessary to prepare their graduates for leadership roles in the increasingly diverse United States of the twenty-first century, as well as the global marketplace. Social science research indicates that receiving an education in a diverse environment helps students develop leadership skills.¹⁸³ In the *Grutter* litigation, this leader-

179. Dasgupta, *supra* note 178, at 257, 271-72.

180. See Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 55-58 (2006) (finding the presence of implicit pro-white bias among white children at age 6).

181. *Grutter*, 539 U.S. at 329-33 (describing the “important and laudable” pedagogical benefits of diversity).

182. The interaction and potential tension between this program and existing affirmative action programs are discussed *infra* Section III.D.

183. See, e.g., Anthony L. Antonio, *The Role of Interracial Interaction in the Development of Leadership Skills and Cultural Knowledge and Understanding*, 42 RES. HIGHER EDUC. 593, 607 (2001) (finding a positive relationship between interracial interaction and leadership ability); Nicholas A. Bowman, *How Much Diversity Is Enough? The Curvilinear Relationship Between College Diversity Interactions and First-Year Student Outcomes*, 54 RES. HIGHER EDUC. 874, 886-87 (2013) (finding, *inter alia*, that “[o]verall diversity interactions are also positively and significantly associated with growth in leadership skills, intellectual engagement, and intercultural effectiveness”); Jiali Luo & David Jamieson-Drake, *A Retrospective Assessment of the*

ship rationale for diversity argument was buttressed by a slew of amicus briefs from major businesses, professional associations, and retired military officers.¹⁸⁴ If anything, this has only become truer with time, as can be seen in the avalanche of amicus briefs to the Court in support of affirmative action in *Fisher II*.¹⁸⁵ Private and public colleges,¹⁸⁶ Fortune 100 companies ranging from Walmart to Apple,¹⁸⁷ and the Department of Defense,¹⁸⁸ among many others, echoed the same theme: It is becoming ever more important that those who will assume future leadership positions, in either the public or private sectors, have received an education in a diverse environment. The breadth of support for this position from across society is compelling testimony of its importance. Once again, there is reason to think this would be even more effectively realized at the K-12 level, and that doing so would increase the ability to foster an environment of inclusion and diversity on college campuses themselves.¹⁸⁹ This program would help colleges produce graduates prepared for leadership roles in a changing world, as well as with a greater sense of civic engagement.¹⁹⁰

Educational Benefits of Interaction Across Racial Boundaries, 50 J.C. STUDENT DEV. 67, 78 (2009).

184. Indeed, the majority in *Grutter* referred favorably to several of these amicus briefs. *Grutter*, 539 U.S. at 330-33.
185. See generally *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016).
186. Brief of Brown University et al. in Support of Respondents, *Fisher v. University of Texas at Austin*, 136 S. Ct. 533 (2015) (No. 14-981), 2015 WL 6690032, at *3-4 (“[U]niversities continue to have a compelling interest in ensuring that their student bodies reflect a robust diversity that enriches the educational experience for all students and also prepares them to be active, capable citizens and leaders in a complex and heterogeneous nation and world.”).
187. Brief of Fortune-100 and Other Leading American Businesses as Amici Curiae in Support of Respondents, *Fisher v. University of Texas at Austin*, 136 S. Ct. 533 (2015) (No. 14-981), 2015 WL 6735839, at *7.
188. Brief for the United States as Amicus Curiae Supporting Respondents, *Fisher v. University of Texas at Austin*, 136 S. Ct. 533 (2015) (No. 14-981), 2015 WL 6735838 at * 9-10.
189. These briefs are in support of race-conscious affirmative action policies, while the program advocated in this paper focuses instead on class diversity. However, for reasons discussed further in Section III.D, there is good reason to believe that there will be a great deal of overlap between the effects of such programs.
190. APA Brief, *supra* note 174, at *34 (“Intergroup contact, which is possible only in diverse settings, generally improves cross-group interacting skills, motivates civic engagement, and promotes ‘greater openness to and understanding of diverse people.’”).

C. *The Feasibility of Coordination Between Colleges*

In order for this plan to work, the message sent needs to be broadcast sufficiently loudly for parents, students, and high school guidance counselors to hear it and heed it. It would therefore be ideal for colleges to coordinate so that the message sent will be coherent and conspicuous enough to be acted upon. Given the atmosphere of competition among colleges, such coordination is not a foregone conclusion.¹⁹¹ Indeed, institutions will likely be wary of shifting their application criteria in ways that they perceive might give other institutions a leg up in the rankings.

Yet there is also clearly a desire among many colleges to show that they are aware of the flaws with the current admissions system and are working to improve it.¹⁹² Within this context, there is room for cooperation. *Turning the Tide* illustrates how widespread coordination among colleges in the realm of admission is feasible.¹⁹³ *Turning the Tide* was signed on to by dozens of colleges and administrators.¹⁹⁴ Another example of such coordination is the American Talent Initiative.¹⁹⁵ As was true in both these instances, buy-in from some of the most selective colleges would be particularly helpful. Not only do institutions across the country often look to the most selective colleges in crafting their own admissions policies, but it could lessen first-mover concerns if some of the most

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191. See, e.g., EDUC. CONSERVANCY, *supra* note 64, at 4-7 (detailing how many college presidents have concerns about the educational effects of rising competition between colleges over enrollment, but feel limited in their ability to act in isolation by the high degree of competitiveness itself); see also SCHULZ & LUCIDO, *supra* note 64, at 3-5, 8-9, 14 (describing the history of increasing competition between colleges over prestige and students, summarizing research into the different methods by which colleges compete, and tracking the rise of an enrollment consulting industry to meet the demands of this competition); Bill Destler, *Competition and the Rising Cost of Higher Education*, HUFFINGTON POST (Nov. 10, 2012), http://www.huffingtonpost.com/bill-destler/college-competition-_b_1867165.html [<http://perma.cc/C69C-Z9XT>] (offering one college president's account of rising competition). Indeed, some enrollment management companies directly market to colleges based on a message that competition is rising. See Brandon B. A. Miller, *Competition for Students is Heating Up. But Colleges and Universities Have Options*, ELLUCIAN (Nov. 26, 2014), <http://www.ellucian.com/Blog/Competition-for-Students-is-Heating-Up—But-Colleges-and-Universities-Have-Options/> [<http://perma.cc/HF94-SF5C>].
192. See EDUC. CONSERVANCY, *supra* note 64, at 4-7, 14-20; cf. MAKING CARING COMMON, *supra* note 72, at 22-23 (the fact that dozens of colleges who signed on to both the critiques and prescriptions in *Turning the Tide* indicates a receptivity to cooperation and reform).
193. See MAKING CARING COMMON, *supra* note 72.
194. *Id.*
195. See *Who We Are*, AM. TALENT INITIATIVE, <http://americantalentinitiative.org/who-we-are/> [<http://perma.cc/D5QQ-SJFW>].

competitive actors in the space signed on.¹⁹⁶ Furthermore, the most selective colleges will often have the greatest degree of leeway in determining their application criteria. While other schools may strive to snag applicants with sufficient quantitative credentials like GPA or test scores (or who will be best situated to pay), the most selective colleges often have a considerably larger number of qualified applicants than they could possibly admit.¹⁹⁷ It is therefore plausible that such institutions might be willing to coordinate around a program like the one advocated in this piece—so long as they understood it to fit within what they regarded as their institutional constraints and to be aligned with their objectives. The publication of federal guidelines or benchmarks could help facilitate such coordination between colleges, and offer a concrete target for institutions to aim towards.¹⁹⁸

