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The Quixotic Search for Race-Neutral Alternatives

Michael E. Rosman*

The Supreme Court has stated that the narrow-tailoring inquiry of the Equal Protection Clause’s strict scrutiny analysis of racially disparate treatment by state actors requires courts to consider whether the defendant seriously considered race-neutral alternatives before adopting the race-conscious program at issue. This Article briefly examines what that means in the context of race-conscious admissions programs at colleges and universities.

Part I sets forth the basic concepts that the Supreme Court uses to analyze race-conscious decision-making by governmental actors and describes the role of “race-neutral alternatives” in that scheme. Part II examines the nature of “race-neutral alternatives” and identifies its various possible meanings, arguing that the idea of a “race-neutral alternative” only makes sense when the goal itself is race-neutral. Part II then carefully considers Supreme Court cases that mention this idea and argues that the Court has given confusing signals. Part III suggests that the idea of “race-neutral alternatives” has been misused when the government’s underlying goal is race-conscious; the Court’s guidance about what it means to consider a “race-neutral alternative” is practically useless because it has never explained whether that concept includes racially motivated manipulation of facially neutral criteria to achieve a racial goal. Requiring such “race-neutral alternatives” is akin to requiring the serious consideration of a slow-moving alternative to achieving a speed goal. One might well wonder why anyone would do such a counterintuitive thing, and the Court has not yet provided a good explanation.

In the world of race-conscious admissions policies, the concept of a “race-neutral alternative” distracts attention from the more important question: whether having more racial or ethnic minorities at a college or professional school leads to better educational outcomes. I suggest that the Court should eliminate the “race-neutral alternative” requirement in this context. Instead, the Court should focus

In the interest of full disclosure, the Center for Individual Rights (CIR) submitted an amicus brief in Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013), in support of the petitioner. The views expressed in this Article, however, are mine. They do not necessarily reflect or represent the views of CIR as an organization.
more attention on whether the use of race actually leads to the benefits claimed.

I. AN INTRODUCTION TO STRICT SCRUTINY UNDER THE EQUAL PROTECTION Clause

Race-conscious decisions by government actors are subject to “strict scrutiny.” Traditionally, strict scrutiny in this context means that “racial classificatons are constitutional only if they are narrowly tailored to further compelling governmental interests.”

Much attention focuses on whether a particular interest—and especially whether an interest in the real or perceived benefits of “diversity” in education—is a compelling governmental interest. For the purposes of this Article, I assume that “educational benefit” is a compelling interest.

Defenders of race-conscious admissions policies argue that a “diverse” student body—one that includes students from a wide variety of backgrounds—enhances learning and creates educational benefits. They assert that “racial diversity”—defined as a class composed of a certain percentage of racial minorities—is an essential component of that broader concept of diversity because race is an important part of each person’s background. Moreover, they contend that the conscious use of race or ethnicity in admissions is necessary to achieve the desired educational benefit. Such necessity, it would seem, is the minimum required by “narrow tailoring.”

2. See e.g., Fisher, 133 S. Ct. at 2422–25 (Thomas, J., concurring); Grutter, 539 U.S. at 327–33; id. at 354–61 (Thomas, J., concurring and dissenting).
3. See e.g., Grutter, 539 U.S. at 319 (“[T]he Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom.”).
4. Although the Court has denied that it permits a quota, it has approvingly identified the Harvard Plan discussed in Justice Powell’s opinion in Regents of the University of California v. Bakke as consistent with the Constitution and acknowledged that such a plan has “minimum goals for minority enrollment, even if it ha[s] no specific number firmly in mind.” Grutter, 539 U.S. at 335 (emphasis in original). See generally Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978) (opinion of Powell, J.) (discussing the Harvard Plan). The Court has not said precisely what the “minimum goal” might be if it is not a “specific number firmly in mind.” See Grutter, 539 U.S. at 316 (noting that the Law School sought to enroll a “critical mass” of underrepresented minority students).
5. Grutter, 539 U.S. at 328.
6. Grutter, 539 U.S. at 327 (“When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.”) (emphasis added). Although this quote suggests that perhaps “necessity” is something apart from narrow tailoring, other cases place it in the “narrow tailoring” basket. Fisher, 133 S. Ct. at 2420 ("Narrow
The Court has essentially agreed with this line of argument in the context of university admissions. In expounding on the concept of “necessity,” the Court has said that both universities and courts must consider whether “race-neutral alternatives” can achieve the benefits of diversity.\(^7\) If the university does not consider viable race-neutral alternatives, the consideration of race is not narrowly tailored and fails strict scrutiny. To understand exactly what “race-neutral alternatives” mean in this context—or more accurately, to understand the possible meanings—a brief case law digression is necessary.

