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Evan F. Jaffe

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## NOW IS THE TIME: CLASS-BASED AFFIRMATIVE ACTION IN THE 21<sup>ST</sup> CENTURY

EVAN F. JAFFE\*

### INTRODUCTION

It is another cold, wintery day in New York. A high school junior at Yonkers-Gorton<sup>1</sup> grabs his textbooks, leaves his modest home and heads off to school. During homeroom, the teacher makes a stunning announcement: Scarsdale High School<sup>2</sup>, only ten miles away and in the same county, is dropping Advanced Placement<sup>3</sup> (AP) from its curriculum. After investing \$40,000 to bring in professors from Harvard, Yale and NYU, Scarsdale replaced

\*J.D. Candidate, St. John's University School of Law, June 2016; B.A., Wake Forest University, May 2008.

<sup>1</sup> Compare United States Census Bureau, <http://quickfacts.census.gov/qfd/states/36/3684000.html> (last revised July 8, 2014) (providing data for Yonkers, NY) with United States Census Bureau, <http://quickfacts.census.gov/qfd/states/36/3665431.html>, (last revised July 8, 2014) (providing data for Scarsdale, NY).

<sup>2</sup> *Id.*

<sup>3</sup> WIKIPEDIA, *Advanced Placement*, available at [http://en.wikipedia.org/wiki/Advanced\\_Placement](http://en.wikipedia.org/wiki/Advanced_Placement). Advanced Placement (AP) is a program, created by the College Board, which offers college-level curricula and examinations to high school students. Colleges and universities often grant placement and course credit to students who obtain high scores on the examinations. The AP curriculum for each of the various subjects is created for the College Board by a panel of experts and college-level educators in that field of study. *Id.*

Advanced Placement with an Advanced Topics<sup>4</sup> curriculum.<sup>5</sup> Many of the students at Yonkers-Gorton are confused. First, Yonkers-Gorton could not afford to spend that amount of money on consultants as the district is composed primarily of low and middle income students.<sup>6</sup> Some of these students are not in a single AP course. Many of the students wonder how the juniors in Scarsdale are going to get into college without AP classes and scores. The teacher makes the announcement on the amount spent on the consultants and wonders how many computers and college preparation materials \$40,000 could buy. The teacher laughs and eventually exclaims, “only in Scarsdale!”

The example above underscores one of many difficulties facing districts composed primarily of low-income<sup>7</sup> students. Since the start of the great recession, states throughout the country have reduced financial support for secondary<sup>8</sup> and higher education.<sup>9</sup> As most spending for education comes from local property taxes,

<sup>4</sup> Michael V. McGill, *Supplanting AP Classes with our Own*, AASA, June 2011, available at <http://www.aasa.org/SchoolAdministratorArticle.aspx?id=19116>.

Advanced Topic classes range from a museum-based art history course to advanced biology to Western political thought. The courses feature experiences that teachers would have been reluctant to include previously — for instance, original research in the Kennedy and Franklin D. Roosevelt presidential libraries. Students have more opportunities to examine issues and events from alternative perspectives. They make more connections between academic study and the real world. We’re seeing more simulations, debates, research, primary source analyses and outside readings. Teaching is more responsive to emerging topics and student interests. *Id.*

<sup>5</sup> Winnie Hu, *Scarsdale Adjusts to Life Without Advanced Placement Courses*, NEW YORK TIMES, Dec. 6, 2008, available at <http://www.nytimes.com/2008/12/07/education/07advanced.html>.

<sup>6</sup> See United States Census Bureau, *supra* note 1. According to census data, the median income in Scarsdale is \$232,422 whereas the median income for Yonkers is \$56,782. Also, the percentage of adults with a Bachelor’s Degree or higher in Scarsdale is 84.9% compared to 29.4% in Yonkers. *Id.*

<sup>7</sup> *Id.* (stating that low-income refers to families in the bottom 25<sup>th</sup> percentile of median yearly income).

<sup>8</sup> Michael Leachman & Chris Mai, *Most States Funding Schools Less Than Before the Recession*, CENTER ON BUDGET AND POLICY PRIORITIES, 1 (May 20, 2014), <http://www.cbpp.org/files/9-12-13sfp.pdf>. At least 35 states are providing less funding per student for the 2013-14 school year than they did before the recession hit. Fourteen of these states have cut per-student funding by more than 10 percent.

<sup>9</sup> Ozan Jaquette & Bradley R. Curs, *Creating the Out-of-State University: Do Public Universities Respond to Declining State Appropriations by Increasing Nonresident Enrollment?*, 1 (May 19, 2014), [http://web.missouri.edu/~cursb/research/Jaquette\\_Curs\\_nonres\\_approp\\_2014.pdf](http://web.missouri.edu/~cursb/research/Jaquette_Curs_nonres_approp_2014.pdf). Total state appropriations across all U.S. public baccalaureate granting institutions declined by \$10 billion since 2001-2002. *Id.*

districts composed primarily of lower income families face even greater hardship to make up for lost support from the state legislature. Decades of research confirms the crucial role family income and parents' education play in a student's school performance.<sup>10</sup> These indicators alone, though, do not fully grasp the complexity of testing and performance differences. Issues such as school resources, parental involvement in the student's education, parental employment, among other measures further explain the differences in performance.

In comparing Scarsdale and Yonkers-Gorton, each district spends over \$20,000 per student; they have similar percentages of teachers with an MA or PhD; and each district has a similar enrollment size.<sup>11</sup> At the same time, however, according to census data, the median income in Scarsdale is \$232,422, whereas the median income in Yonkers is \$56,782.<sup>12</sup> Over 86% of Yonkers-Gorton students qualify for free lunch compared with 0% in Scarsdale.<sup>13</sup> Further, the percentage of adults with a Bachelor's Degree or higher in Scarsdale is 84.9% compared to 29.4% in Yonkers.<sup>14</sup>

Given that parental income and education is a significant predictor in a pre-college student's performance,<sup>15</sup> it is no surprise that Scarsdale students vastly outperform Yonkers-Gorton students in standardized testing.<sup>16</sup> In addition, the two districts

<sup>10</sup> RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 129-130 (BasicBooks 1996); see also Richard H. Sander, *Class and American Legal Education: Article: Class in American Legal Education*, 88 DENV. U. L. REV. 631, 633.

<sup>11</sup> See *Westchester County High School Data Chart, SAT Scores, and Rankings*, WESTCHESTER MAGAZINE, available at <http://www.westchestermagazine.com/Westchester-County-Public-Schools-Rankings-Chart/>.

<sup>12</sup> See United States Census Bureau, <http://www.census.gov/quickfacts/table/LFE041214/3611965442,3684000,00> (last revised August 22, 2016) (comparing Yonkers, NY with Scarsdale, NY).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> KAHLENBERG, *supra* note 10.

<sup>16</sup> KAHLENBERG, *supra* note 10, at 129-130; see also Richard H. Sander, *Class and American Legal Education: Article: Class in American Legal Education*, 88 DENV. U. L. REV. 631, 633. The Mean SAT is 740 points greater in Scarsdale. Scarsdale students score on AP Tests of 3 or better 94% of the time versus 9% at Yonkers-Gorton. Scarsdale's Aspirational Performance Measures (APM) are 76.4% versus 9.70% for Yonkers-Gorton (APM is designed to assess college and career readiness by designating the percentage of students who earned a score of 75 or greater on their English Regents examination, and an 80 or better on a mathematics Regents exam).

could not be more different in terms of racial makeup.<sup>17</sup> This leaves obvious the question of whether class<sup>18</sup> impacts performance more than race. Can both class and race impact performance? What is the proper role of class in assessing admission standards? Should class be more important than race? Or is it vice-versa? Can they co-exist in the admissions process? I answer in this Note that class affects performance more than race and therefore should be the focus of affirmative action policies going forward.

Since affirmative action in higher education began in the 1960s there has been substantial educational and economic advancement of racial minorities, specifically in terms of college matriculation rates and higher paying jobs.<sup>19</sup> Many factors, including landmark civil rights and employment legislation, opened up economic opportunities to the nation's minorities in academia, service sector, and other higher paying jobs.<sup>20</sup> As more high school students, including minorities, attend college,<sup>21</sup> admissions issues surrounding the need for affirmative action have become more prevalent because of the belief that it is no longer needed.<sup>22</sup>

<sup>17</sup> Compare U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/3684000.html> (last revised July 8, 2014) (Yonkers, NY) with U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/3665431.html>, (last revised July 8, 2014) (Scarsdale, NY). Yonkers is 55.8% White, 34.7% Hispanic or Latino, 18.7 Black, 5.9% Asian whereas Scarsdale is 82.7% White, 3.9% Hispanic of Latino, 1.5% Black, 13.0% Asian.

<sup>18</sup> KAHLBERG, *supra* note 10, at 129-34. Richard Kahlenberg described multiple approaches to defining "class" and in this Note I use his sophisticated class definition. A sophisticated class definition includes not only income, education and occupation, but also factors such as wealth, schooling opportunities, neighborhood influences, and family structure. Today, colleges are in a position to collect more data to assess a candidate and give a comprehensive review of an admissions decision. *Id.*

<sup>19</sup> See KAHLBERG, *supra* note 10, at 45, 299.

<sup>20</sup> KAHLBERG, *supra* note 10, at 46; see also Richard H. Sander, *Class and American Legal Education: Article: Class in American Legal Education*, 88 DENV. U. L. REV. 631, 633.

<sup>21</sup> Ben Casselman, *Race Gap Narrows in College Enrollment, But Not in Graduation*, FiveThirtyEightEconomics, (April 30, 2014), <http://fivethirtyeight.com/features/race-gap-narrows-in-college-enrollment-but-not-in-graduation/>.