III. HOW SUCH A POLICY COULD BE DESIGNED TO BEST PROMOTE K-12 INTEGRATION AND INCLUSION ON COLLEGE CAMPUSES

Now that the general benefits of such a program have been outlined, the question then becomes how to design it. In this section I will argue that in order to best promote this policy's goals of integration and inclusion, the most effective form would be an admissions bonus to students who attended schools who for over six years at which over 40 percent of the students were eligible for Free or Reduced Price Lunches (FRPL), contingent upon the school meeting a context-specific standard for intraschool integration. This is not the only possibility for how such a program could operate, however, and in this section I will discuss both why this would be the optimal form, as well as other potential options

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196. To the extent that the most selective colleges serve as pacesetters within the college admissions world, if the several highly selective colleges were to adopt the policy advocated by this piece, it would signal that they consider this is a feasible policy, put pressure on other colleges seeking to show their commitment to educational equality, and reduce concerns that in adopting such a policy colleges might fall behind the top-tier schools.
197. HARRY LEWIS, EXCELLENCE WITHOUT A SOUL: DOES LIBERAL EDUCATION HAVE A FUTURE? 10 (2006) (the former Dean of Harvard College illustrates the idea that “[e]ven if academic talent were the only admissions criterion, objective tests are far too insensitive to distinguish among the students in the Harvard application pool” by noting that “[v]aledictorians are a dime a dozen at Harvard—the admissions office could fill the whole class with them if it wanted to.”).
198. For example, the Obama White House’s *Increasing College Opportunity for Low-Income Students: Promising Models and a Call to Action* helped provide a target for colleges seeking to demonstrate their commitment to increasing equality of access at the level of higher education. See *9 for 9: Yale Meets Commitments to Increase College Opportunity and Socio-economic Diversity*, YALENEWS (June 12, 2015), <http://news.yale.edu/2015/06/12/9-9-yale-meets-commitments-increase-college-opportunity-and-socio-economic-diversity> [<http://perma.cc/N4L2-X6T4>].

and the empirical determinations and value choices implicated by different choices of metric.

A. Finding an Appropriate Metric

The debate over the merits of affirmative action in colleges on the basis of class as opposed to race is a complex one.¹⁹⁹ Though it is outside of the scope of this piece to attempt to intervene in this general debate, there is a strong argument that socioeconomic affirmative action *alone* is likely insufficient to address the deep problems of racial inequality in our society.²⁰⁰ Nonetheless, many advocates of race-based affirmative action also accept the value of socioeconomic affirmative action, either because it may be less legally vulnerable and more politically feasible,²⁰¹ or because it would target certain specific forms of inequality more directly than race.²⁰² In the specific plan envisaged by this piece, it seems feasible to use socioeconomic status, rather than race, as a metric. First, for a combination of geographic and demographic reasons, it may simply be unworkable for K-12 schools in various rural regions of the country to become racially integrated.²⁰³ This means that students from these regions would be

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199. For a summary of the arguments in favor of replacing race-conscious affirmative action with purely socioeconomic affirmative action, see KAHLENBERG, *supra* note 69, at 12-25. For an argument that both socioeconomic and race-conscious affirmative action should coexist, see, for example, Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 101 (R. Kahlenberg ed. 2014). Several state universities, including Texas, argued as part of the *Fisher* litigation that socioeconomic affirmative action alone would be insufficient, which was expressly accepted by the Court in *Fisher II*.
200. Indeed, the Supreme Court accepted this argument by Texas in *Fisher II*. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2211-12 (2016). Examples of successful socioeconomic integration reveal that it is not always a perfect replacement for race-conscious affirmative action. See, e.g., McMillian et al., *Can Class-Based Substitute for Race-Based Student Assignment Plans? Evidence From Wake County, North Carolina*, URBAN ED. 1, 14-18 (2015) (discussing how socioeconomic desegregation can help with racial desegregation, but also why it may not be a full substitute, and finding that the data "suggest a modest increase in the degree of Black-White segregation across Wake County schools under the socioeconomic-based plan").
201. As is the case with, for example, the ten percent component of the Texas Ten Percent plan. See Guinier, *supra* note 26, at 162-71.
202. As is the case with, for example, admissions policies that grant affirmative action to first generation professionals or Pell-eligible students. See Brown-Nagin, *supra* note 6, at 466-97.
203. For example, as of 2015, there were fourteen states where over 80% of the population identified as white. *State Health Facts*, KAISER FAMILY FOUND., <http://www.kff.org/other/state-indicator/distribution-by-raceethnicity/>

placed at an effective disadvantage in admissions, a counter-productive result from the point of view of increasing diversity on campus. Second, the use of race as a factor could potentially expose colleges to legal challenge, and could potentially expose K-12 schools to liability as they sought to meet the eligibility criteria for this program, as will be discussed further in Section V. For these reasons and others, many of the new integration projects at the K-12 level focus on markers of socioeconomic status, rather than race.²⁰⁴

The use of a socioeconomic *metric*, however, does not mean that this program is concerned solely with the problem of socioeconomic segregation in K-12 schools. Rather, the use of an economic metric should be understood as the most effective form such a program could take to address the deeply interconnected problems of racial and economic segregation at the K-12 level.²⁰⁵ For example, in 2012-2013, 45 percent of black and Hispanic students attended schools classified as “high poverty” by the National Center for Educational Statistics,²⁰⁶ while this was true of only 8 percent of white students.²⁰⁷ Thus, because it would provide an incentive for desegregation at the level of both K-12 and higher education, this proposal does not force a fundamental choice between race and class-based affirmative action, but rather pursues one of the two in a way that will tend to simultaneously further the other.²⁰⁸ Indeed, as is true

[<http://perma.cc/DK7S-EJ8B>]. More generally, the rural population of the United States remains considerably more non-Hispanic white than the population as a whole. See, e.g., *Rural Research Brief*, HOUS. ASSISTANCE COUNCIL 9 (Apr. 2012), http://www.ruralhome.org/storage/research_notes/rrn-race-and-ethnicity-web.pdf [<http://perma.cc/DN8Q-VUHF>].

204. See Potter et al., *supra* note 141; Wells et al., *supra* note 15.
205. See Orfield et al., *E Pluribus*, *supra* note 1. It may even be that certain diversity criteria employed by schools, such as “students of color,” do a poor job of capturing concerns about under-representation and economic inequality. As noted above, a private school with 20 percent students of color included only 3.8 percent of students who were free and reduced lunch eligible. See *supra* note 145.
206. Table, *Number and Percentage Distribution of Public School Students, By Percentage of Students in School Who are Eligible for Free or Reduced-Price Lunch, School Level, Locale, and Student Race/Ethnicity: 2012-13*, NAT’L CTR. EDUC. STATS., http://nces.ed.gov/programs/digest/d14/tables/dt14_216.60.asp [<http://perma.cc/V6TK-VBPG>] (defining high poverty schools as those where more than 75 percent of the student body are eligible for FRPL).
207. Tom Snyder & Lauren Musu-Gillette, *Free or Reduced Price Lunch: A Proxy for Poverty*, NCES BLOG (Apr. 16, 2015), <http://nces.ed.gov/blogs/nces/post/free-or-reduced-price-lunch-a-proxy-for-poverty> [<http://perma.cc/8V85-2KQL>]; NAT’L CTR. EDUC. STATS., *supra* note 206.
208. Kahlenberg, *supra* note 15, at 1556 (2007) (noting that given the intersection of race and poverty in the segregation of schools, “policies that break up concentrations of poverty will disproportionately affect African Americans”); Jennifer Ayscue, Erica Frankenberg & Genevieve Siegel-Hawley, *The Complementary Benefits of Racial and Socioeconomic Diversity in Schools*, NAT’L COAL. ON SCHL.

with both the Texas Ten Percent Plan and affirmative action for first-generation professionals, this proposal would be complementary with race-conscious affirmative action programs.