II. The Court’s Use of the “Race-Neutral Alternative” Concept

Before assessing whether something is “race-neutral,” one must define what “race-neutral” means. This Section posits a connection between the “neutrality” of the means used to achieve a goal and the goal itself. Specifically, this Section argues that it is very difficult to define a “race-neutral alternative” if the underlying goal is racial. It then examines how the Supreme Court has muddied the idea of “neutrality” in both admissions and non-admissions cases by ignoring this tension.

A. The Importance of Identifying Goals

The concept of a race-neutral alternative depends significantly on the goal. A race-neutral alternative to achieving a race-neutral goal is fairly easy to imagine. Suppose the goal is to reduce highway deaths (which certainly sounds compelling) and it happens that one ethnicity is disproportionately causing fatal highway accidents. One could propose lowering the speed limit only for that ethnicity. But since that ethnicity is not exclusively causing highway accidents, there seems an obvious race-neutral alternative: lower the speed limit for everyone. Or, in terms of “necessity,” it is not necessary to single out one ethnicity to achieve the goal of reducing highway

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7. Fisher, 133 S. Ct. at 2420 (“Consideration by the university [of race-neutral alternatives] is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the education benefits of diversity.”).
fatalities. Accordingly, a hypothetical law lowering the speed limit for the ethnicity causing a disproportionate number of fatal accidents would be unconstitutional because there is a race-neutral alternative that achieves the same objective. As a result, a law that singles out one ethnicity is not narrowly tailored and cannot survive strict scrutiny analysis.

The Supreme Court has found only a few governmental interests that are sufficiently “compelling” to survive strict scrutiny in race-conscious decision-making.\(^8\) One such interest is “remediying the effects of past intentional discrimination.”\(^9\) What are those effects? One possible effect is that a government agency pays more for construction contracts than it otherwise would (because, for example, it discriminatorily excluded minority-owned low-cost contractors from bidding). The remedy for higher costs, then, would be lower costs. One could achieve lower costs by carefully scrutinizing the bids of previously successful white-owned contracting companies and requiring them to justify any profit over a particular percentage. But a race-conscious remedy does not appear necessary to achieve the goal of lower costs. One can achieve lower costs simply by permitting all qualified contractors to bid—that is, the agency can just stop discriminating.

A second possible effect of past discrimination might be that a particular person has been deprived of certain benefits. But, again, remediying a particular person’s injury does not really require race-conscious efforts by the government. Providing damages to other members of the injured party’s racial group, for example, would not necessarily remedy that individual’s losses. One can simply measure the injury and provide (or require those who caused the injury to provide) compensation.\(^10\)

Yet a third effect of past discrimination, particularly of systemic discrimination, is that there may be fewer members of particular races in higher education, professions, or specific industries. If the goal is to remedy that effect, it presumably means striving to have more members of those races in those areas. But if the goal itself is a

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8. Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (noting that “our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling”).

9. Id.

10. Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring) (“[A] State may ‘undo the effects of past discrimination’ in the sense of giving the identified victim of state discrimination that which it wrongfully denied him . . . . Nothing prevents Richmond from according a contracting preference to identified victims of discrimination.”). From the context, I assume that Justice Scalia is referring to the contracting preference as a kind of compensation in lieu of damages.
racial goal, then trying to achieve it in a “race-neutral” way seems impossible or quixotic.\footnote{11}

B. “Race Neutrality” in Non-Admissions Cases

Unfortunately, the Supreme Court has not distinguished between these two kinds of goals in considering the requirement of race-neutral alternatives or the broader requirement of “necessity.” If anything, the Court has confused the matter. It has suggested, but never explicitly held, that facially neutral measures designed to achieve a racial goal are “race-neutral.”\footnote{12} Yet the Court has also suggested, without explicitly holding, just the opposite.\footnote{13}

In 1989, Justice Sandra Day O’Connor, writing for the Court, first articulated the idea of a race-neutral alternative in \textit{City of Richmond v. J.A. Croson Co.}\footnote{14} The Court found that a set-aside program, called the Richmond Plan, for city construction contracts violated the Equal Protection Clause.\footnote{15} The discussion of race-neutral alternatives in the narrow-tailoring analysis was relatively brief:

As noted by the court below, it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way. We limit ourselves to two observations in this regard.