<sup>22</sup> Compare Casey Quinlan, *Why We Still Need Affirmative Action Policies in College Admissions*, THINKPROGRESS (Jul. 1, 2015), <http://thinkprogress.org/education/2015/07/01/3676124/still-need-affirmative-action-policies-college-admissions/> (discussing various reasons why affirmative action policies should be continued), with The Editors, *Affirmative Action in College Admissions is Past Its Use-By Date*, OBSERVER (Dec. 13, 2015), <http://observer.com/2015/12/affirmative-action-in->

The Supreme Court's landmark decision in *University of California Regents v. Bakke*<sup>23</sup> found that colleges may consider race as a plus factor<sup>24</sup> in a holistic review of applicants, but may not employ racial quotas to achieve racial diversity. *Bakke* held that under a Fourteenth Amendment challenge to a university's use of race in admissions, courts must apply "strict scrutiny" to the use of race.<sup>25</sup> The use of race must be narrowly tailored to achieve a compelling interest, such as racial diversity.<sup>26</sup> Through *Bakke*, and more recently *Grutter v. Bollinger*,<sup>27</sup> the Supreme Court has outlined three overall goals for diversity in higher education: 1) increased perspectives on other racial groups, 2) enhanced professional development, and 3) increased civic engagement.<sup>28</sup> Although historical challenges to affirmative action concerned the use of racial quotas or preferences, these higher education goals encompass more than just racial diversity. Even so, schools, legislatures, and courts construed race applicable to all three goals

college-admissions-is-past-its-use-by-date/ (opining that affirmative action policies should end).

<sup>23</sup> *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

<sup>24</sup> *Id.* A plus factor is an additional factor, outside GPA and SAT scores, that colleges look at when assessing an application. This may include, among many other factors, a student's geographic location, whether a student is the first in their family to go to college, a student's race or ethnicity, a student's family income, and a student's relation to alumni. *See id.* at 314, 317.

<sup>25</sup> *Id.* at 317.

<sup>26</sup> *See id.* at 299. Strict scrutiny review "is not dependent on the race of those burdened or benefited by a particular classification." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)). Thus, "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224.

<sup>27</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>28</sup> The Fifth Circuit, on remand in *Fisher v. Univ. of Texas*, 758 F.3d 633 (2014) ("Fisher II"), highlighted three goals from the *Bakke* and *Grutter* line of cases:

(i) increased perspectives, meaning that diverse perspectives improve educational quality by making classroom discussion 'livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds'; (ii) professionalism, meaning that 'student body diversity...better prepares [students] as professionals,' because the skills students need for the 'increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints'; and (iii) civic engagement, meaning that a diverse student body is necessary for fostering '[e]ffective participation by members of all racial and ethnic groups in the civil life of our Nation[, which] is essential if the dream of one Nation, indivisible, is to be realized.

*Fisher II*, 758 F.3d 633 (2014) (internal citations omitted).

for diversity in higher education, especially since remedying racial injustice and providing equal opportunity was the overriding objective of race-based affirmative action.

In the past decade, three pivotal Supreme Court cases,<sup>29</sup> most recently *Fisher v. University of Texas* (“Fisher I”), narrowed the focus and objective of race-based affirmative action while adhering to *Bakke* that race could be used as a plus factor. In particular, Justice O’Connor held in *Grutter* that race may be used as a plus factor in considering an applicant’s college application.<sup>30</sup> Courts still had to apply strict scrutiny to the use of race and make sure the use of race was narrowly tailored to achieving a compelling interest.<sup>31</sup> But what about a challenge to the use of class? In a case decided before *Bakke*, the Supreme Court stated in *San Antonio Independent School District v. Rodriguez* that a Fourteenth Amendment challenge to the use of class requires only “rational basis” review.<sup>32</sup> This difference in court review is noteworthy because the use of class has a lower threshold to meet. This lower standard of review is helpful as increasing a university’s economic diversity is “rationally related” to a legitimate state interest.<sup>33</sup>

While race-based affirmative action brought, and continues to bring, opportunity to many minorities, this Note proposes that class-based, or socioeconomic<sup>34</sup> affirmative action should be the focus of the future because it will not only increase enrollment in higher education for low-income students, but also increase racial diversity.<sup>35</sup> Race-based affirmative action was enacted to be a

<sup>29</sup> See generally *Grutter v. Bollinger*, 539 U.S. at 334; *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Fisher v. Univ. of Texas*, 133 S. Ct. 2411 (2013).

<sup>30</sup> *Grutter*, 539 U.S. at 334.

<sup>31</sup> *Id.*

<sup>32</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973). “Rational basis” review means that the enactment in question is “rationally related” to a “legitimate” government interest. *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> For the purposes of this Note, socioeconomic status and class are the same terms. See U.S. CENSUS BUREAU, *supra* note 18, for a definition of class.

<sup>35</sup> This Note does not advocate that class-based affirmative action should replace race-based policies; instead, this note argues that class should be used ahead of, but in conjunction with race, as a plus factor.

temporary fix to remedy past injustice.<sup>36</sup> While statistics<sup>37</sup> show affirmative action has been successful in boosting racial diversity in higher education, the efforts only go so far. Structural issues, such as proper levels of financial aid/Pell grants, and maintaining high rankings affect economic diversity in higher education.<sup>38</sup> In order to achieve more socioeconomic diversity, class should be given more weight as a plus factor in the holistic application process. Race should still be employed as a plus factor, but more focus on class will achieve the original ideals of affirmative action as a way to provide equal opportunity to all.<sup>39</sup>

Part I of this Note highlights the key affirmative action cases leading up to Fisher I. Part II of this Note focuses on Fisher I and the Fifth Circuit's dicta in Fisher II about the unsolved arena of class-based affirmative action.<sup>40</sup> Part III of this Note details how race-based affirmative action does not capture a critical mass<sup>41</sup> of economic and racial diversity in higher education. Part IV of this Note argues that class-based affirmative action will bolster economic and racial diversity in higher education by focusing more on class characteristics in the holistic review process. This change will capture not only high achieving poor students, but high achieving poor minority students, thus attaining the original goals of affirmative action and fostering a richer collegiate experience for the future leaders of America.

<sup>36</sup> Richard D. Kahlenberg, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, THE CENTURY FOUNDATION, 3 (Oct. 3, 2012), <https://tcf.org/assets/downloads/tcf-abaa.pdf>.

<sup>37</sup> *Grutter*, 539 U.S. at 343.

<sup>38</sup> Justin Pope, *Colleges Caught in Obsession over Rankings*, (Feb. 5, 2012), available at [http://www.nbcnews.com/id/46272142/ns/us\\_news-life/t/colleges-caught-obsession-over-rankings](http://www.nbcnews.com/id/46272142/ns/us_news-life/t/colleges-caught-obsession-over-rankings) (asserting that colleges are obsessed with keeping their US News rankings, which are largely driven by SAT and GPA numbers).

<sup>39</sup> *Bakke*, 438 U.S. at 311-12 (“[T]he attainment of a diverse student body ... [is] clearly [] a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”).

<sup>40</sup> In this note I do not address arguments made in the most recent Supreme Court review of Abigail Fisher's petition. Additionally, the Court did not address the use of class-based affirmative action as an alternative to race-based affirmation action.

<sup>41</sup> Critical mass, introduced in *Bakke*, encompasses a numerical-based system to achieve a proportionate amount of diversity in the student body. Critical mass has been criticized as being a veiled quota system, and therefore, this Note does not endorse a strict numerical-based proportion for achieving diversity. *Bakke*, 438 U.S. 265 (1978).



## I. *BAKKE* AND ITS PROGENY

### A. *The Challenge*

Affirmative action, as enacted, was seen by its supporters as a mechanism to remedy structural and long-lasting discrimination in higher education and employment.<sup>42</sup> Born out of the civil rights struggle of the 1960s, universities adopted various formulas to increase minority enrollment and diversity.<sup>43</sup> In 1978, the Supreme Court handed down the first of three key decisions regarding the proper treatment of race in the university admissions landscape. Prior to 1978, however, the Court handed down a decision on the proper treatment of class in the context of secondary education, providing unexpected guidance for possible class-based affirmative action in higher education.

#### 1. Regents of University of *California v. Bakke*

*Bakke* was the first case before the Supreme Court that directly addressed the issue of considering race as a positive or favorable factor in a university's admissions process. University of California at Davis (UC Davis) Medical School's ultimate goal of using race was to achieve the educational benefits of a more diverse student body.<sup>44</sup>

The Court considered the constitutionality of a points-based admissions system used by the medical school at UC Davis.<sup>45</sup> The school set aside 16 out of 100 seats for minority applicants under a separate admissions program.<sup>46</sup> Alan Bakke, a white male, challenged this racial quota as an alleged violation of Title VI of

<sup>42</sup> KAHLBERG, *supra* note 36.

<sup>43</sup> KAHLBERG, *supra* note 36, at 3.

<sup>44</sup> *Bakke*, 438 U.S. 265 (1978).

<sup>45</sup> *Id.*

Beginning in 1971, the UC Davis faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical School class. The special program consisted of a separate admissions system operating in coordination with the regular admissions process. The special program operated with a separate committee, a majority of whom were minorities. Similar to the regular admissions procedure, the applicant in each program was rated with a score; this score, in turn, determined offers of admission. This rating procedure was common at the time and is a standard practice in university admissions to this day. *Id.*

<sup>46</sup> *Bakke*, 438 U.S. at 279.

the Civil Rights Act and the Fourteenth Amendment.<sup>47</sup> Bakke was twice denied admission to UC Davis under the general admission program whereas applicants with lower point totals were admitted under the special program.<sup>48</sup>

Justice Powell, writing for the majority in a 5-4 decision, held this special program was impermissible under the Equal Protection Clause. First, “decisions based on race...are reviewable under the Fourteenth Amendment.”<sup>49</sup> Second, equal protection means there is no “artificial line of a ‘two-class theory’” that “permits the recognition of special wards entitled to a degree of protection greater than that accorded others.”<sup>50</sup> Third, any racial classification must meet strict scrutiny, as any decision to utilize race must be “precisely tailored to serve a compelling governmental interest.”<sup>51</sup> The Court held UC Davis’ quota system was invalid and violated the Fourteenth Amendment.<sup>52</sup> Under the quota system, there were only 84 seats in the freshman class open to white students, whereas minorities could compete for any spot in the 100-member class.<sup>53</sup> Justice Powell found that the program, with its set-aside of a specific number of seats for minorities, did discriminate against Bakke.<sup>54</sup> The Court concluded less restrictive programs, such as making race one of several factors in admission, would serve the same purpose.<sup>55</sup> Nevertheless, the state was entitled to consider race as one of several factors in admissions.<sup>56</sup>

<sup>47</sup> *Id.* at 277-78.

<sup>48</sup> *Id.* at 277.

<sup>49</sup> *Id.* at 287 (citing to earlier cases dealing with separate white and black schools and that issues of separate racial classification are reviewable under the Fourteenth Amendment, including: *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)).