If economic status is to be the salient metric, there are two basic ways this could be done: the plan could use the average socioeconomic profile of the student body or the percentage of students below a certain income level. The first option would offer a general picture of the income-level of a school, and thus would indirectly reflect SES-integration. But even using a median instead of a mean would offer an imperfect proxy, as schools that were integrated between high- and low- income students might be indistinguishable from schools that were almost entirely middle-income students. A more sophisticated measure like a GINI-coefficient, often used to measure inequality, could again indirectly tell us how economically unequal, and thus diverse, a school was. But it might also have trouble distinguishing between a school that was unequal between super rich and middle-income and a school that was unequal between middle- and low-income. Such a program would also not confer benefits on predominantly low-income schools, a problem that I will discuss further later in this section.

In order to maximally target those most disadvantaged by our current system, the most workable proxy would therefore be the percentage of a school's students who meet the familiar government-established criteria for eligibility for free and reduced-price lunches. It would be difficult and perhaps intrusive for K-12 schools to seek accurate information about the family incomes of the students attending their schools from any other source, and we might also worry that a system that relied on the schools for data collection might be susceptible to deceit. FRPL information comes from the federal government, and pairs federally reported household income with the poverty line, revised annually to account for shifts in the Consumer Price Index.²⁰⁹ The threshold for free lunches is 130% of the poverty line; for reduced lunches it is 185%.²¹⁰ For example, for 2017, the poverty line for a family of four is \$24,600.²¹¹ A household annual income of \$31,980 or less would currently be the threshold for free lunches, and \$45,510 for reduced ones.²¹² There is no requirement to participate in the National School Lunch Program, but around 94 percent of public and private

DIVERSITY (Mar. 2017) <http://school-diversity.org/pdf/DiversityResearchBriefNo10.pdf> [<http://perma.cc/PPS4-CU4H>]. *But see* McMillian et al., *supra* note 200, at 14-18 (noting the limitation of focusing on SES alone).

209. Child Nutrition Programs: Income Eligibility Guidelines, 82 Fed. Reg. 17182 (Apr. 10, 2017).

210. *Id.*

211. *Id.*

212. *Id.*

schools across the country choose to do so.²¹³ Rather than relying on parental applications, school districts or state agencies since 2008-09 have determined eligibility through “direct certification,” obtaining records of households that receive food benefits, have foster children, or are enrolled in federal welfare programs like WIC or TANF, and matching those against the lists of students.²¹⁴

The benefits of using FRPL as a measure of poverty are manifold, given its extensive use and its reliance on federal statistics. Indeed, FRPL continues to be the primary measure of choice for education researchers seeking to study student poverty nationwide at the school level.²¹⁵ Using FRPL avoids the fuzziness of other definitions of low-income used in the context of higher education, which can vary widely and reach as high as a \$60,000 to \$75,000 annual income.²¹⁶ As such, legislators and researchers have often used it as a proxy.²¹⁷

This practice is not without its critics. First, using FRPL as measures of individual poverty can be distorting, since some schools with over 40 percent FRPL-eligible students receive permission from the government to offer FRPL to all their students under the Community Eligibility Provision.²¹⁸ This is not relevant here, however, since schools with over 40 percent FRPL-eligible students would be eligible for the admissions boost.²¹⁹ Second, high school students participate in the program at a lower rate because of the stigma associated with it. Though the extent of this effect is disputed,²²⁰ since this program would

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213. KATHERINE RALSTON ET AL., U.S. DEP'T OF AGRIC., THE NATIONAL SCHOOL LUNCH PROGRAM: BACKGROUND, TRENDS, AND ISSUE 1 (2008), <http://naldc.nal.usda.gov/download/19460/PDF> [<http://perma.cc/5HAY-Q3Q5>].
214. Clare McCann, *National School Lunch Program*, EDCENTRAL, <http://www.edcentral.org/edcyclopedia/national-school-lunch-program/> [<http://perma.cc/8A8E-RVVT>].
215. Sarah D. Sparks, *Popular Child-Poverty Measure Gets Another Look*, EDUC. WEEK (Aug. 19, 2014), http://www.edweek.org/ew/articles/2014/08/20/01poverty_measures.h34.html [<http://perma.cc/ZY4V-2AB7>] (detailing how the use of FRPL as a proxy remains ubiquitous, though efforts are underway to find more accurate measures, but noting that there are various concerns about these new measures as well, and none of them as yet provide the national level individual school information that FRPL does).
216. Brown-Nagin, *supra* note 6, at 473 (noting that the “‘low-income’ concept, it turns out, is strikingly imprecise terminology”).
217. *See id.*; Michael Harwell & Brandon LeBeau, *Student Eligibility for a Free Lunch as an SES Measure in Education Research*, 39 EDUC. RESEARCHER 120, 122-23 (2010).
218. Will Huntsberry, *True or False? Free and Reduced-Price Lunch = Poor?*, NAT'L PUB. RADIO (Jan. 30, 2015), <http://www.npr.org/sections/ed/2015/01/30/379330001/true-or-false-free-and-reduced-price-lunch-poor> [<http://perma.cc/D54L-9SHG>].
219. However if the program was designed as range, such as 40%-60%, this would be less true.
220. The extent to which this is a product of stigma rather than reduced eligibility is also disputed, as the average household incomes of older students were also high-

look at eligibility determined through direct certification, rather than participation, this distortion would not matter for our purposes. Third, federal poverty guidelines are themselves an imperfect variable.²²¹ The debate over poverty lines, the fact that they do not include in-kind benefits, and that they are not sufficiently tailored to geographic differences in Consumer Price Index is somewhat relevant here. Several of the critiques, however, are focused more on the shortcomings of the poverty line as a measure of *absolute* poverty, rather than the *relative* disadvantage we would be interested in from the standpoint of reducing segregation, which is a metric of relative inequality. And fourth, there is evidence that school eligibility determinations are incorrect. Though some studies found that up to twenty percent of students had been incorrectly found eligible, these studies all pre-date mandatory direct certification and many of the causes of error were attributable to the application process.²²² Studies of errors in direct certification found considerably lower rates, from six to nine percent.²²³ FRPL is therefore an imperfect measure of poverty. However, in the absence of another nationwide indicator of socioeconomic status matched with the student bodies of different schools, these imperfections should not overshadow its value. For this very reason, FRPL continues to be widely used, despite its recognized shortcomings.

Therefore, it is likely that most effective and accurate metric for this policy would be once a school had reached above a certain level of FRPL-eligible students. Of course, this program does not remain wedded to any particular metric, and any improvements upon the metric advocated here would only improve the program itself. The threshold number itself will inevitably be somewhat arbitrary, and more research and discussion with relevant stakeholders would be necessary before providing a firm answer. Something in the range of 25 percent might represent erring on the side of breadth, as it would include schools accounting for roughly 79.4 percent of students.²²⁴ Setting it at 50 percent would cover all schools deemed “mid” to “high” poverty by the NCES, which account for around 50.8 percent of students.²²⁵ There will be a trade-off between ensuring that the category includes schools that are meaningfully integrated and ensuring that this category is limited enough for the benefit to have an impact. A review of the FRPL eligibility percentages across participating

er, in part because lower-income students are more likely to drop out. Ralston et al, *supra* note 213, at 13.

221. Harwell & LeBeau, *supra* note 217, at 123-24.

222. *Id.*

223. *Id.* at 125.

224. NAT'L CTR. EDUC. STATS., *supra* note 206; Orfield et al., *E Pluribus*, *supra* note 1, at vii (noting that “the typical black student is now in a school where almost two out of every three classmates (64%) are low income, nearly double the level in schools of the typical white or Asian student (37% and 39%, respectively)”).