First, there does not appear to have been any consideration of the use of race-neutral means \textit{to increase minority business participation} in city contracting. . . . Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If [minority-owned businesses] disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of

\begin{thebibliography}{9}
  \bibitem{11} Ian Ayres, \textit{Narrow Tailoring}, 43 UCLA L. Rev. 1781, 1787 (1996) (arguing that face-neutral, but racially-motivated, remedies must still meet strict scrutiny and that such remedies are overinclusive because they benefit whites that are not part of the class of harmed individuals). Professor Ayres, focusing more on the contracting preferences that were at issue in \textit{Croson}, considers two possible justifications for facially-neutral, racially-motivated remedies: opaqueness (that is, the inability to discern the racial motivation) and avoiding determinations about the race under which a particular individual should be classified. See id. at 1793–1800. He ultimately rejects both. See id.
  \bibitem{12} See \textit{Croson}, 488 U.S. at 507.
  \bibitem{14} 488 U.S. 469 (1989).
  \bibitem{15} \textit{Id}. 
\end{thebibliography}
city financing for small firms would, *a fortiori*, lead to greater minority participation.\textsuperscript{16}

The Court appears to suggest that facially-neutral (even if race-motivated) means can achieve a race-conscious goal in a more narrowly-tailored way than the explicit use of race. If past discrimination created a shortage of minority contractors, the Court suggests that Richmond can “remedy” that effect by giving money to all small contractors through “a race-neutral program of city financing.” Coincidentally, this remedy permits minority firms to bid on contracts when they otherwise might lack the resources to do so.

In a later part of the opinion, a plurality of the Court stated that Richmond had “a whole array of race-neutral devices” available “[e]ven in the absence of evidence of discrimination.”\textsuperscript{17} The plurality suggested “[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races” as means of “open[ing] the public contracting market to all those who have suffered the effects of past societal discrimination or neglect.”\textsuperscript{18} The plurality asserted that barriers to new entrants “may be the product of bureaucratic inertia more than actual necessity” and that “[t]heir elimination or modification would have little detrimental effect on the city’s interests . . . .”\textsuperscript{19} The plurality did not identify the source of its newfound expertise on contracting procedures. And, of course, it did not state how much “training and financial aid for disadvantaged entrepreneurs of all races”\textsuperscript{20} would cost the City of Richmond.

Nonetheless, the Court itself (as opposed to the plurality) did not say that bonding or capital requirements were generally unnecessary or that Richmond should not have imposed them in the first place. Thus, the Court’s “race-neutral” solution was more than simply the elimination of inappropriate barriers to small business success: it would have required working around otherwise apparently legitimate barriers.

There are several rejoinders to the Court’s solution here. First, a race-neutral program of financing for all small contractors might be quite expensive—perhaps a lot more expensive than simply setting aside contracts for minority contractors. A proposal to implement the Court’s suggestion could well raise the following question: if the

\textsuperscript{16} Id. at 507 (emphasis added).
\textsuperscript{17} Id. at 509 (plurality op.).
\textsuperscript{18} Id. at 509–10.
\textsuperscript{19} Id. at 510.
\textsuperscript{20} Id.
government has a compelling interest in increasing minority firm participation, why should we provide financing to firms that are not owned by minorities?

Second, and relatedly, a race-neutral program of financing might not increase the proportion of minority-owned firms receiving city contracts. After all, while financing minority-owned small firms is likely to increase the proportion of those firms procuring city contracts, financing non-minority-owned small firms is likely to counteract that effect. Even assuming the former effect outweighs the latter, the degree to which it will is difficult to predict. Thus, if the goal is to increase the proportion of minority-owned firms procuring city contracts, a race-neutral financing scheme is likely to be inefficient.