<sup>50</sup> *Id.* at 295.

<sup>51</sup> *Bakke*, 438 U.S. at 299.

<sup>52</sup> *Id.* at 320.

<sup>53</sup> *Id.* at 289.

<sup>54</sup> *Id.* at 318.

<sup>55</sup> *Id.* at 316-18. Justice Powell offered the example of the admissions program at Harvard University as one he believed would pass constitutional muster. Harvard did not set rigid quotas for minorities, but actively recruited and sought to include minorities as more than a specific number and instead towards creating a racially and culturally diverse student body. *Id.*

<sup>56</sup> *Bakke*, 438 U.S. at 316-18.

The interest in the educational benefits that flows from a diverse student body is a compelling interest a university could use to justify the consideration of race.<sup>57</sup> A diverse student body serves values beyond race alone, including enhanced classroom dialogue, robust exchange of ideas, and lessening of racial isolation and stereotypes.<sup>58</sup> But securing diversity's benefits, according to Justice Powell was complex: "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."<sup>59</sup> Going forward, as long as universities did not employ a racially-based quota system, schools could use race as a plus factor in a holistic review of an applicant. However, race could not be outcome-determinative for an applicant.<sup>60</sup>

Twenty-five years later, changing attitudes and societal pressures pushed the Court to revisit race-based affirmative action with a pair of cases involving the University of Michigan.

## 2. *Grutter v. Bollinger* and *Gratz v. Bollinger*

*Grutter* and *Gratz*, each decided by the Court on June 23, 2003, confirmed that diversity is a compelling state interest. Each case involved a Fourteenth Amendment challenge brought by an in-state, white applicant denied admission to a school at the University of Michigan.<sup>61</sup>

In *Grutter v. Bollinger*, Barbara Grutter, a white female applicant from Michigan, was denied admission to the University of Michigan's Law School ("Law School").<sup>62</sup> Grutter challenged her denial as violating Title VI of the Civil Rights Act and the Fourteenth Amendment, specifically because the Law School used race as a predominant factor in its admissions decision.<sup>63</sup> The United States District Court for the Eastern District of Michigan concluded that the Law School's use of race as a factor in

<sup>57</sup> *Id.* at 311-12.

<sup>58</sup> *Id.* at 312-13.

<sup>59</sup> *Id.* at 315.

<sup>60</sup> *Id.* at 318.

<sup>61</sup> See generally *Grutter*, 539 U.S. at 312-22; *Gratz*, 539 U.S. at 251-57.

<sup>62</sup> *Grutter*, 539 U.S. at 316.

<sup>63</sup> *Id.* at 317.

admissions decisions was unlawful.<sup>64</sup> The Sixth Circuit reversed, holding Justice Powell's opinion in *Bakke* was binding precedent establishing diversity as a compelling state interest.<sup>65</sup>

In a 5-4 decision affirming the Sixth Circuit, Justice O'Connor found that the Law School's program was not a quota system and was sufficiently flexible to ensure individualized review.<sup>66</sup> Justice O'Connor noted that the Law School reviewed each applicant individually, with no policy for any acceptance or rejection based on a single plus factor, and did not automatically award points based on race.<sup>67</sup> In addition, the Law School took into account many variables such as economic status to ensure the admitted class came from a wide swatch of the country.<sup>68</sup> Furthermore, the Court held that narrow tailoring does not require exhausting all conceivable race-neutral alternatives.<sup>69</sup> The Law School considered, in good faith, race-neutral alternatives and concluded that in order to achieve a "critical mass" of racial diversity, the use of race as a plus factor in holistic review was the best decision.<sup>70</sup>

Justice O'Connor highlighted the benefits of diversity in education as substantial, noting an admission policy using race as plus factor helps "promote[] 'cross-racial understanding,'...breakdown racial stereotypes, and 'enable[] [students] to better understand persons of different races.'"<sup>71</sup> Additionally, "[t]hese benefits are 'important and laudable,'

<sup>64</sup> *Id.* at 321. Applying strict scrutiny, the court determined the Law School's asserted interest in assembling a diverse student body was not compelling because "the attainment of a racially diverse class . . . was not recognized as such by *Bakke* and it is not a remedy for past discrimination." The District Court also held that even if diversity were compelling, the Law School had not narrowly tailored its use of race to further that interest.

<sup>65</sup> *Id.* The Sixth Circuit also held the Law School's use of race was narrowly tailored because race was merely a "potential 'plus' factor," and because the Law School's program was "virtually identical" to the approved Harvard admissions program described by Justice Powell.

<sup>66</sup> *Id.* at 336-38.

<sup>67</sup> *Grutter*, 539 U.S. at 337.

<sup>68</sup> *Id.* at 338.

<sup>69</sup> *Id.* at 339-40.

<sup>70</sup> *Id.* at 340. The Court noted the Government advocated that the Law School embrace the percentage plans adopted in Texas and other states; but Justice O'Connor stated that "even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."

<sup>71</sup> *Grutter*, 539 U.S. at 330 (internal citation omitted).

because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’”<sup>72</sup> Based on an extensive record, the Court emphasized the validity of decades of research and studies from noted scholars, leading multi-national companies and government officials.<sup>73</sup> Therefore, “a ‘critical mass’<sup>74</sup> of underrepresented minorities is necessary to further [the Law School’s] compelling interest in securing the educational benefits of a diverse student body.”<sup>75</sup> Justice O’Connor also predicted that “25 years from now, the use of racial preferences [would] no longer be necessary to further the interest approved today.”<sup>76</sup>

While Justice O’Connor’s opinion in *Grutter* emphasized the substantial values of diversity, *Gratz* dealt with the procedural aspects of employing race in an admissions program.<sup>77</sup>

In *Gratz v. Bollinger*, Jennifer Gratz, a white female from Michigan, was denied admission to the University of Michigan’s College of Literature, Science, and the Arts (“LSA”).<sup>78</sup> Gratz challenged her denial as violating Title VI of the Civil Rights Act and the Fourteenth Amendment, specifically that the LSA used race as a predominant factor in its admission decision.<sup>79</sup> The United States District Court for the Eastern District of Michigan, using *Bakke* as precedent, found that achieving diversity was a compelling government interest.<sup>80</sup> The Sixth Circuit did not

<sup>72</sup> *Id.* (internal citation omitted). The court stated its deference to a university’s judgment about values it wants to pursue, including composition of its student body.

<sup>73</sup> *Id.* at 330-33. The Court cited amicus briefs from major multi-national corporations General Motors and 3M; the U.S. military; and the U.S. government.

<sup>74</sup> *Cf.* note 41 for this note’s position on critical mass. The Law School’s view on “critical mass” is also not a specific percentage or numbers-based quota.

<sup>75</sup> *Id.* at 333.

<sup>76</sup> *Id.* at 343. Sandra Day O’Connor and Stewart Schwab, *Affirmative Action in Higher Education over the Next Twenty-five Years: A Need for Study and Action*, Paper 429 CORNELL LAW FACULTY PUBLICATIONS (2010). Justice O’Connor, in reflecting on *Grutter*, noted the 25-year expectation was not a deadline and that educators and schools must study the issue and utilize all possible data and measurements to ensure the best course of action to achieve diversity.

<sup>77</sup> *Gratz*, 539 U.S. at 275-76.

<sup>78</sup> *Id.* at 251.

<sup>79</sup> *Id.* at 252-53.

<sup>80</sup> *Id.* at 258. The court did find that the old LSA admissions policy of “protecting” or “reserving” seats for underrepresented minority applicants effectively kept non-protected applicants from competing for those slots and operated as the functional equivalent of a quota.

review the lower court opinion specifically as it decided *Grutter*, and the parties petitioned for combined review of the constitutionality of the consideration of race in university admissions.<sup>81</sup>

In *Gratz*, the Court struck down the old LSA policy that automatically distributed 20 points, 20 percent of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race.<sup>82</sup> The Court did not agree that this plan was “narrowly tailored” to achieve the school’s interest in educational diversity.<sup>83</sup> The majority compared the LSA’s plan to the Harvard College Program made famous in *Bakke*.<sup>84</sup> The university’s “automatic distribution of 20 points ha[d] the effect of making ‘the factor of race...decisive’ for virtually every minimally qualified underrepresented minority applicant.”<sup>85</sup> The Court reiterated Justice Powell’s view in *Bakke* that employing race as a plus factor in holistic review is flexible to ensuring a diverse student body.<sup>86</sup>

*Bakke*,<sup>87</sup> *Grutter*,<sup>88</sup> and *Gratz*<sup>89</sup> confirmed that racial classifications, in light of Fourteenth Amendment challenges, are subject to strict scrutiny review by the Court.<sup>90</sup> The Court views the use of class differently, previously holding that class is subject to a lesser standard: rational basis.<sup>91</sup> This level of review has not

<sup>81</sup> *Id.* at 259-60.

<sup>82</sup> *Gratz*, 539 U.S. 244, 270 (2003).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 271 (“The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity.”).

<sup>85</sup> *Id.* at 272. The Court rejected the all-to-common argument that the volume of applications and individual review is a strain on its resources: “the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.”

<sup>86</sup> *Id.* at 271.

<sup>87</sup> 438 U.S. at 356-57.

<sup>88</sup> 539 U.S. at 326-27.

<sup>89</sup> 539 U.S. at 270.

<sup>90</sup> *See Univ. of California Regents v. Bakke*, 438 U.S. 265 (1978).

<sup>91</sup> *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973); *see also* Britton Kovachevich, *Note: Making it to Class: Socioeconomic Diversity and the Statutory Authority of the Department of Education*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 757, 812 (2013) (“To date, no classifications beyond religion, race, alienage, ethnicity, sex, and legitimacy of parentage

been overruled or overturned, even though the foundational case establishing rational basis review for class, *Rodriguez*,<sup>92</sup> was decided before *Bakke*.