225. NAT'L CTR. EDUC. STATS., *supra* note 206.

Connecticut schools shows that a threshold of 50% may cut off a number of schools we may wish to include, include several of the Hartford magnet schools, whose FRPL eligibility is in the mid-40s.²²⁶ On the other hand, if the boost was given too widely, it might lose some of its force as an incentive, as it would already apply to the majority of students.²²⁷ Therefore it may be useful to aim, at least initially, for a number somewhere between 40 and 50 percent. The question of whether there should also be a cut-off on the top-end, i.e. if the metric should include a percentage above which a school's students would no longer receive this admissions bonus is a complex one, and I will address it in greater detail below.

There is also the question of how many years students would need to attend an eligible school to qualify for this admissions bonus. One solution would be to limit the benefit to elementary school, which would represent an earlier intervention and might be more feasible.²²⁸ Another solution would be to choose a number of years, independent of level of schooling. Any number will be somewhat arbitrary, and there is a balance here between expanding the scope of eligibility and allowing for some flexibility on one hand (including allowing parents of children currently in nonintegrated affluent schools to opt in), and ensuring that students spend a meaningful number of years in an SES-integrated setting, on the other. Six years seems like a potential middle path, representing either a full elementary school education or a full high school education. Though with that in mind, perhaps seven years would be a way of allowing for flexibility while ensuring that *some* of each stage of a student's education takes place in the relevant environment—and it might also be that once a student has spent a year somewhere, they will be less likely to want to switch. Or the program could start with four years, to make it easier for older students to participate at the outset, before increasing the number of years over time once the program was in place.²²⁹

As to the size of such a boost that would be necessary to meaningfully influence the K-12 preferences of parents, it is difficult to ex ante anticipate how large a boost would be necessary. As such a program has yet to be adopted, there is not a great deal of empirical evidence indicating one way or another. However, the observed K-12 integration produced by both the Texas Ten Percent plan and various efforts at voluntary integration do indicate that parents are indeed susceptible to such incentives.²³⁰

226. *Connecticut Schools Participating in The National School Lunch Program*, *supra* note 145, at 6-7.

227. Orfield et al., *E Pluribus*, *supra* note 1, at 7.

228. There is a lower absolute number of free and reduced lunch eligible students in secondary schools. See NAT'L CTR. EDUC. STATS., *supra* note 206.

229. I am grateful to Professor Sam Erman for this suggestion.

230. See *supra* notes 119-134 and accompanying text.

B. *Why Other Metrics Would Be Less Effective at Promoting K-12 Integration*

To show why using the percentage of students who are FRPL-eligible would be more effective at promoting integration than other metrics, it may be useful to compare the plan advocated here with two other proposals in the literature that suggest using college admissions to incentivize integration. Danielle Allen has suggested that using applicants' ZIP codes could incentivize more affluent families to move to poorer neighborhoods²³¹ and David Orentlicher has suggested that all colleges nationwide, private and public alike, only admit applicants who placed in the top ten percent of their high school classes.²³² Though both proposals are intriguing, and offer evidence for how college admissions could be used to incentivize integration, neither proposal would likely be as effective as the proposal advanced here.

It is likely true that, as Allen notes, if colleges were to reserve slots for students from certain ZIP+4²³³ codes, some parents with resources might seek to strategically move to these areas.²³⁴ However, while neighborhoods can be valuable indicators of socioeconomic status and opportunity, they would likely be less effective proxies than K-12 schools, with the result that they would be less accurate at targeting socioeconomic inequality and provide less powerful incentives to increase integration. There are three principal reasons why.

First, neighborhoods may be an imperfect proxy for social or educational integration, as parents with resources could live in a ZIP+4 code that was non-affluent on average but send their children to an elite private school.²³⁵ And ZIP+4 code lines may also be drawn in ways that do not reflect the types of disadvantage we might wish to target, or the types of social integration we might wish to foster.²³⁶ This might be particularly true in large metropolitan areas, which are loci of some of the most severe educational segregation.²³⁷ K-12 schools, on the other hand, will generally (and especially when Allport's factors²³⁸ are present) involve a greater degree of social contact. Second, schools would provide easier units for parents to understand and to pursue, whereas the

231. Allen, *supra* note 71, at 145-59.

232. Orentlicher, *supra* note 41, at 111-14.

233. Allen, *supra* note 71, at 147. A more precise ZIP code level that Allen suggests using for increased accuracy.

234. Allen, *supra* note 71, at 145-59.

235. See Reardon & Yun, *supra* note 45, at 1585-86.

236. Indeed there is some evidence that residential integration will not necessarily lead to school integration. See Orfield et al., *E Pluribus*, *supra* note 1, at 10; Reardon & Yun, *supra* note 45, at 1571-85.

237. See, e.g., Orfield et al., *E Pluribus*, *supra* note 1, at 9 (describing the severe racial segregation in large metropolitan areas).

238. See *infra* note 248 and accompanying text.

socioeconomic features of a specific ZIP+4 is likely not something many individuals are familiar with. While the percentage of a school's student body who are FRPL-eligible will also not necessarily be common knowledge, schools as actors would have a direct interest in spreading this information to parents and students, acting as informational middlemen. Third, neighborhoods, unlike schools, are typically not unitary actors. While a wealthy school could take advantage of the plan advocated in this piece in a coordinated manner by admitting more low-income students, it might not be possible for a wealthy neighborhood to act in a coordinated manner to do the same (especially if a certain percentage of the inhabitants of the neighborhood were childless or had adult children and thus were not receptive to education-oriented incentives).

There are also serious question about whether a top ten percent program, such as Texas' Ten Percent Plan (TPP) would be feasible at a nationwide level. Orentlicher proposes that all selective colleges across the country limit themselves to only admitting applications from the top ten percent of their respective high school classes.²³⁹ On this plan, colleges would *only* admit students who were in the top ten percent, but within that set of applicants, colleges would be free to use their own criteria.²⁴⁰ Recognizing that this alone would inevitably result in a situation where elite colleges would only admit students in the top ten percent of elite high schools, Orentlicher states that colleges would have to ensure that "the odds of admission from any one high school were similar to the odds of admission from other high schools."²⁴¹

However, it is unclear how smaller private schools could ever make such a guarantee, or even how large public schools could do so once their class of applicants was nationwide.²⁴² It seems like the most predictable result would be that colleges who were already drawing from the top ten percent of students (if not much higher) at elite high schools would simply continue to do so. This issue is inevitable to the extent that a similar advantage is given to top-ten students across all high schools, affluent and poor alike. The program advocated in this piece avoids this problem, because it grants a benefit *only* to schools with above a threshold percentage of FRPL-eligible students, rather than treating the top students in all high schools alike.

Scaling a top ten percent program nationwide would also likely accentuate concerns that are less problematic at the state level. If implemented in full by all

239. Orentlicher, *supra* note 41, at 111-14. Orentlicher notes that the exact percentage could vary from college to college, depending on size. *Id.* However, the smaller the percentage, the more these problems would be magnified.

240. *Id.* at 113.

241. *Id.*

242. There simply are not enough spots in these colleges to provide anything like equal results to all high schools across the country. Asking college officials to make an abstract commitment to treat all high schools equally would be difficult to verify and raise coordination problems if colleges thought that others were not playing fair.

(or even by most) colleges, Orentlicher's proposal would consign 90% of all students to non-eligibility to all (or most) selective colleges nationwide. While the TTP itself might raise similar worries within Texas, in its present form it includes two escape valves. First, a current Texas high school student in the bottom ninety percent of their class remains eligible for a separate non-top-ten admissions track.²⁴³ Second, this student remains eligible for all other potential colleges across the country. If Orentlicher's plan were implemented, neither of these would be possible; he argues that top ten class rank should be a *necessary* prerequisite to admission and that it would undermine the plan to include any admissions track for non-top ten students.²⁴⁴ It is a little troubling to ask colleges to put all of their eggs in this one basket and *automatically* exclude the 90 percent of students who did not meet the GPA requirements.