Finally, one can question whether a “race-neutral” system of financing small businesses is “race-neutral” in any meaningful sense of the term when the purpose of such a system is to increase the number of minority-owned firms obtaining city contracts. After all, that purpose is what the Court presumably intended when it claimed that such a program would lead to greater minority participation. Indeed, such policies would normally be considered race-conscious and subject to strict scrutiny.21

The same should hold true in the admissions context. A policy whose purpose is to achieve a particular racial goal should not be considered “race-neutral.” If a medical school began to consider singing ability as a criterion for admissions only because it was convinced that more applicants from a particular race would be offered admission as a consequence, would that really constitute “race-neutral” admissions?

C. “Race-Neutral Alternatives” in Admissions and the Texas Plan

The meaning of “race neutrality” is peripherally part of the Court’s education and admissions cases.22 When circumstances

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21. Miller v. Johnson, 515 U.S. 900, 913 (1995) (“[S]tatutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object.”).

have required states to abandon explicitly using race in admissions, some have adopted facially-neutral rules designed to achieve racial goals. The most well-known of these is the Texas “Top Ten Percent Plan,” enacted in the wake of a Fifth Circuit Court of Appeals decision finding that the state lacked a compelling governmental interest in using race in admissions for the University of Texas Law School at Austin. That plan automatically admitted students ranked in the top ten percent of their high school classes to Texas public universities, including the University of Texas. Many Texas high schools have student populations with one predominant racial group—that is, the students at many high schools are mostly white, African-American, or Hispanic. Accordingly, the Top Ten Percent Plan actually led to a significant number of minority admissions to the University of Texas each year. In fact, both the absolute numbers of African-Americans and Hispanics at the University of Texas in 2004 and their percentage of the entire class were the same or higher than in 1993 (when race had been an explicit admissions factor).

It is widely believed that the Texas legislature adopted the Ten Percent Plan to increase the number of minorities admitted, not because it decided that class rank alone, without benefit of any score from a standardized test, was the best means of assessing who would be the best students. Indeed, Texas’s brief to the Supreme Court noted the following:

23. A number of states have passed laws by referendum precluding any state entity (including state universities) from discriminating against or granting preferential treatment to any person on the basis of race or ethnicity. E.g., CAL. CONST. art. I, § 31; WASH. REV. CODE § 49.60.400 (2012); MICH. CONST. art. I, § 26; NEB. CONST. art. I, § 30.

24. See Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (holding, among other things, that diversity was not a compelling governmental interest). But see Grutter, 539 U.S. at 328 (2003) (holding that diversity is a compelling governmental interest). The Top Ten Percent Plan, however, was held to be constitutional in Gratz v. Bollinger, 539 U.S. 244 (2003). See id. at 265 (Breyer, J., concurring). Other states have similar programs. E.g., Local Path (ELC), UNIVERSITY OF CALIFORNIA, http://admission.universityofcalifornia.edu/freshman/california-residents/local-path/index.html (last visited Mar. 22, 2014) (describing a top 9% plan for the University of California).

25. Fisher v. University of Texas at Austin, 631 F.3d 213, 223–24 (5th Cir. 2011) (noting that there were 238 African Americans and 832 Hispanics in the freshman class entering in 1999, constituting 4.5% and 15.6%, respectively, of the overall class, and that there were 309 African-Americans and 1149 Hispanics in the entering class of 2004, constituting 4.5% and 16.9% of the overall class), rev’d, 133 S. Ct. 2411 (2013). In 1994 and 1995, while the University continued to use race as an admissions factor, minority enrollment decreased slightly. Id. at 223 n.47.

26. Cf. 2009 Tex. Gen. Laws 4252 (“The purpose of the reforms provided for in this Act is to continue and facilitate progress in general academic institutions in this state with regard...
Court in *Fisher v. University of Texas at Austin* took this position. It asserted that “increas[ing] minority admissions” was “[a]n acknowledged purpose of the law,” which came “at significant cost to educational objectives.”

In *Grutter v. Bollinger*, the Court hinted that the motive for adopting facially neutral admissions criteria may preclude a finding that the use of race in admissions was narrowly tailored. The United States (as an amicus) argued that “percentage plans,” like those in Texas, were race-neutral alternatives to the race-conscious admission plan at issue in that case. Unlike in *Croson*, the Court in *Grutter* seemed to reject that argument and questioned whether such a plan could be race-neutral if its motive were race-conscious.