### 3. *San Antonio Independent School District v. Rodriguez*

In *Rodriguez*, Hispanic parents in the under-privileged part of a huge district challenged a Texas education-funding program as discriminating on the basis of wealth, and thus violated the Fourteenth Amendment.<sup>93</sup> The United States District Court for the Western District of Texas held that the program discriminated on the basis of wealth in the manner in which education was provided to Texas students.<sup>94</sup> The court found wealth was a “suspect” classification and that education is a “fundamental interest”; therefore, the system could be sustained only if the State could show that it was premised upon some compelling state interest.<sup>95</sup> The court concluded that “[n]ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications.”<sup>96</sup>

In reversing, the Supreme Court held there was no basis to say that the system was “invidiously discriminatory,” and that deference was accorded to the legislators, scholars, and educational leaders.<sup>97</sup> The Court refused to assume a level of knowledge superior to that of the officials in charge of creating, revising, and implementing the system.<sup>98</sup> Most importantly, according to the Supreme Court, a Fourteenth Amendment challenge based on class status is “whether the challenged state action rationally furthers a legitimate state purpose or interest.”<sup>99</sup>

have been consistently afforded a degree of scrutiny formally higher than this ‘rational basis’ review by the Supreme Court”).

<sup>92</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>93</sup> *Id.* at 16. The Court described differences between two districts, Edgewood and Alamo Heights. These differences closely resemble the differences between Yonkers-Gorton and Scarsdale. See U.S. CENSUS BUREAU, *supra* note 1.

<sup>94</sup> *Rodriguez*, 411 U.S. 1 (1973).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 55.

<sup>98</sup> *Id.*

<sup>99</sup> *Rodriguez*, 411 U.S. 1 (1973). The Court emphatically stated, based on the record and Texas’ education policy going back to the state’s first constitution in 1845, that it easily met the “rational basis” standard. *Id.*

In the affirmative action universe, increasing access to higher education to an underserved half of the income scale certainly furthers a legitimate state interest of enhancing diversity.<sup>100</sup> *Rodriguez* is important for the use of class in affirmative action because it provides guidance for future policy decisions. Since *Bakke*, *Grutter*, and *Gratz* stated that a reviewing court must apply strict scrutiny to the use of race, *Rodriguez* offers hope to plans for class-based affirmative action because the use of class only has to pass rational basis review.

While the Supreme Court in *Fisher I* did not specifically address the use of class-based affirmative action under the Fourteenth Amendment, the Fifth Circuit on remand in *Fisher II* left open the idea of substituting class for race in affirmative action.

## II. THE *FISHER* CHALLENGE

### A. *Fisher I*

In 2013, the Supreme Court faced another challenge to the use of race-based affirmative action in higher education.<sup>101</sup> Abigail Fisher, a white female from Texas, applied for admission to the University of Texas at Austin (“UT Austin”) for the 2008 entering class.<sup>102</sup> Although a Texas resident, Fisher did not graduate in the top ten percent of her class.<sup>103</sup> She therefore did not qualify for automatic admission under the Top Ten Percent Plan, which that year took 81% of the seats available for Texas residents.<sup>104</sup> Instead, she was considered under the holistic review program,<sup>105</sup>

<sup>100</sup> Britton Kovachevich, *Note: Making it to Class: Socioeconomic Diversity and the Statutory Authority of the Department of Education*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 757, 812-813 (2013); Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL’Y REV. 367, 370-71 (Summer 2013).

<sup>101</sup> 133 S.Ct. 2411 (2013).

<sup>102</sup> *Id.* at 2417.

<sup>103</sup> *Fisher II*, 758 F.3d at 637.

<sup>104</sup> *Id.* at 638. Top Ten Percent Plan guarantees Texas residents graduating in the top ten percent of their high school class, regardless of other measurements, admission to any public university in Texas.

<sup>105</sup> *Id.*

[A]ny applicant who was not offered admission either through the Top Ten Percent Law or through an exceptionally high Academic Index (“AI”) score is evaluated through the holistic review process. The AI is calculated based on an applicant’s standardized test scores, class rank, and high school coursework. Holistic review



which looked past class rank to evaluate each applicant as an individual based on her achievements and experiences. Under holistic review, Fisher became one of 17,131 applicants for the remaining 1,216 seats for Texas residents.<sup>106</sup> UT Austin denied Fisher admission for the 2008 entering class.<sup>107</sup>

Fisher sued UT Austin and various officials in the United States District Court for the Western District of Texas.<sup>108</sup> She alleged UT Austin's consideration of race in admissions violated the Fourteenth Amendment.<sup>109</sup> The District Court granted summary judgment to the University and the Fifth Circuit affirmed.<sup>110</sup> Over the dissent of seven judges, the Court of Appeals denied petitioner's request for rehearing en banc.<sup>111</sup>

The Supreme Court confirmed the *Grutter*, *Gratz*, and *Bakke* reasoning that diversity in higher education is a permissible goal.<sup>112</sup> The Court reiterated that using race-based policies as a plus factor is allowed so long as the means chosen by the university to attain diversity are narrowly tailored to that goal.<sup>113</sup> Justice

considers applicants' AI scores and Personal Achievement Index ("PAI") scores. The PAI is calculated from (i) the weighted average score received for each of two required essays and (ii) a personal achievement score based on a holistic review of the entire application, with slightly more weight being placed on the latter. In calculating the personal achievement score, the staff member conducts a holistic review of the contents of the applicant's entire file, including demonstrated leadership qualities, extracurricular activities, honors and awards, essays, work experience, community service, and special circumstances, such as the applicant's socioeconomic status, family composition, special family responsibilities, the socioeconomic status of the applicant's high school, and race. No numerical value is ever assigned to any of the components of personal achievement scores, and because race is a factor considered in the unique context of each applicant's entire experience, it may be a beneficial factor for a minority or a non-minority student. *Id.* (emphasis added).

<sup>106</sup> *Fisher II*, 758 F.3d at 638.

<sup>107</sup> *Id.*

<sup>108</sup> *Fisher v. Univ. of Texas at Austin*, 133 S.Ct. at 2417.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* The Fifth Circuit held that *Grutter* required courts to give substantial deference to UT Austin, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 2417-18.

<sup>113</sup> *Id.* The State of California's amicus brief built upon the findings of Justice O'Connor in *Grutter* regarding a university's reason for diversity:

California has a keen interest in ensuring that its future leaders are adequately prepared to function productively in an increasingly diverse and increasingly urban society....Student body diversity at the college and university level is a critical piece of this effort. Many students arrive at college having had limited exposure to different races and

Kennedy wrote that *Grutter* made clear it is for the courts, not for university administrators, to ensure that “[t]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.”<sup>114</sup> Justice Kennedy further asserted that *Grutter* made clear that it remains at all times the University’s obligation to demonstrate, and the Judiciary’s obligation to determine, that admissions processes “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”<sup>115</sup>

The Supreme Court found that the Fifth Circuit did not apply “strict scrutiny”<sup>116</sup> to the use of race as a “narrowly tailored,” and necessary way to achieve diversity.<sup>117</sup> Narrow tailoring requires the reviewing court to verify that it is “necessary” for a university to use race to achieve the educational benefits of diversity.<sup>118</sup> This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.<sup>119</sup> Although “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” strict scrutiny does require a court to examine with care, and not defer to, a university’s “serious, good faith consideration of workable race-neutral alternatives.”<sup>120</sup> The Court found that the Fifth Circuit did not analyze possible race-neutral alternatives, and instead, deferred to the “good faith” judgment of UT Austin.<sup>121</sup> The Court remanded the case to the Fifth Circuit to determine whether UT Austin

cultures, and with biases already imprinted upon them. Their college years provide the opportunity for them to interact ‘with different people from different places, cultures, races, religions, and socio-economic backgrounds’ and to ‘learn the lessons that will shape their behavior for the rest of their lives.’....[T]he educational experiences uniquely provided by a diverse student fellowship are critical to future civic participation and leadership. *Id.*

<sup>114</sup> *Fisher I*, 133 S.Ct. at 2420 (quoting *Grutter*, 539 U.S. at 333).

<sup>115</sup> *Id.* (quoting *Grutter*, 539 U.S. at 337).

<sup>116</sup> *See Univ. of California Regents v. Bakke*, 438 U.S. 265 (1978).

<sup>117</sup> 133 S.Ct. at 2421.

<sup>118</sup> *Id.* (quoting *Bakke*, 438 U.S. at 305).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (quoting *Grutter*, 539 U.S. at 339-40).

<sup>121</sup> *Id.* at 2420-21. The Court cited that *Grutter* “did not hold that good faith would forgive an impermissible consideration of race” and “[s]trict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.”

offered sufficient evidence that its use of race was “narrowly tailored” to achieve the educational benefits of diversity.<sup>122</sup>

### B. *Fisher II*

While the Supreme Court further narrowed the landscape as to the use of race as a plus factor in college admissions in *Fisher I*, an unexpected window may have opened to the use of class in *Fisher II*.<sup>123</sup>

In *Fisher II*, the Fifth Circuit undertook an exacting discussion of the history, purpose, and achievements or failures of Texas’ Top Ten Percent Plan.<sup>124</sup> The court denied that UT Austin’s ten percent plan functioned as a racial quota, finding that the plan had an opposite effect.<sup>125</sup> In fact, based on the gap in test scores between minority and non-minority applicants, holistic review with individualized evaluations ensured UT Austin did not otherwise admit an all-white class.<sup>126</sup> In consideration of the Supreme Court’s stern language about deference, the Fifth Circuit highlighted the vast recruiting<sup>127</sup> and financial aid investments<sup>128</sup> by UT Austin to increase access for minority candidates as well as seek out minority candidates that might not be aware of their

<sup>122</sup> 133 S. Ct. at 2421.

<sup>123</sup> *Fisher II*, 758 F.3d 633 (5th Cir. 2014).

<sup>124</sup> See generally *Fisher II*, 758 F.3d at 645, 654-56.

<sup>125</sup> *Id.* at 646-47. “The increasingly fierce competition for the decreasing number of seats available for Texas students outside the top ten percent results in minority students being *under-represented*—and white students being overrepresented—in holistic review admissions relative to the program’s impact on each incoming class.” (emphasis in original). *Id.* at 646.

<sup>126</sup> *Id.* at 647. The court cited data from 2005, 2007 and 2008 showing test gap score of at least 100 points between whites, Hispanic and Black students.

<sup>127</sup> *Id.* at 648-49. UT Austin greatly expanded local recruiting centers in large metropolitan regions such as Dallas and San Antonio. The school hosted day/night visits to entice top ten percent students, including the “Longhorn Lock-in,” where students from targeted high schools would spend the night at UT Austin.