Colleges might be less likely to adopt Orentlicher's plan to the extent that it would leave them with severely constricted flexibility in admissions. The Texas plan, even with its escape valves, was only possible with significant institutional and political buy-in within a single state system.²⁴⁵ With a nationwide top ten percent policy, this would be particularly difficult, since even a few non-cooperating colleges could undermine the plan by recruiting the students in top eleven or twelve percent of the most elite high schools.

Designing a program around the percentage of a K-12 school's students who are FRPL-eligible would therefore be a more effective means of targeting educational inequality and increasing K-12 integration than either granting a bonus based on neighborhood or instituting a nationwide top ten percent plan.

C. *Avoiding Intra-School Segregation*

One potentially complicating factor for the policy advocated in this Note would be if inter-school segregation was replaced by intra-school segregation through tracking programs that segment the student body. Tracking programs take the form of gifted, honors, or AP classes available to higher-performing students.²⁴⁶ Different schools run their tracking programs differently, some us-

243. This category was the subject of the litigation in *Fisher II*. See *Fisher v. Univ. of Texas at Austin*, 136 S.Ct. 2198, 2205-06 (2016).

244. Orentlicher, *supra* note 41, at 112-15. This is not an incidental feature of the proposal; Orentlicher may indeed be right that given the already small number of students that most private universities can admit, a separate non-ten-percent admissions category at the *national* level could risk significantly diluting the pro-integration incentive of such a plan.

245. See Guinier, *supra* note 26, at 161-71.

246. Tracking, which involves the placement of students in different classes, is not to be confused with "ability grouping", a practice that is more common at the elementary level, whereby students are broken up into groups based on ability *within* classes. See Tom Loveless, *How Well Are American Students Learning?*, BROWN CTR. EDU. POL'Y BROOKINGS 13-20 (2013), <http://www.brookings.edu/wp>

ing admissions tests and others offering teachers a degree of discretion.²⁴⁷ Such programs could undermine some of the benefits of integrated schools, both in terms of implicit prejudice and educational equality more generally. Studies have shown that the presence of Allport's factors—equal group status, common goals, intergroup cooperation, and support from authority—is optimal, though not necessary, for intergroup contact to reduce prejudice.²⁴⁸ It would therefore be important that tracking not reproduce segregation within schools, since such programs could create unequal group statuses, would result in fewer common goals and intergroup cooperation, and would signal that authority was willing to separate these groups in ways that indicated some were more favored than others. There are also serious equity concerns about the use of tracking, and compelling arguments against the use of the practice in general.²⁴⁹

One solution would be for colleges to reserve this admissions bonus for schools that did not track. While this might be a desirable outcome, it could also be quite a heavy lift, as tracking is remarkably widespread; one longitudinal study found that nearly 86 percent of middle school and high school students in the U.S. are placed in tracked classes.²⁵⁰ Another, more modest way to try to counteract this would be for the admissions bonus to only be given to schools that did not have a percentage of low-income students in AP classes (or their equivalent) that was too far below their representation in the school as a whole.²⁵¹ Students from schools that fell below this bar would not receive the admissions bonus.

AP and honors classes are the most frequent way that schools divide their populations and track students. And there is significant evidence that gaps in AP participation among students of color and low-income students could be

-content/uploads/2016/06/2013-brown-center-report-web-3.pdf [http://perma.cc/BV3V-62NW] (differentiating the two).

247. See, e.g., Maureen T. Hallinan, *Tracking: From Theory to Practice*, 67 SOC. EDUC. 79, 79-80 (1994) (describing the wide variety of ways in which schools utilize tracking); Loveless, *supra* note 243, at 13-20.
248. Pettigrew & Tropp, *supra* note 171, at 753; see also Robert E. Slavin & Robert Cooper, *Improving Intergroup Relations: Lessons Learned From Cooperative Learning Programs*, 55 J. SOC. ISSUES 647 (1999).
249. See JOHN HATTIE, *VISIBLE LEARNING: A SYNTHESIS OF OVER 800 META-ANALYSES RELATING TO ACHIEVEMENT* 89-91 (2009). Hattie's seminal work on meta-analyses of educational achievement details the results of a meta-analysis of "300 studies of tracking, covering a wide variety of schooling cultures and experiences, in most curriculum subjects, across all age ranges, and across most major educational outcomes The results show that tracking has minimal effects on learning outcomes and profound negative equity effects." *Id.* at 90.
250. *Id.* at 89.
251. The actual threshold here would necessarily be somewhat arbitrary, but would need to balance ensuring real integration of AP classrooms with potential differences in achievement between groups.

remedied without altering admissions standards. There is currently a great deal of “under-matching” along race and class lines, where students who are deemed likely to succeed in AP classes in a particular subject (based on their performance on the PSAT, which the College Board finds to be the strongest predictor of success on the AP exam) do not end up taking any AP classes.²⁵² The College Board found that the greatest potential being lost was among African-American and Native American students; for those groups, only three out of ten students take the AP science class for which they showed potential.²⁵³ There is similar under-participation along socioeconomic lines.²⁵⁴ Various schools have been working to try to close these gaps, and certain states have succeeded.²⁵⁵ Other approaches, such as one school’s switch to mandatory application of the test used to select students for participation in gifted programs led to a significant increase in low-income students without a change in admission standards.²⁵⁶ There is therefore good reason to believe improvement and increased participation in AP or other tracking programs is quite feasible.

Schools that wished to make their students eligible for this admissions boost would provide information on the percentage of their students who are FRPL-eligible (information that is also publicly available) and the percentage of those students in their relevant tracking programs. If there were too great a discrepancy between those numbers, the school could be given either a reduced bonus or none at all.

Nonetheless, while some of the most conspicuous and harmful forms of intra-school segregation could be controlled for, it is unlikely that it would be possible to closely monitor and prevent schools from employing creative means to segregate their own students. Some degree of good faith (though, as noted above, not necessarily sacrifice) on the part of schools and educators would therefore be necessary in order for this policy to have an optimal effect.

A related concern might be that if K-12 schools, in order to accrue the admissions benefit for their students, were to begin admitting low-income students, these students might be treated solely as placeholders, which would undermine the value of intergroup contact. An analogous argument has long been

252. COLLEGEBOARD, *The 10th Annual AP Report to the Nation* 27-29 (Feb. 11, 2014), <http://media.collegeboard.com/digitalServices/pdf/ap/rtn/10th-annual/10th-annual-ap-report-to-the-nation-single-page.pdf> [<http://perma.cc/4T4D-UP3S>].

253. *Id.* at 29.

254. *Id.*

255. *Id.* at 33-37.

256. David Card & Laura Giuliano, *Can Universal Screening Increase the Representation of Low Income and Minority Students in Gifted Education?* (Nat’l Bureau of Econ. Research, Working Paper No. 21519, 2015), <http://www.nber.org/papers/w21519> [<http://perma.cc/U6MF-BDUM>].

raised about affirmative action at the college level,²⁵⁷ and variants of the argument have dogged attempts at integration from the outset. Though the psychological environment that such a program might create in schools across the country is a question that merits a more in-depth examination than can be provided here, and would likely require a certain degree of empirical study, I will offer several preliminary responses here. First, even assuming that this potential risk exists, it should be measured against the alternative, which would be to push for integration only to the extent that wealthier schools and students would consider it to be “merited.” The current re-segregation in our schools is testament to the insufficiency of this approach. Furthermore, as the literature on under-matching suggests, there are significant numbers of high-performing low-income students who meet the standards for advanced classes but who are currently left behind. The fact that other students might have incorrect assumptions about these students’ abilities—assumptions that the social science literature on implicit bias indicates would be challenged by greater contact—does not seem a worthy reason to refrain from attempting to change both the setting and the presumptions. Lastly, to the extent that this program is being proposed to colleges that already employ affirmative action programs that have faced the same critique, these institutions generally recognize that the pedagogical values of diversity and integration overshadow the potential unintended consequences of affirmative action.