More generally, the Court identified various other problems with the “percentage plans” that the United States touted in its amicus brief. For example, it noted that “[t]he United States does not . . . explain how such plans could work for graduate and professional schools.” Further, “[these plans] 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.”

The Court also rejected other “race-neutral” plans because they would have required the law school to abandon its commitment to other kinds of diversity and/or academic excellence. One plan proposed diminished emphasis on grades and tests scores while continuing to assess non-racial forms of diversity. The Court described this as a “drastic remedy” that might result in a “dramatic” sacrifice of academic quality (although it did not explain how it


32. Id. at 340.
34. 539 U.S. at 340 (“Moreover, even assuming such plans are race-neutral . . . .”).
35. Id.
36. Id.
37. Id.
38. Id.
knew that).\textsuperscript{39} A second proposed race-neutral alternative was a lottery.\textsuperscript{40} But, as with the Top Ten Percent Plan, one can also question whether the proposed lottery suggestion was “race-neutral.” The argument, raised by those challenging the constitutionality of the current admissions system, was that the law school could achieve similar levels of racial diversity by using a lottery. The Court, however, did not expressly address whether such a solution would be “race-neutral.”

The tension between \textit{Croson} and \textit{Grutter} is clear. Why should the City of Richmond spend unknown amounts of money (with a concomitant increase in taxes on its citizens) on a “race-neutral” financing system for all small businesses when the University of Michigan Law School need not even generally moderate its admissions requirements for fear that the academic quality of its students (measured solely by their GPA and LSAT scores) might be lowered?\textsuperscript{41} Surely, one can argue that the City of Richmond has an interest in preserving the public fisc that is at least equal to the law school’s interest in “maintaining a reputation for excellence”\textsuperscript{42} (which is apparently highly sensitive to the GPA and LSAT scores of its students). The Court appears inconsistent in its treatment of different compelling interests—or, perhaps, different defendants.

In \textit{Fisher v. University of Texas at Austin},\textsuperscript{43} the Court considered an admissions system for undergraduates that continued to use the Top Ten Percent Plan but that also explicitly considered race as a potential diversity factor for those not admitted under the plan. The Court did not address whether the Top Ten Percent Plan was race-neutral nor what the consequences would be if it were not.\textsuperscript{44} Rather, it simply reiterated the following rule from \textit{Grutter}: narrow tailoring does not require the consideration of every conceivable race-neutral alternative but does require the good-faith consideration of “workable” race-neutral alternatives.\textsuperscript{45} It did not state whether Texas’s Top Ten Percent Plan was either “race-neutral” or

\textsuperscript{39} Id.

\textsuperscript{40} Id.

\textsuperscript{41} I say “generally” because the Court surely understood that the law school was modifying its admissions criteria—that is, admitting students with lower credentials on undergraduate GPA and the LSAT test—to provide a racial preference. \textit{Id.} at 320 (noting the testimony of the law school’s expert that race-neutral admissions would have a very dramatic negative effect on underrepresented minority admissions). Thus, it may have been a bit disingenuous of the Court to suggest that the law school should not have had to lower its academic standards just to find a “race-neutral” method of admitting more minorities.

\textsuperscript{42} Id. at 339.

\textsuperscript{43} 133 S. Ct. 2411 (2013).

\textsuperscript{44} In \textit{Fisher}, plaintiffs had not challenged the Top Ten Percent Plan. \textit{Fisher v. University of Texas at Austin}, 631 F.3d 213, 242 n.156 (5th Cir. 2011), \textit{rev’d}, 133 S. Ct. 2411 (2012).

\textsuperscript{45} \textit{Fisher}, 133 S. Ct. at 2420.
workable” (although it would presumably pass the latter requirement since Texas actually employed it for some time). Indeed, as the discussion in this Section shows, the Court has never supplied satisfactory definitions for these terms. Nor has it discussed what role the motivation behind a policy might play in determining whether it is “race-neutral.”

Justice Ginsburg, the sole dissenter in Fisher, however, had no problem claiming that “only an ostrich could regard the supposedly neutral alternatives as race unconscious.” She insisted that “[i]t is race consciousness, not blindness to race, that drives such plans.”