<sup>128</sup> *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 649. UT Austin scholarship programs include the Longhorn Opportunity Scholarship Program (scholarships to graduates of certain high schools throughout Texas that had predominantly low-income student populations and a history of few, if any, UT Austin matriculates); the Presidential Achievement Scholarship Program (need-based scholarship that is awarded based on the applicant’s family income, high school characteristics, and academic performance as compared to his or her peers at that high school); and the First Generation Scholarship (targets applicants who are the first in their family to attend college). According to data from UT Austin, between 1997 and 2007 these scholarship programs awarded \$59 million to these students. *Id.* at 647-48.

possible chance of admission.<sup>129</sup> The Fifth Circuit concluded that UT Austin implemented every race-neutral effort alternative to show that the use of race is necessary as a plus factor.<sup>130</sup>

The Fifth Circuit emphasized the difficult nature of *de facto* segregation in Texas' secondary schools as a primary reason for implementing the Top Ten Percent Plan. In commending the vast economic, racial, and performance measures throughout Texas districts, the court found that UT Austin's race-neutral plan was a major step in achieving Texas' goal of diversity.<sup>131</sup> In conjunction with this plan, which provided upwards of 85% of available seats for Texas residents in any given year,<sup>132</sup> UT Austin's holistic review process, using race as a plus factor, sought to find high-performing students passed over by the Top Ten Percent Plan.<sup>133</sup> The Fifth Circuit agreed with UT Austin's justification, and found the holistic review program to be an attempt to achieve "critical mass" envisioned by Justice Powell in *Bakke*.<sup>134</sup> Although the program was found to be "narrowly tailored" and proper under

<sup>129</sup> *Fisher v. Univ. of Texas at Austin*, 758 F.3d at 648-49. UT Austin's financial aid office created a special group "to convince low income students that money should not be a barrier to attending college."

<sup>130</sup> 758 F.3d at 649.

<sup>131</sup> *Id.* at 653. Under the plan, the top decile of high schools "including large numbers of students from highly segregated, underfunded, and underperforming schools—all qualified for automatic admission to UT Austin." *Id.* Race played no role in determining their admission status.

<sup>132</sup> *Id.* at 654-55.

In 1996, when the Top Ten Percent Plan was introduced, it admitted 42% of the Texas incoming class; by 2005, when the *Grutter* plan was introduced, the Top Ten Percent Plan occupied 69% of the seats available to Texas residents; and by 2008, when *Fisher* applied for admission, it had swelled to 81%. *Id.* at 654. Since then, Texas passed Senate Bill 175 which modified the Top Ten Percent Plan for UT Austin to authorize the University "to limit automatic admission to no less than 75% of its enrollment capacity for first-time resident undergraduate students beginning with admission for the entering class of 2011 and ending with the entering class of 2015." *Id.* at 655. For the entering class of 2011, the first affected by Senate Bill 175, 74% of enrolled Texas residents were automatically admitted, a figure that again was pushed upward by a growing population, to 77% for the entering class of 2013. *Id.*

<sup>133</sup> *Id.* at 653-54. UT Austin contended this reach into the applicant pool was not a further search for numbers but a search for students of unique talents and backgrounds who can enrich the diversity of the student body in distinct ways and draws from a highly competitive pool, a mix of minority and non-minority students.

<sup>134</sup> *Fisher v. Univ. of Texas at Austin*, 758 F.3d at 655-66. The Court cited early results of the plan for minority enrollment: the percentage of black students admitted to UT Austin climbed from 4.82% in 2004 to 5.05% in 2005, climbing to 5.13% in 2006, 5.41% in 2007, and 5.67% in 2008. Similarly, the percentage of Hispanic admitted students climbed from 16.21% in 2004, to 17.88% in 2005, 18.08% in 2006, 19.07% in 2007, and 20.41% in 2008.

“strict scrutiny,” the court addressed Fisher’s last-ditch argument of substituting socioeconomic status with race.<sup>135</sup>

Abigail Fisher argued socioeconomic disadvantage could be a neutral proxy for race and was a permissible race-neutral alternative for UT Austin.<sup>136</sup> UT Austin, in turn, cited accepted scholarly work that “there are almost six times as many white students as black students who both come from [socioeconomically disadvantaged] families and have test scores that are above the threshold for gaining admission at an academically selective college or university.”<sup>137</sup> Instead of addressing the issue head-on, the Fifth Circuit stated it was “ill-equipped” to sort out this messy area.<sup>138</sup>

Since the Fifth Circuit did not decide whether class may serve as a proxy for race, it left open an intriguing possibility for future affirmative action policy decisions.

### III. CURRENT RACE-BASED AFFIRMATIVE ACTION DOES NOT CAPTURE A “CRITICAL MASS”

#### A. *States With Bans on the Use of Race in Affirmative Action*

With the Court’s recent decision in *Schuette v. Coalition to Defend Affirmative Action*,<sup>139</sup> eight states now have broad bans on the use of race in higher education and other public fields.<sup>140</sup> The language of each proposition is similar: the state “shall not discriminate against, or grant preferential treatment to, any

<sup>135</sup> *Id.* at 656-57.

<sup>136</sup> *Id.* at 655-56.

<sup>137</sup> *Fisher v. Univ. of Texas at Austin*, 758 F.3d at 655-56. In its brief, UT Austin cited the data from the influential book *THE SHAPE OF THE RIVER* by WILLIAM G. BOWEN & DEREK BOK. GAERTNER & HART, *supra* note 100, at 377.

William Bowen and Derek Bok used simulations to demonstrate that class-based policies would not be effective replacements for race-conscious affirmative action. Bowen and Bok explain that race-based considerations at most selective universities offer a large admissions boost. Even if universities were to grant low-income students ‘minority-size’ boosts, racial diversity would plummet because minority status and poverty are not sufficiently correlated. Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL’Y REV. 367, 377 (Summer 2013).

<sup>138</sup> *Fisher v. Univ. of Texas at Austin*, 758 F.3d at 657.

<sup>139</sup> 134 S. Ct. 1623 (2014)

<sup>140</sup> Drew DeSilver, *Supreme Court Says States can Ban Affirmative Action; 8 Already Have*, PEW RESEARCH CENTER (Apr. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have/>.

individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation...public education...”<sup>141</sup> The success of these voter initiatives confirms the growing nationwide opposition to the use of race-based preferences in college admissions.<sup>142</sup> Scholars attribute this opposition to several factors: 1) people understand that where you go to college matters, and they do not like the idea of race counting in who gets ahead;<sup>143</sup> 2) many Americans appear to recognize that, today, educational disadvantages are much more closely linked to class than race;<sup>144</sup>

<sup>141</sup> *Id.* (quoting language from California’s Proposition 209).

<sup>142</sup> Sheryll Cashin, *Place, Not Race: Affirmative Action and the Geography of Educational Opportunity*, 47 U. MICH. J.L. REFORM 935, 946 (Summer 2014).

While a majority of Americans say in opinion polls that they support affirmative action programs generally, large majorities oppose when asked specifically if they support racial preferences in college admissions. In a 2013 Public Religion Research Institute poll, fifty-seven percent of respondents opposed racial preferences, including a majority of Republicans (80%), Independents (67%), and Democrats (53%). In a 2009 Quinnipiac University poll of registered voters, fifty-five percent said affirmative action should be abolished. In a Pew Research Center values survey released in 2009, only thirty-one percent agreed that “we should make every effort to improve the position of blacks and minorities, even if it means giving them preferential treatment,” while sixty-five percent disagreed—a balance of opinion that has endured throughout most of the two decade history of the Pew values survey. *Id.*; see also Sander, *supra* note 10, at 664 n. 92 (“Three national polls conducted by EPIC/MRA, the Los Angeles Times, and Newsweek early in 2003 found nearly identical patterns: from 57% to 65% of respondents supported admissions preferences based on income; 26% to 27% supported preferences based on race.”); Kahlenberg, *supra* note 36, at 11 (“Americans appear to understand that class is now a bigger obstacle to opportunity than race, which may help explain why Americans strongly prefer economic to racial affirmative action.”).

<sup>143</sup> KAHLBERG, *supra* note 36, at 9.

Colleges with low selectivity spend about \$12,000 per students compared with \$92,000 per student at the most selective institutions. Moreover, per pupil subsidies at selective universities are eight times greater than at nonselective institutions. In the wealthiest 10 percent of institutions, for example, students pay \$0.20 for each \$1 spent on them, compared with poorest 10 percent of colleges, where students pay \$0.78 for each \$1 spent on them .... Wages are estimated to be 5 percent to 20 percent higher for graduates of selective colleges. Moreover, extensive empirical data support Justice Sandra Day O’Connor’s view that America’s leadership class derives disproportionately from the ranks of top colleges and universities. As Thomas Dye’s research has found, 54 percent of America’s corporate leaders and 42 percent of government leaders are graduates of just twelve institutions—Harvard, Yale, the University of Chicago, Stanford, Columbia, MIT, Cornell, Northwestern, Princeton, Johns Hopkins, the University of Pennsylvania, and Dartmouth. Richard D. Kahlenberg, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, THE CENTURY FOUNDATION, 9 (Oct. 3, 2012), <https://tcf.org/assets/downloads/tcf-abaa.pdf>.

<sup>144</sup> KAHLBERG, *supra* note 36, at 10.

[R]esearch finds that the obstacles to doing well on standardized tests like the SAT are much more closely related to class than race. In a 2010 Century Foundation

and 3) the growth in minority populations, multi-racial families, and a public perception that racism is an issue of the past strengthens the idea that race-based preferences are likely to grow increasingly unpopular over time.<sup>145</sup>

With educational disadvantages more closely linked with class than race, universities should focus more on class as a plus factor in a holistic admissions review. In fact, in a comprehensive 2011 analysis of the test score gap, Stanford professor Sean Reardon examined nineteen nationally representative studies going back more than fifty years and found that, whereas the black/white test score gap used to be about twice as large as the rich/poor gap, today, the income gap is about twice as large as the race gap.<sup>146</sup>

Large support for class-based affirmative action would not upset the states' choice to remove race from the equation. When the Court took up the challenge in *Grutter* in 2003, numerous polls found Americans opposed race-based preferences, but supported preferences for economically disadvantaged students.<sup>147</sup>

study, Carnevale and Strohl found that socioeconomically disadvantaged students are expected to score 399 points lower on the math and verbal SAT than the most socioeconomically advantaged, while blacks are expected to score 56 points lower than whites. Put differently, the socioeconomic obstacles were seven times as large as the racial ones.