D. How This Policy Would Interact with Current Affirmative Action Programs

By using FRPL eligibility and aiming to reduce intra-school segregation, this proposal seeks to align the institutional interests of colleges with wider social objectives; the value of admitting students who attended class-integrated schools depends on the metric for integration being accurate and measuring *true* integration as distinct from intra-school segregation. However, when we turn to the question of how this program would coexist alongside existing affirmative action programs, a tension becomes more visible. This tension consists of two interrelated questions: first, how will this program coexist with existing college affirmative action programs? Second, should there be a percentage of FRPL-eligible students above which a school should no longer receive an admissions bonus designed in part to reflect the benefits of integration?

The most conceptually neat answer would be to say that this program would consist in an admissions bonus given to students from schools that fell within a range of FRPL-eligible students, say from forty to sixty percent. Though this would mean that students who attended the most impoverished schools would not benefit from this boost, this program would coexist along-

257. See, e.g., STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 47-98 (1992) (describing, among other things, the ways in which perceptions that an individual has benefitted from affirmative action can be harmful).

side existing affirmative action programs that tend to benefit those students.²⁵⁸ Under this approach, the relationship between a college's desire to admit students who attended integrated schools and the metric is intuitively clearer. In addition, the absolute harm may be low, since perhaps few of those students would have been rendered competitive on the traditional metrics of college admission by this bonus in the first place. Though this is a potentially viable form for this program to take, I nevertheless do not find it altogether satisfying. There is something troubling about the idea of a program that aims to address inequality that then comparatively disadvantages those in the worst-off schools. In addition, to limit the extent of this disadvantage, the size of this boost would have to be relatively limited in comparison to existing affirmative action programs. This would commensurately reduce the benefits of this program for both colleges and K-12 schools. And finally, as I will argue below, societal benefits and to a certain extent institutional benefits would be more effectively pursued by not placing an upper bound on the percentage of FRPL-eligible students used as a metric in this program.

Yet it is undeniable that there is, at the very least, a seeming tension between arguing that colleges should give an admissions boost based partly on the benefits of having attended an integrated school, only to employ a metric that includes schools that are overwhelmingly composed of students eligible for FRPL and thus not socioeconomically integrated. What would account for the seeming asymmetry between excluding non-integrated schools that are affluent, but including those that are poor?

To understand the rationale, it is useful to step back and take into account the larger stated purpose of affirmative action: promoting diversity. From this standpoint, it is in the interest of colleges to avoid implementing a program that would reduce the representation of already underrepresented groups. After all, the goal of diversity on campus is not just creating an inclusive environment but also bringing together students from different class backgrounds. It would certainly not improve diversity on campus to admit a class of only affluent, white students who had attended class-integrated schools. Any proposal that would reduce the representation of a group that is already severely underrepresented would be counter-productive from the perspective of increasing diversity. Excluding non-integrated schools of mostly affluent students from the bonus program does not trigger this counter-productive effect. Including schools with a significant majority of FRPL-eligible students, on the other hand, allows

258. Though a program giving a boost to students from integrated schools might in some ways conflict with the Ten Percent programs that some state schools have adopted, this is not a significant concern for two reasons. First, Ten Percent programs are only feasible for large state institutions. Second, any large-scale effort to integrate K-12 schools might eventually conflict with Ten Percent programs, which are predicated on the existence of *de facto* segregation. Surely it cannot be the case that all attempts to integrate schools should be stopped in their tracks because of potential down-the-road conflicts with Ten Percent programs.

colleges to balance an effort to increase inclusion while maintaining a critical mass of students from underrepresented SES backgrounds.

Furthermore, one of the main reasons for this program is to update college admissions criteria to reflect modern social science research on prejudicial attitudes and beliefs. This research tells us that intergroup contact can help reduce out-group stereotypes (stereotypes about other groups), but it also indicates that groups continually exposed to negative stereotypes will to a certain extent internalize those views.²⁵⁹ This produces “in-group prejudice,” in which groups internalize stereotypes about themselves and other members of their in-group.²⁶⁰ Presumably because of the impact of exposure to negative stereotypes, it can in certain specific circumstances be easier to combat in-group prejudice in non-integrated educational settings.²⁶¹ However, this effect is observed *only* for groups already on the wrong side of societal assumptions. While female students taught by and around women are more likely than those in mixed-gender settings to maintain a positive perception of their own mathematical ability, for example, male students’ self-reports of mathematical ability do not increase when they are taught predominantly by and around men.²⁶² Reducing in-group negative stereotypes would also be useful to the overall goal of promoting inclusion, as this can be one of the most pernicious effects of stigmatization. Colleges should not disadvantage parents and children who for this reason sought out schools that historically served underprivileged groups. It may well be the case that the in-group bias reductions do not obtain in all non-integrated educational environments, and these benefits do not outweigh the larger benefits of integrated schools. Rather than being conclusive, the recent findings on these questions simply suggest other reasons for treating predominantly low-income schools differently from high-income ones.

In addition, the general benefits of promoting K-12 integration would better be served by using a threshold (above 40%) rather than a range (40-60%). Schools with mostly students from low-income households that are trying to attract students from more affluent households would be unlikely to attract significant numbers overnight. Extending this benefit to them in general would allow them to overcome what might otherwise be a serious coordination problem. This would be true at one end of the income spectrum and not the other, since affluent schools will have significantly greater material enticements that they can offer to parents and students from poorer households. Therefore, it would be important to provide this incentive while poorer schools make incremental gains in integration. For the same reason, it is important that the benefit only kick in once currently non-integrated affluent schools pass a certain threshold. It is therefore likely that promoting integrated schools can be done

259. Dasgupta, *supra* note 178, at 257.

260. *Id.*

261. *Id.*

262. *Id.*

more effectively by rewarding students from some schools that predominantly serve families of the same income level, but doing so only for such schools that are predominantly low-income.

A final note: If this program becomes part of a “holistic” affirmative action policy, it may not be as necessary to put exact numbers on how large the class-integrated school bonus is or who exactly would receive it. Indeed, some admissions departments are already taking the relevant factors into account to some degree.²⁶³ Though this might smooth out some of the tensions, it would reduce the visibility of the program as well as the ability of parents to take it into account, both of which would reduce the attractiveness of the idea. It would be necessary for colleges to credibly and conspicuously assert that this factor would receive particularly significant consideration in a holistic evaluation, since it is unlikely that a nebulous bonus would be the optimal form for this policy.

Though the question of threshold versus range is a complicated conceptual one, it may be that the practical effects of this decision are not particularly significant given the analysis above. Both approaches are different paths to the same result: Ensuring that in adopting this program, colleges do not reduce the number of students they are admitting from schools that serve the most impoverished communities. Thus, this program could be viable either way, though again, there are several reasons to think a threshold would be optimal from both the institutional and social perspective.

For the reasons outlined above, I believe that the optimal version of this plan would be to grant an admissions bonus to students who for at least six years attended a school where over forty percent of students were FRPL-eligible. This program would be implemented alongside or in coordination with existing race- or SES-based affirmative action programs in such a way that students from racial or class backgrounds currently underrepresented would continue to receive a boost in admissions, while students from racial or class backgrounds that are overrepresented in colleges could receive a less substantial boost for having attended class-integrated schools.