But the Court did not respond to Justice Ginsburg’s claim. In Croson, it had suggested a “race neutral alternative” could be a policy that is facially neutral, but designed to achieve a racial goal. The Court’s unwillingness to decide whether motive is a determining factor as to whether a policy is race-neutral leaves little guidance for future litigation.

III. Race-Neutrality Reconsidered

Whether considering the potential of a race-neutral alternative should be part of “strict scrutiny” depends on the compelling governmental interest. If the compelling interest is “national security,” by all means every race-neutral alternative should be considered before resorting to race. On the other hand, if the goal is “more African American engineers”—or “more African American engineers” is essential to some other compelling interest—it seems disingenuous to suggest that we should consider a “race-neutral” alternative to a race-conscious goal. Almost by definition, the “race-neutral” means will not be race-neutral if they are designed to reach the race-conscious goal.

Thus, when a race-conscious goal is at issue, the consideration of a “race-neutral” alternative seems misplaced as an element of narrow tailoring. Rather, the analysis should consider the possibility of

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46. Id. at 2433 (Ginsburg, J., dissenting); cf. Gratz v. Bollinger, 539 U.S. 244, 308 n.10 (Ginsburg, J., dissenting) (asserting that it is “disingenuous” to characterize percentage plans as “race-neutral”). Justice Ginsburg’s attack on race-neutral alternatives seemed to extend to “race-blind holistic review of each applicant,” apparently because universities might resort to camouflage in such review to enroll more minorities. Fisher, 133 S. Ct. at 2433 (Ginsburg, J., dissenting). No doubt that is true, but the same could be said about any subjective criteria, such as evaluation of writing ability. In and of itself, the mere potential for manipulation should not be sufficient to characterize any process as race-conscious.

47. Fisher, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

48. See supra Part II.B.
a race-neutral alternative to the compelling interest. Suppose a local government identifies a dearth of minority-owned companies in a particular industry. One solution could require government actors to consider, as part of the strict scrutiny analysis, whether the absence of minority-owned companies is part of a larger problem, like the lack of companies owned by low-income individuals of all races or the start-ups’ inability to obtain valuable experience. If a plaintiff challenging a race-conscious program can demonstrate that there is a larger problem that the government entity has ignored or overlooked (i.e., a race-neutral goal), a court then could conclude that the defendant really did not have a compelling governmental interest to use race in the first place.

In any event, no narrow-tailoring analysis is necessary when the Court, as it did in Croson, concludes that there is no compelling governmental interest because the government failed to demonstrate that the absence of minorities is attributable to past discrimination.

When we consider race-conscious admissions to colleges and universities, the debate should not be about whether a race-motivated but facially neutral plan like Texas’s Top Ten Percent Plan is more “narrowly-tailored” than a system that openly uses race. Rather, it should be about whether the goal—or, more accurately, the government’s compelling interest—includes racial diversity. Those who favor an openly race-conscious admissions system insist that it should. If they are right, using a pretextual method to obtain the needed racial diversity is just bizarre.

And those who oppose such admissions should either, like Justice Thomas, argue that “educational benefits” are not a compelling governmental interest or that they can be achieved without racial diversity. Thus, a number of scholars propose class-based affirmative action as an alternative to race-based affirmative action. Their arguments should be that class-based affirmative action successfully provides the same benefits of diversity in higher education. They should not argue that class-based affirmative action is a “race-neutral

50. As mentioned earlier, we can assume that the educational benefits of “diversity” are compelling for purposes of this Article. See discussion supra Part I, pp. 2–4.
53. Id. at 83–120.
alternative” because it achieves a substantial amount of racial diversity.54

IV. Conclusion

This brief examination of race-neutral alternative jurisprudence has argued that the Court misconceives what “race-neutral” actually means. One cannot consider whether something is a “race-neutral” alternative until one examines the goal more carefully. Meaningful race-conscious goals cannot be achieved by “race-neutral” means. For purposes of the debate over the use of race-conscious admissions system in higher education, that debate should center around whether there are unique educational benefits from racial diversity and whether those unique—and marginal, in the sense that they purport to provide additional educational benefits beyond what a student body diverse in non-racial ways would provide—benefits are compelling. It cannot be about whether we can behave ostrich-like (to borrow Justice Ginsburg’s notion) and ignore the obvious racial motivation behind facially neutral selection criteria.