Richard D. Kahlenberg, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, THE CENTURY FOUNDATION, 10 (Oct. 3, 2012), <https://tcf.org/assets/downloads/tcf-abaa.pdf>.

<sup>145</sup> KAHLENBERG, *supra* note 36, at 11-12 (citing to changing demographic shifts throughout the country due to immigration, intermarriage and biracial children. Moreover, “[a]ccording to a January 2009 *Washington Post*-ABC poll, the percentage of Americans saying racism is a ‘big problem’ stands at just 26 percent, down an astounding 28 percentage points from 1996.”); David R. Colburn, et. al., *Admissions and Public Higher Education in California, Texas, and Florida: The Post-Affirmative Action Era*, 4 UCLA J. OF EDUC. AND INFO. STUDIES 1, 7 (2008) (describing the dramatic increase in California, Florida, and Texas’ Hispanic population from 1990 to 2005).

<sup>146</sup> Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, STANFORD CENTER FOR EDUCATION POLICY ANALYSIS, 1 (2011), <https://cepa.stanford.edu/sites/default/files/reardon%20whither%20opportunity%20-%20chapter%205.pdf>.

<sup>147</sup> KAHLENBERG, *supra* note 36, at 11.

In 2003, for example, a Los Angeles Times survey found that Americans opposed (56 percent to 26 percent) the University of Michigan’s racial preference policy, but those same Americans supported preferences for low-income students (59 percent to 31 percent). A Newsweek poll around that same time likewise found that Americans opposed preferences for blacks in university admissions (68 percent to 26 percent), but supported preferences for economically disadvantaged students (65 percent to 28 percent). A third poll, by EPIC/MRA, also found that voters opposed the University

Historically, universities used race and class as measures to evaluate candidates with court challenges coming only to the use of race. The lack of challenges to the use of class in admissions, coupled with overwhelming public support for such use, suggests little future resistance from broad-based applications by our nation's universities.

*B. States That Ban Race-Based Affirmative Action Have Seen A Noticeable Drop In Minority Enrollment*

Extensive data from states that banned the use of race show a noticeable drop in minority representation.<sup>148</sup> Precipitous declines in black student enrollment have occurred at elite public undergraduate institutions immediately after bans on race-based affirmative action.<sup>149</sup> A study of the impact of these bans in California, Washington, Texas, and Florida found Black and Latino enrollment fell 4.3 percent overall at select state universities.<sup>150</sup> In Florida, ten years after the governor enacted an

of Michigan's affirmative action plan (63 percent to 27 percent), but supported preferences for economically disadvantaged students (57 percent to 36 percent). A subsequent 2005 New York Times poll put support for socioeconomic preferences at nearly 85 percent.

*Id.*; see also KOVACHEVICH, *supra* note 91, at 806 n. 219; SANDER, *supra* note 10, at 664 n.92.

<sup>148</sup> CASHIN, *supra* note 142, at 952.

<sup>149</sup> *Id.*; Anemona Hartocollis, *As Justices Weigh Affirmative Action, Michigan Offers an Alternative*, NEW YORK TIMES (Jan. 4, 2016), available at <http://www.nytimes.com/2016/01/05/us/affirmative-action-supreme-court-michigan.html> ("In a brief that Michigan filed in the Texas case, officials told the justices that the overall drop in minority enrollment since 2006 was a 'cautionary tale' about the difficulty of choosing a diverse class without being able to consider race. They said that since the statewide ban, a panoply of recruitment and outreach efforts had fallen short. Using low income as a proxy for race also had not been effective, they said, because there are far more white students than black students in Michigan who come from low-income families and have the threshold test scores for admission.)

<sup>150</sup> *Id.*; see Brief Amicus Curiae of the President and Chancellors of the University of California in Support of Respondents at 23-24, *Fisher I*, 2012 U.S. S. Ct. Briefs, LEXIS 3357.

Despite numerous and varied efforts at increasing diversity on each of its campuses, UC has enjoyed only limited success. In particular, the admission and enrollment of underrepresented minority students at a number of UC campuses still have not regained the levels that prevailed before Proposition 209 was enacted. The race-neutral measures UC has implemented in an effort to increase diversity have not enabled it to achieve a 'critical mass' of certain minority students, particularly



executive order banning race-based affirmative-action admissions, minority enrollment at state universities has not kept pace with the number of minorities graduating from high school.<sup>151</sup>

Following the 5<sup>th</sup> Circuit's decision on remand in *Fisher II*, Abigail Fisher petitioned the Supreme Court for a second time; the Court granted certiorari.<sup>152</sup> In its brief, UT Austin emphatically stated that its "own experience confirms that socioeconomic factors are *not* an adequate proxy for race in holistic review. When UT tried that experiment...African-American enrollment plummeted and Hispanic underrepresentation increased."<sup>153</sup>

A similar study found the big "losers" in this entire process are not just Blacks and Hispanics, but Whites as well.<sup>154</sup> As Richard Kahlenberg noted in his book, *The Remedy: Class, Race, and Affirmative Action*, race-based affirmative action is "classically over inclusive (including advantaged blacks) and under inclusive (not including disadvantaged whites)."<sup>155</sup> In fact, universities have a double incentive to take wealthy minorities over poor Whites as privileged minorities bring both the ability to pay full tuition and

African-American students, at its most selective campuses. Nor have they enabled it to assemble a student body that fully reflects the racial and ethnic diversity of the pool of state high school applicants from which those campuses draw. *Id.*

<sup>151</sup> Scott Powers & Luis Zaragoza, *10 Years in, 'One Florida' Posts Mixed Results for Minorities at Universities*, ORLANDO SENTINEL (Apr. 10, 2010), [http://articles.orlandosentinel.com/2010-04-10/news/os-one-florida-10-years-later-20100410\\_1-affirmative-action-florida-s-public-universities-graduates/](http://articles.orlandosentinel.com/2010-04-10/news/os-one-florida-10-years-later-20100410_1-affirmative-action-florida-s-public-universities-graduates/).

In 1999, a bit more than 20 percent of the state's high-school graduates were black, as were 17.5 percent of university freshmen. By 2008, the last year for which a racial breakdown is available, blacks accounted for 19.5 percent of high-school graduates — but only 14.9 percent of university freshmen. Similarly, in 1999, Hispanics made up 14.7 percent of high-school graduates and 13.8 percent of university freshmen. By 2008, Hispanics were 21.4 percent of graduates and 19.1 percent of the freshmen class, a wider gap. By contrast, white and Asian students were overrepresented among college freshmen in 1999 — and still were in 2008, according to the Sentinel's analysis. For example, white students comprised roughly 60 percent of high-school graduates and university freshmen in 1999; by 2008, they were 54 percent of high-school graduates — and 58 percent of university freshmen. *Id.*

<sup>152</sup> *Fisher II*, 135 S.Ct. 2888 (2015).

<sup>153</sup> Brief for Respondents at 44, *Fisher v. Univ. of Texas at Austin*, 2015 WL 6467640.

<sup>154</sup> COLBURN et. al., *supra* note 145, at 18. The study followed the five universities in these states that were members of the AAU in 1990 - the University of California, Berkeley (UCB), the University of California, Los Angeles (UCLA), the University of California, San Diego (UCSD), the University of Texas, Austin (UT Austin), and the University of Florida (UF) — and followed freshmen enrollment patterns from 1990 to the entering freshmen class of 2005. They also examined state high school graduation rates in these three states and added a control group of universities to compare these five universities with five others that did not eliminate Affirmative Action in admissions. *Id.*

<sup>155</sup> KAHLENBERG, *supra* note 10, at 44.

the ethnic diversity that enhances status; poor Whites, by contrast, bring no cash and add no racial diversity.<sup>156</sup>

C. *Race-Based Affirmative Action Does Not Capture A “Critical Mass”<sup>157</sup> Of Low Income Students*

Universities contend that they seek to enroll a diverse pool of students, but the statistics suggest otherwise. Consider this statement submitted by a collection of elite private universities in its amicus brief in *Fisher I*:

The admissions policies of Amici vary somewhat, but each is firmly committed to individualized, holistic review of the type long approved of by this Court. In deciding which students to admit, Amici consider all aspects of their applicants both as individuals and also in relation to other potential members of the incoming class. That review is intended to produce a student body that is talented and diverse in many ways, including in intellectual interests, geography, socio-economic status, background and experience (including race and ethnicity), perspective, and areas of accomplishment.<sup>158</sup>

The reality of this statement, as critics contend, is universities, especially selective ones, operate in a highly competitive marketplace for students.<sup>159</sup> While universities search for the “well-rounded” applicant, they are equally constrained by limited

<sup>156</sup> *Id.* at 50.

<sup>157</sup> See note 41 for an explanation of “critical mass.”

<sup>158</sup> Brief of Amici Curiae Brown Univ., et al. in Support of Respondents at 12, *Fisher I*, 2012 U.S. S. Ct. Briefs LEXIS 3291.

<sup>159</sup> Richard Sander & Aaron Danielson, *Article: Thinking Hard About “Race-Neutral” Admission*, 47 U. MICH. J.L. REFORM 967, 971-72 (Summer 2014); KOVACHEVICH, *supra* note 91, at 803; David Leonhardt, *A New Push to Get Low-Income Students Through College*, NEW YORK TIMES, (Oct. 28, 2014), available at [www.nytimes.com/2014/10/28/upshot/a-new-push-to-get-low-income-students-through-college.html](http://www.nytimes.com/2014/10/28/upshot/a-new-push-to-get-low-income-students-through-college.html).

Colleges will then face a series of choices. Administrators could decide that they are not especially interested in economic diversity, even if they publicly assert otherwise. (On some campuses, including Caltech, Dartmouth, Notre Dame and Washington University in St. Louis, fewer than 15 percent of entering students receive federal Pell grants, which go roughly to students from the bottom two-fifths of the income distribution. *Id.*

financial aid,<sup>160</sup> public relations campaigns to maintain relevance, and most of all, the need to sustain elite rankings due to high SAT<sup>161</sup> and GPA scores.<sup>162</sup>

Racial diversity at selective universities has barely budged as schools are caught in a bind between satisfying the diversity constraint and avoiding harm to the general academic standing of the school.<sup>163</sup> In fact, minorities who are admitted tend to be from upper middle and high-income brackets, and therefore, do not necessarily need the protections of race-based affirmative action.<sup>164</sup> Higher income groups have more disposable resources to spend on education for their children, putting lower class students at a disadvantage for testing and achieving similar scores.<sup>165</sup> Since race-based affirmative action, in part, covers qualified or desired candidates, class-based affirmative action is needed to ensure

<sup>160</sup> KOVACHEVICH, *supra* note 91, at 764 (“According to a recent study by Professors Caroline Hoxby and Christopher Avery, only 34 percent of high-achieving high school seniors in the bottom fourth of income distribution attended any one of the country’s 238 most selective colleges...Among top students in the highest income quartile, that figure was 78 percent.”). Universities strive to admit students that need little or no financial aid to reduce the heavy expense of financial aid. *Id.*

<sup>161</sup> Sabrina Tavernise, *Education Gap Grows Between Rich and Poor, Studies Say*, NEW YORK TIMES, (Feb. 9, 2012) <http://www.nytimes.com/2012/02/10/education/education-gap-grows-between-rich-and-poor-studies-show.html>.