IV. WHY SUCH A POLICY WOULD BE CONSTITUTIONAL

As is often the case with affirmative action programs, to evaluate this policy, we must also ask if it would be constitutional. In this section, I will compare the constitutionality of two potential versions of this program, one in which applicants receive a bonus based on the racial composition of the K-12 schools they attended, and one in which applicants receive a bonus based on the SES composition of their K-12 schools. At the college level, both of the plans are race-neutral with respect to the individual applicant herself. However, the first form might raise more serious constitutional questions if K-12 schools took into account the race of students in admissions in an attempt to qualify for the bonus—especially if it seemed like these schools were instituting something

263. See *supra* note 78.

along the lines of a quota. Both plans are also to a certain degree race-conscious in their goals: in both cases, if the plans failed to result over time in both a greater representation of historically underrepresented groups in higher education as well as less racial segregation at the K-12 level, then they could not be considered successful.

A. *The Legal Landscape Post-Fisher II: Stuck in the Grutter*

The Court's jurisprudence on affirmative action stretches from *Bakke*,²⁶⁴ through *Grutter*,²⁶⁵ *Parents Involved*,²⁶⁶ and now to *Fisher II*.²⁶⁷ How would a version of this program that took into account the racial composition of an applicant's K-12 schools fare in the legal landscape created by the Court's decision in *Fisher II*? There is, perhaps unsurprisingly, some debate over what the legacy of *Fisher II* will be for affirmative action. For opponents of race-based affirmative action, it means "racial preferences forever"²⁶⁸ and "affirmative action gone berserk."²⁶⁹ Some supporters may have been just as surprised, as Justice Kennedy "had never previously voted to uphold a race-based affirmative action program against a constitutional challenge."²⁷⁰ Yet to the extent that the *Fisher II* decision consciously sees itself as upholding the precedent set by *Grutter*, this "shocker" of a decision is unlikely to have a major impact on affirmative action programs using race.²⁷¹ For the time being, then, the legal doctrine appears to be stuck in the *Grutter* framework.

264. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

265. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

266. *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

267. *Fisher v. Univ. of Texas at Austin (Fisher II)*, 136 S. Ct. 2198, 2205-06 (2016).

268. Stuart Taylor, *Symposium: Extrapolating from Fisher — Racial Preferences Forever*, SCOTUSBLOG (June 23, 2016, 4:42 PM), <http://www.scotusblog.com/2016/06/symposium-extrapolating-from-fisher-racial-preferences-forever> [http://perma.cc/4UL6-NPCQ].

269. Mark Walsh, A "View" from the Courtroom: Alito Dissents on Affirmative Action, a Deadlock on Immigration, and More, SCOTUSBLOG, (June 23, 2016, 5:31 PM), <http://www.scotusblog.com/2016/06/a-view-from-the-courtroom-alito-dissents-on-affirmative-action-a-deadlock-on-immigration-and-more> [http://perma.cc/Y9CS-NFTC] (quoting Justice Alito's off-hand remark as he read his opinion from the bench).

270. Steve Vladeck, *Symposium: So What Happened Between Fisher I and Fisher II?*, SCOTUSBLOG (June 23, 2016, 12:53 PM), <http://www.scotusblog.com/2016/06/symposium-so-what-happened-between-fisher-i-and-fisher-ii/> [http://perma.cc/4ZP2-V8MJ].

271. Richard Kahlenberg, *Symposium: A Win for Wealthy Students*, SCOTUSBLOG, (June 23, 2016, 9:10 PM), <http://www.scotusblog.com/2016/06/symposium-a-win-for-wealthy-students/> [http://perma.cc/TBN3-DC8A].

The *Grutter* framework, expressly preserved by *Fisher II*, sanctions the use of race in affirmative action to promote compelling state interests, so long as such programs are narrowly tailored to achieve those ends.²⁷² Failure to narrowly tailor means running afoul of constitutional equal protection. The Court held that it would give “some, but not complete” deference to colleges’ determination of the educational benefits of student diversity.²⁷³ And, drawing again on previous cases, *Grutter* expressly allows certain ends as “compelling state interests”: “the destruction of stereotypes, the ‘promot[ion of] cross-racial understanding,’ the preparation of a student body ‘for an increasingly diverse workforce and society,’ and the ‘cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.’”²⁷⁴

However, the Court also found that no deference is owed to the college itself in determining whether the use of race has been “narrowly tailored” to meet these compelling state ends.²⁷⁵ One thing this means is a requirement that the college demonstrate that the same compelling interests could not be promoted by programs that do not employ racial classifications—which are not exactly the same thing as programs that take no account of race. The Court has expressed concerns about potential perverse effects of well-meaning racial classifications. Poorly designed programs could “fail to capture diversity in all of its dimensions” or even, “when used in a divisive manner, could undermine the educational benefits” themselves.²⁷⁶ This concern about divisiveness stems from the same grounds on which Justice Kennedy has supported certain race-conscious programs that seek to increase racial integration; social cohesion is undermined both by de facto racial segregation in education *and* by blunt remedies through which individuals are told that they are being judged based on their race.²⁷⁷ There are crucial differences between this approach and either of what are often referred to as the “anti-subordination” and the “colorblind” understandings of the requirements of constitutional equal protection.²⁷⁸

In contrast to the simple versions of the anti-subordination account of constitutional equal protection, the Court’s concern about “balkanization” (understood as the idea that raising the salience of certain identities can increase social distance among groups) implies that certain policies aimed at remedying racial

272. See *Fisher II*, 136 S.Ct. at 2207-09.

273. *Id.* at 2203 (quoting *Fisher I*, 133 S. Ct. 2411, 2419 (2013)).

274. *Id.* at 2211 (quoting University’s 2004 “Proposal to Consider Race and Ethnicity in Admissions”).

275. *Id.* at 2208 (quoting *Fisher I*, 133 S. Ct. at 2421).

276. *Id.* at 2210.

277. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1306–07 (2011).

278. *Id.* at 1287-315.

inequality can be unconstitutional despite their integrative purpose.²⁷⁹ At the same time, unlike a basic version of the “colorblind” account of equal protection, this anti-balkanization jurisprudence continues to treat race-classifying programs that seek to benefit underrepresented racial minorities differently from those that would benefit racial groups that are already overrepresented.²⁸⁰ The fear that racial stratification could produce balkanization is relatively straightforward. It presumes that a lack of racial diversity in higher education and the de facto segregation of the nation’s K-12 schools tend to decrease intergroup understanding and increase racial fault lines, but also that the perverse effects of programs to remedy racial inequality in education may outweigh their good intentions.²⁸¹ The Court has articulated these doubts in several different ways.

In *Parents Involved*, five Justices agreed that policies that “endorse race-based reasoning and the conception of a Nation divided into racial blocs” can “contribut[e] to an escalation of racial hostility and conflict.”²⁸² Justice Kennedy also notes in *Parents Involved* that these policies sow “new divisiveness” and feed a “corrosive discourse” by making race into a “bargaining chip in the political process.”²⁸³ This concern is the most straightforwardly cognizable along the anti-balkanization framework discussed above; classifying individuals by race can mean essentializing and entrenching race as a category in a way that raises the level of antagonism between racial groups, whose members will fight over benefits allocated by race.²⁸⁴

The Court has also voiced concerns about how the message communicated by race-classifying policies might intrude on individuals’ dignity and autonomy. In *Parents Involved*, Justice Kennedy notes that: “Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.”²⁸⁵ This is a concern that “state-mandated racial label[s]” that individuals are “powerless to change” impede an individual’s ability to determine her own life.²⁸⁶

Both of these concerns include a fundamentally communicative element, and a conviction that “race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser

279. *Id.* at 1300-03.

280. *Id.* at 1300-01.

281. *Id.* at 1300-03.

282. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990)).

283. *Id.* at 797 (Kennedy, J., concurring in part and concurring in the judgment).

284. *See id.*

285. *Id.*

286. *Id.* at 743.

degree.”²⁸⁷ Because these problems arise when programs broadcast a message out into society that either increases antagonism between racial groups or tells an individual that they will forever be defined by their race, indirection will reduce these harms by scrambling the message. This is why, under the existing doctrine, holistic treatment of an applicant’s race is constitutionally preferred to mechanical treatment of those same classifications, and why facially race-neutral but race-conscious policies are constitutionally preferable to policies that classify individuals based on race. However, what is interesting about this framework is that it seems just as (if not more) concerned about the *intelligibility* of the message communicated than about its *content*. For example, both a mechanical and a holistic affirmative action program that take race into account could be understood as expressing the same basic message: because an institution wishes to admit a more diverse student body, an applicant will be evaluated such that her race may count in her favor or not. The difference lies in how salient and intelligible this message is for applicants; the benefit of a mechanical increase in points is far easier to grasp, while the specific benefit of a holistic process will remain more opaque. This difference is sometimes also justified on the grounds that mechanical weighting of race does not treat applicants like individuals, in a way that prejudices their autonomy or dignity. However, this relies on an assumption that when a large institution like a college adjudges an applicant in part based on her race, this does not pose constitutionally invalidating harms to her autonomy and dignity so long as she (or perhaps anyone) is unaware of how much weight was given to her race.

This jurisprudence rests on the idea that while racial inequality is an urgent problem, “both racial stratification and its repair each have the potential to balkanize.”²⁸⁸ And thus “the nation must strive for new, effective approaches that eschew the shortcomings of prior policies.”²⁸⁹ Yet by keeping *Grutter’s* model, *Fisher II* has actually provided little impetus for colleges to shift their policies. Rather, the Court has preserved a safe harbor out of which colleges may be understandably uneasy about straying. Thus, *Fisher II* will do little to change the fact that “the educational advantage that the wealthy enjoy in higher education contributes to declining economic mobility.”²⁹⁰

It is not solely the Court’s affirmative action jurisprudence that calls out for new approaches, but the reality on the ground that students from low-income backgrounds are increasingly underrepresented on college campuses.²⁹¹ And as constraining as the Court’s doctrine is for race-conscious affirmative action programs of the traditional form, it leaves open more room than has heretofore

287. *Id.* at 797.

288. Siegel, *supra* note 277, at 1300.

289. Erman & Walton, *supra* note 70, at 340 (citing Siegel, *supra* note 277).

290. Brown-Nagin, *supra* note 6, at 467.

291. *See supra* notes 54-56 and accompanying text.

been used. To the extent that current policies leave much to be desired, colleges should seek to explore what more they can do.

B. A Program Focused on SES Would Be Constitutional

Under the currently applicable line of cases, a program that used the percentage of FRLP-eligible students in an applicant's K-12 schools to calculate an admissions bonus would almost certainly pass muster under the Court's equal protection jurisprudence.²⁹² Nor would such a plan lead to constitutionally worrisome behavior on the part of K-12 schools if they were, as we would hope, to select students based on SES in response to this plan. Students would not be being told that they were being favored based on their race, but rather their parents' income, a message that would not trigger strict scrutiny.²⁹³

If such a program instead gave an admissions bonus based on the racial composition of an applicant's K-12 schools, more difficult constitutional questions could be raised. It might initially seem that because this program involves a similar degree of indirectness, it could survive scrutiny: Individuals are not being evaluated based on their race, but based on the experiences they likely had at more racially integrated schools. This might assuage the communicative, dignity, and autonomy concerns underlying the Court's doctrine. In addition, such a program fits many of the goals that *Fisher II* identifies as compelling state interests, primarily by increasing a sense of inclusion on college campuses.²⁹⁴

This would not, however, be enough to bring this program into the clear. It would also be important that this program would not risk causing K-12 schools to engage in unconstitutional behavior. The same equal protection framework that the Court has applied to college admissions applies to K-12 schools, and the Court has struck down K-12 policies employing racial classifications in selecting their student bodies when it found they were not narrowly tailored to the schools' compelling interests in diversity.²⁹⁵

K-12 schools seeking to reach a percentage of students of certain racial/ethnic groups to meet the standards for a program based on that metric could still admit students in a "holistic" manner. *Parents Involved* leaves open several other possibilities by which K-12 schools could aim to increase racial diversity, including drawing attendance zones with an understanding of neighborhood demographics or recruiting students in a targeted fashion.²⁹⁶ However, in order

292. Indeed, a primary question in *Fisher II* was whether presumptively constitutional socioeconomic affirmative action would have been sufficient to accomplish the University of Texas' objectives. See 136 S. Ct. at 2213.

293. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25-29 (1973).

294. *Fisher II*, 136 S. Ct. at 2212.

295. *Parents Involved*, 551 U.S. 701, 733 (2007) (Kennedy, J., concurring in part, concurring in the judgment).

296. *Id.* at 789.

for the program advocated in this piece to be practicable, it would almost certainly be necessary for K-12 schools to have a solid metric they could target. This could begin to resemble a forbidden racial quota; after all, while educational institutions can pursue a nebulous “critical mass” of students from certain racial/ethnic backgrounds, they are expressly forbidden from trying to achieve a specific percentage of such students.²⁹⁷ Here again, the line between when the communicative danger renders a policy unconstitutional and when it does not is extremely fine. Under existing doctrine, there is a significant constitutional difference between the race-conscious targeted recruitment of students, race-conscious holistic application policies, and race-conscious mechanistic admissions policies—even if these three policies were to have similar outcomes in terms of the racial composition of the student body. The difference again rests on the communicative element, and the risk that the audience of broader society would understand the same message (“X school should have more students from Y racial backgrounds”) differently—or perhaps more accurately, would understand it at all—when it was more or less direct.

Thus, while the actions of colleges in creating an incentive for such behavior might not necessarily be unconstitutional given the degrees of separation, for K-12 schools to respond to such an incentive by pursuing what looks like a racial quota might raise real constitutional concerns. Since changing the behavior of such schools is the principal reason for pursuing such a program, defining the metric in this way would be a significant drawback. In order to have the hoped-for effect on wider societal behavior, it would be important for it to be straightforward enough that parents, K-12 schools, and colleges be able to understand relatively easily which K-12 schools would and wouldn’t qualify for the bonus. Relying on using SES rather than race would avoid the potentially serious constitutional concerns that might otherwise arise.

CONCLUSION

The proposal outlined in this paper offers a novel solution for a pressing problem: How can colleges work to reduce or reverse their role in increasing inequality in a way that would be institutionally, politically, and legally feasible? By adopting such a program, particularly if they did so in a coordinated manner, colleges could use their privileged position in society as a source of educational norms to shift the behavior and improve the educations of a greater number of low-income students than these institutions are presently prepared to admit. In addition to representing an important step in doing more to live up to their broader social commitments, there is substantial social science evidence indicating that adopting such a program could help foster an atmosphere of inclusion on campuses, which is itself vital to the pedagogical benefits of diversity that colleges have long extolled. This policy would also be relatively inexpensive for colleges to adopt and, so long as it was based on SES rather than race, it

297. *Fisher II*, 136 S. Ct. at 2212.

SHIFTING THE SCOPE

would likely be constitutional under the Court's existing affirmative action doctrine.

At a time when educational inequality contributes to rising economic inequality, colleges should act proactively to reduce their role in this process and to encourage integration throughout the educational system. The policy described in this piece offers them an inexpensive, legal, and effective means to do so.