We have moved from a society in the 1950s and 1960s, in which race was more consequential than family income, to one today in which family income appears more determinative of educational success than race, ...Professor Reardon is the author of a study that found that the gap in standardized test scores between affluent and low-income students had grown by about 40 percent since the 1960s, and is now double the testing gap between blacks and whites. *Id.*

<sup>162</sup> SANDER & DANIELSON, *supra* note 159, at 972-74.

<sup>163</sup> Michael Greenstone et. al., *Thirteen Economic Facts about Social Mobility and the Role of Education*, The Hamilton Project, 12 (June 2013), <http://www.brookings.edu/research/reports/2013/06/13-facts-higher-education>.

At institutions ranked as “most competitive”—those with more-selective admissions and that require high grades and SAT scores—the wealthiest students out-populate the poorest students by a margin of fourteen to one (Carnevale and Strohl 2010). By contrast, at institutions ranked as “less-competitive” and “noncompetitive,” the lowest-socioeconomic status students are over-represented. *Id.*

<sup>164</sup> SANDER & DANIELSON, *supra* note 159, at 980; KOVACHEVICH, *supra* note 91, at 803.

<sup>165</sup> TAVERNISE, *supra* note 161.

A study by Sabino Kornrich, a researcher at the Center for Advanced Studies at the Juan March Institute in Madrid, and Frank F. Furstenberg, scheduled to appear in the journal *Demography* this year, found that in 1972, Americans at the upper end of the income spectrum were spending five times as much per child as low-income families. By 2007 that gap had grown to nine to one; spending by upper-income families more than doubled, while spending by low-income families grew by 20 percent. *Id.*

qualified or semi-qualified poor students receive a similar focus for college admissions.

IV. CLASS-BASED AFFIRMATIVE ACTION WILL ADDRESS THE 21ST CENTURY PROBLEM OF SOCIOECONOMIC DIVERSITY AND ALLEVIATE ISSUES OF RACIAL DIVERSITY

A competent system of class-based preferences is much more accurately targeted at the intended beneficiaries than race-based preferences. Schools that target class status as a plus factor, especially ahead of race, can capture not only low-income candidates, but also those minorities that overlap in this category. While proponents of race-based affirmative action argue that this may decrease diversity, early empirical research shows a tailored program using class together with race can increase diversity.<sup>166</sup> Using class-focused affirmative action, as a plus factor part of a holistic review, accomplishes an important societal goal of lifting up the poor. Substantial research confirms the importance of higher education to career earnings and social mobility.<sup>167</sup> In addition, any possible legal challenge to a university's use of class-based affirmative action would be subject to "rational basis" review under *Rodriguez*, a much lower threshold than "strict scrutiny" for race-based affirmative action.

A. *Class-Based Affirmative Action Increases Economic Diversity in Higher Education*

Class-based policies, including merit-based, are designed to give a boost to applicants who have faced obstacles to upward mobility.<sup>168</sup> Since demographic factors present substantial obstacles to upward mobility, proponents of class-conscious

<sup>166</sup> KAHLENBERG, *supra* note 36, at 17; *see also* GAERTNER & HART, *supra* note 100, at 378.

<sup>167</sup> TAVERNISE, *supra* note 161.

<sup>168</sup> GAERTNER & HART, *supra* note 100, at 374.

Top X percent plans essentially guarantee college admission to students with a sufficiently high class rank in their graduating high-school class. This guarantee means that students from a broad range of neighborhoods, towns, and counties in a state will be admitted to college. Given socioeconomic and racial diversity among different parts of a city or state, top X percent plans have the potential to diversify an entering class of students. *Id.*

affirmative action support this boost as a means to level the playing field.<sup>169</sup> Class-based policies historically replace, and do not coincide with, race-based affirmative action; thus, class-based affirmative action is usually evaluated in terms of maintaining racial diversity.<sup>170</sup>

In *The Remedy: Class, Race, and Affirmative Action*, Richard Kahlenberg provided the earliest framework for universities implementing a class-based system. Many high school students' academic credentials relevant to admission, such as SAT scores, are depressed by variables outside their control, such as family income.<sup>171</sup> Historically, the gap in test scores between white and black students was almost twice as large as the gap between low and high socioeconomic students; today, that trend has reversed.<sup>172</sup> In fact, recent research now concludes GPA is the best indicator of college success, not SAT scores.<sup>173</sup> Schools that

<sup>169</sup> GREENSTONE et. al., *supra* note 163, at 8-12 (describing the differences in opportunities for children born in low-income households versus high-income households, how income affects that family's investment in the child's education, the escalating gap in achievement through primary and secondary education, and the vast disparity in college admission and graduation rates between high-income and low-income students); Steve Suitts, *A New Majority: Low Income Students in the South and Nation*, *Southern Education Foundation*, 2-3 (Oct. 2013), <http://www.southerneducation.org/getattachment/0bc70ce1-d375-4ff6-8340-f9b3452ee088/A-New-Majority-Low-Income-Students-in-the-South-an.aspx>.

A majority of public school children in 17 states, one-third of the 50 states across the nation, were low income students – eligible for free or reduced lunches – in the school year that ended in 2011. Thirteen of the 17 states were in the South, and the remaining four were in the West...The latest NCES data indicates that 48 percent of all public school children across the nation were eligible for free or reduced lunch in 2011. The rate of low income students in the South was 53 percent – the highest rate among the regions of the nation. For the first time in recent history, at least half of the public school students in the West were low income. In 2010 the rate was 51 percent. In 2011, it remained 50 percent of all public school children. The Midwest had the next highest rate, 44 percent, and the Northeast had a rate of 40 percent.

*Id.*

<sup>170</sup> GAERTNER & HART, *supra* note 100, at 376-77.

<sup>171</sup> KAHLBERG, *supra* note 10, at 129-30; GAERTNER & HART, *supra* note 100, at 374.

<sup>172</sup> KOVACHEVICH, *supra* note 91, at 802-03, n. 203 (“observing that ‘the income achievement gap ... between a child from a family at the 90th percentile of the family income distribution and a child from a family at the 10th percentile ... is now nearly twice as large as the black-white achievement gap. Fifty years ago, in contrast, the black-white gap was one and a half to two times as large as the income gap.’”).

<sup>173</sup> Hilary Burns, *New Study Says High School GPA Matters More than SAT Scores*, USA TODAY (Feb. 26, 2014), available at <http://college.usatoday.com/2014/02/26/new-study-says-high-school-gpa-matters-more-than-sat-scores/>.

The three year study looked at 123,000 students at 33 U.S. colleges and universities that are test-optional .... The study included private and public colleges and

promote an SAT-optional policy for admissions can even attract a broader mix of students, especially first-generation-to-college students, minorities, and socioeconomic-disadvantaged students.<sup>174</sup> For many high-school students, socioeconomic obstacles prevent access to college and all the benefits that accrue.<sup>175</sup> Any class-based system seeking to compensate for those obstacles must recognize and attempt to account for socioeconomic barriers to college access.<sup>176</sup>

Recent research from states that have banned, supplemented or replaced race-based affirmative action with class-based policies shows effective, targeted, and wide-ranging class-based policies increased admission rates for low-income students and minorities.<sup>177</sup> States that used class-based affirmative action or race-neutral plans met or exceeded the percentage representation of Blacks and Latinos, compared to the levels achieved when the universities had used racial preferences.<sup>178</sup> Several factors played a role in maintaining or enhancing racial diversity in light of a shift to class-based preferences: use of percentage plans which are race/class neutral;<sup>179</sup> expansion of Pell grants;<sup>180</sup> and giving a

universities, arts schools, technical schools and those serving a predominantly minority population. All institutions observed the same result: High school performance, not standardized test scores, is the most accurate predictor of college success. *Id.*

<sup>174</sup> William C. Hiss & Valerie W. Franks, *Defining Promise: Optional Standardized Testing Policies in American College and University Admissions*, NAT'L ASS'N OF COLL. ADMISSION COUNSELING, 3 (Feb. 5, 2014), <http://www.nacacnet.org/research/research-data/nacac-research/Documents/DefiningPromise.pdf>. Among the reports major findings are: 1) there are no significant differences in either cumulative GPA or graduation rates between students who submitted SAT scores and those that did not; 2) college GPAs closely track high school GPAs; 3) non-submitters are more likely to be first-generation-to-college students, minorities, and SES-disadvantaged students; and 4) non-submitters apply early decision in higher rates, increasing enrollment of minority students and SES-disadvantaged students who need financial aid. *Id.*

<sup>175</sup> KAHLBERG, *supra* note 10, at 43-44, 133-34; GAERTNER & HART, *supra* note 100, at 373-74.

<sup>176</sup> TAVERNISE, *supra* note 161. According to scholars, while the achievement gap between white and black students has narrowed significantly over the past few decades, the gap between rich and poor students has grown substantially during the same period.

<sup>177</sup> KAHLBERG, *supra* note 36, at 17; GAERTNER & HART, *supra* note 100, at 378 (citing University of Colorado at Boulder's success).

<sup>178</sup> KAHLBERG, *supra* note 36, at 17-20; CASHIN, *supra* note 142, at 955.

<sup>179</sup> KAHLBERG, *supra* note 36, at 20.

<sup>180</sup> Richard D. Kahlenberg, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, THE CENTURY FOUND., 20 (Oct. 3, 2012), <https://tcf.org/assets/downloads/tcf-abaa.pdf>.

bigger boost to socioeconomic status in a holistic admissions review.<sup>181</sup> In fact, a 2010 study at the University of Colorado, Boulder suggests that some universities may be able to equal, or even exceed, the racial diversity they previously had if they provide a sufficiently large boost to socioeconomically disadvantaged students.<sup>182</sup> These results are noteworthy as Colorado has a growing minority population and a moderately selective, large state university.<sup>183</sup> In addition, flagship state universities often field candidates from disadvantaged backgrounds that may not have the opportunity to attend another quality state university, further enhancing their chance of upward mobility.<sup>184</sup>

*B. Class-Focused Affirmative Action, a Plus Factor as Part Of Holistic Review, Accomplishes an Important Societal Goal of Lifting Up the Poor*

Prior efforts to recruit low-income students have proven ineffective, primarily because it is impossible for even well-funded institutions to conduct outreach to every American high school.<sup>185</sup> Attempts to make elite colleges free (or very low-cost) for students of low-income have garnered considerable media attention, but have failed to make a large difference in enrollment.<sup>186</sup> In fact, lower-income students tend to under-match and under-estimate their educational opportunity, and therefore, do not reach their optimal school.<sup>187</sup>

<sup>181</sup> *Id.* at 20-21; GAERTNER & HART, *supra* note 100, at 400.

<sup>182</sup> GAERTNER & HART, *supra* note 100, at 400.

<sup>183</sup> *Id.* at 399.

<sup>184</sup> *Id.*; GREENSTONE et. al., *supra* note 163, at 6, 14 (“A low-income individual without a college degree will very likely remain in the lower part of the earnings distribution, whereas a low-income individual with a college degree could just as easily land in any income quintile—including the highest.”).

<sup>185</sup> *Cf.* with efforts of UT Austin, showing how even a state school that relies on taxpayer resources can manage to expand recruiting efforts.

<sup>186</sup> KOVACHEVICH, *supra* note 91, at 801 n. 196 (“Harvard’s policy of waiving tuition for families earning less than \$ 40,000 per year has added at most 15 low-SES students to a class of more than 1600 students”).

<sup>187</sup> *See generally* SANDER, *supra* note 159. The mismatch theory is well-documented but controversial. According to Sander:

The pool of high-achieving, low-income students who apply to selective colleges is small: for every high-achieving, low-income student who applies, there are about

According to the Organization for Economic Co-operation and Development data, socioeconomic status has a bigger impact on college attainment in the United States than in most nations at a similar level of development.<sup>188</sup> Studies show college enrollment after the first year is five times as high for high-income students as for low-income youths.<sup>189</sup> Due to reduced levels of matriculation for low-income students, they often end up with the short straw: no degree, no job, and a bundle of debt that they must pay anyway.<sup>190</sup>

Considering the enormous impact college education has on future earnings, schools must invest more resources to reach these students.<sup>191</sup> Universities should employ better outreach programs such as local recruiting fairs, free college tours, and targeted mailings to low-income students with qualified or semi-qualified marks. By reaching students who may not know they are qualified for admission, schools provide opportunities to those who need it most. Many of these institutions are flagship state universities with 70% or more in-state students. In states such as Texas with

fifteen high-achieving, high-income students who apply. Viewed another way, the admissions staff are too pessimistic: the vast majority of high-achieving, low-income students do not apply to any selective college. There are, in fact, only about 2.5 very high-achieving, high-income students for every high-achieving, low-income student in the population. The problem is that most high-achieving, low-income students do not apply to any selective college so they are invisible to admissions staff. *Id.*

<sup>188</sup> Eduardo Porter, *Why Aid for College Is Missing the Mark*, NEW YORK TIMES, (Oct. 7, 2014) <http://www.nytimes.com/2014/10/08/business/economy/why-federal-aid-for-higher-education-is-missing-the-mark.html>.

<sup>189</sup> Vicki Madden, *Why Poor Students Struggle*, NEW YORK TIMES, (Sept. 21, 2014), available at <http://www.nytimes.com/2014/09/22/opinion/why-poor-students-struggle.html>. The author, an instructional coach for the New York City Department of Education, focused on real life examples to explain why low-income students fail to graduate:

Kids at the most selective colleges often struggle academically, but they are capable of doing the work. The real key is whether they feel comfortable going to professors to ask for help or teaming up with other students in study groups and to manage the workload .... [O]nce those from lower socioeconomic backgrounds arrive on campus, it's often the subtler things, the signifiers of who they are and where they come from, that cause the most trouble, challenging their very identity, comfort and right to be on that campus. The more elite the school, the wider that gap. I remember struggling with references to things I'd never heard of, from Homer to the Social Register. I couldn't read The New York Times — not because the words were too hard, but because I didn't have enough knowledge of the world to follow the articles. Hardest was the awareness that my own experiences were not only undervalued but often mocked, used to indicate when someone was stupid or low-class: No one at Barnard ate Velveeta or had ever butchered a deer. *Id.*

<sup>190</sup> *Id.*; TAVERNISE, *supra* note 161; GREENSTONE et. al., *supra* note 163, at 14.

<sup>191</sup> TAVERNISE, *supra* note 161.



large pockets of minorities and low-income students, it is incumbent for UT Austin and similarly situated schools to provide opportunities to low-income students so they may enhance future economic earning power.

C. *Class-Based Affirmative Action Does Not Ignore the Importance of Race*

Although class-based affirmative action offers promise to disadvantaged groups, critics offer several counter-arguments to using class instead of race. Chief among the complaints is that class is not a suitable proxy for race.<sup>192</sup> While various scholars may debate the exact correlation between the two, the fact remains class cannot easily replace race. Under the same logic for using class-based policies, if universities want to increase racial diversity, they should explore strictly race-based efforts.<sup>193</sup>

Although proponents argue racial preferences need to be in place as long as discrimination occurs, the Supreme Court has never allowed racial preferences as a means of counteracting ongoing societal discrimination.<sup>194</sup> According to some scholars, fighting discrimination with discrimination made sense in the past because racial disparities in higher education and employment could not be corrected through prospective anti-discriminatory laws and policies; moreover, the problem is not necessarily ongoing racism, but the lack of resources and opportunities due to class.<sup>195</sup> But scholars stress the economic and professional landscape has changed dramatically since the 1960s,<sup>196</sup> providing ammunition to

<sup>192</sup> KOVACHEVICH, *supra* note 91, at 817-18; SANDER, *supra* note 159, at 989-90.

The limitations of race as a surrogate for class are exacerbated by the tendency of SES to converge across races for high-achieving students. Racial inequality in America is far more severe at the bottom of the SES distribution than at the top; being black and the child of high school dropouts is associated with far more severe racial consequences than being black and the child of college graduates. *Id.*; Gaertner & Hart, *supra* note 100, at 377.

<sup>193</sup> Arguably, class-based affirmative action is palatable because it can also produce racial diversity.

<sup>194</sup> *Bakke* and *Grutter* made clear that the use of race as a factor was not meant to remedy general notions of racism; see *Univ. of California Regents v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>195</sup> KAHLBERG, *supra* note 10, at 154-55.

<sup>196</sup> KAHLBERG, *supra* note 10, at 45-46.

the notion that using race to counteract structural racism is not necessary in 21<sup>st</sup> century America.

Furthermore, the Fifth Circuit in *Fisher II* cited that six times as many Whites than Blacks who are both low-income and qualified for admission,<sup>197</sup> thus confirming fears of critics that a shift to class preferences will lead to all-White admissions. While statistics vary among states, this fear overlooks the reality that schools look at numerous factors when assessing a candidate.<sup>198</sup> Universities recognize that they need to mirror the society that exists and the diverse composition of the professional community. Even though their efforts, so far, fall short (and arguably are mere public relations campaigns that mask real desires), universities are finding more ways to obtain a “critical mass” of students.

While the Supreme Court recently heard argument on Fisher’s second petition, argument in support or against class-based affirmative action remained noticeably absent.<sup>199</sup> As Justice Kennedy noted, “we’re just arguing the same case.”<sup>200</sup> While the Court has yet to issue a decision, Richard Kahlenberg criticized the parties’ lack of attention on class-based affirmative action.<sup>201</sup> Regardless of the outcome of the most recent challenge, I predict that the Supreme Court will once again ignore the value of class-

<sup>197</sup> 758 F.3d at 656-57.

<sup>198</sup> Brief Amicus Curiae of the President and Chancellors of the University of California in Support of Respondents at 42, *Fisher I*, 2012 U.S. S. Ct. Briefs LEXIS 3357.

The University has devoted substantial resources to creating tools that allow consideration of these factors even in a very large applicant pool, including the development of system wide ‘read sheets’ that display quantitative data such as grades, test scores, and numbers of courses taken as percentiles where an individual is rated against all applicants to UC, all applicants to the individual campus, and all applicants to UC and the campus from the student’s individual high school. The read sheet also provides contextual information about each applicant’s high school—for example, the number of applicants to UC, average test scores, socioeconomic data about the student body (e.g., average family income, numbers of students who qualify for state and federal welfare programs), numbers of uncredentialed teachers, numbers of honors and Advanced Placement courses offered, etc. Read sheets are prepared electronically for every applicant and distributed to each campus to which the applicant has applied. *Id.*

<sup>199</sup> See generally Transcript of Oral Argument, *Fisher v. Univ. of Texas*, No. 14-981 (Dec. 9, 2015).

<sup>200</sup> *Id.* at 20.

<sup>201</sup> Richard Kahlenberg, *The Future of Affirmative Action*, THE ATLANTIC (Dec. 8, 2015) <http://www.theatlantic.com/education/archive/2015/12/class-based-affirmative-action/419307/>.

based policies, and fail to signal approval for class-based affirmative action.

#### CONCLUSION

Since the 1960s, affirmative action has helped increase racial diversity in higher education. Providing equal access to all Americans is necessary to ensure that those who do not have the same opportunities are allowed to access the riches of higher education. The Supreme Court's guidance on acceptable forms of college admissions practices supports the advancement of minority enrollment at universities. At the same time, the lack of focus and effort on ensuring the same advancement for lower-income students is evident in higher education. Low-income students are not well represented in higher education, both among selective universities and state universities. These students, often overlooked, need help getting to college due to structural issues of income and parental educational gap. Universities should place class ahead of race as a plus factor in holistic admissions review to alleviate the huge structural disadvantages these students face. Focusing on class expands opportunities for college enrollment for low-income students, especially at state universities. Once inside these institutions, low-income students can explore their passions and build towards positive economic realities.