INTRODUCTION

Following the *Hopwood* decision, which struck down the University of Texas’s affirmative action policy, the University of Texas ("UT") and the State of Texas sought new ways to promote diversity in higher education that were consistent with the prevailing interpretation of the United States Constitution. The Texas State Legislature narrowly passed a law granting the top ten percent of each graduating high school class in the state automatic admission to UT. Known as the Texas Top Ten Percent Plan (TPP), it both recognized underlying patterns of racial residential segregation and relied on them to generate diversity in the UT undergraduate student body.

A few years later, UT adopted a race-conscious
admissions policy modeled after the University of Michigan Law School’s admissions program, which the Supreme Court upheld in *Grutter v. Bollinger*.

Consequently, UT currently employs two pools as part of its undergraduate admissions process. The first pool includes applicants automatically admitted by law under the TPP. The second pool includes applicants not admitted under the TPP. These applicants are subject to a holistic application review that, in an effort to create a more diverse student body, considers the race of the individual applicant as one of many factors.

The University of Texas denied admission to Abigail Fisher, a white woman who fell outside of the top ten percent of her graduating high school class. Ms. Fisher sued the University of Texas, arguing that UT’s limited consideration of race in undergraduate admissions violates the equal protection clause of the Fourteenth Amendment. Specifically, she claimed that UT discriminated against her on the basis of race because she had academic credentials that were superior to some non-white applicants admitted under the holistic admissions review. She also argued that the

1100, 1113–14 (2010) (Figure 1 shows the location of Texas Higher Education Opportunity Project (THEOP) Universities and Minority Populations and illustrates that the Hispanic population in Texas is concentrated on the western and southern part of the state and that the Black population is concentrated on the eastern part of the state); *id.* at 1111–12 (“Proponents of the plan believed the new admissions policy would restore campus diversity because of the high degree of segregation among high schools in Texas. . . .”); see also *Gunner & Torres, supra* note 2, at 70–74 (describing the formulation of various proposals, including the introduction of the Ten Percent idea by UT professor David Montejano); J. Phillip Thompson and Sarah Tobias, *The Texas Ten Percent Plan*, 43 AM. BEHAV. SCIENTIST 1121, 1125–29 (2000); Julie Berry Cullen et al., *Jockeying for Position: Strategic High School Choice Under Texas Top Ten Percent Plan*, 97 J. PUB. ECON. 32, 33 (2013) (“The admission guarantee ensures that students at low-achieving high schools, who tend to be disproportionately poor and minority, are equally represented among those automatically granted admission.”).


5. Brief for Petitioner at 2, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345). UT disputes Ms. Fisher’s claims regarding the strength of her academic credentials relative to students admitted through the second admissions pool. According to UT’s brief to the Fifth Circuit, Abigail Fisher “would not have been admitted to the Fall 2008 freshman class even if she had received a perfect [Personal Achievement Index] score,” a score that is used during the holistic review process and for candidates who fall below the top 10% of their high school class. Brief for Respondents at 15, Fisher v. Univ. of Tex. at Austin, 133 S.Ct. 2411 (2013) (No. 11-345). Moreover, only one African-American and four Hispanic applicants with lower combined application scores were offered admission to UT’s summer program, compared to forty-two white applicants with equal or lower scores to Abigail Fisher’s. *Id.* at 16. Finally, 168 African-American and Hispanic applicants with identical or higher scores than Abigail Fishers were denied admission to the program. *Id.* at 16.
success of the TPP in generating student body diversity at UT rendered further consideration of race unnecessary.\textsuperscript{6}

Both the District Court and the Fifth Circuit denied her claims. They held that UT’s holistic admissions policy satisfied the constitutional standards announced or clarified in \textit{Grutter} regarding the use of race in admissions in higher education and that UT’s policy was “narrowly tailored” to serve a “compelling interest in attaining a diverse student body.”\textsuperscript{7} Ms. Fisher appealed to the Supreme Court, which granted certiorari to hear her case in the 2012 term.\textsuperscript{8}

In the spring of 2013, affirmative action advocates and opponents braced for the Supreme Court’s \textit{Fisher} ruling with anticipation and apprehension.\textsuperscript{9} Those opposed to affirmative action hoped that the Court would use \textit{Fisher} to overturn or severely limit \textit{Grutter}, as the Court’s composition had since changed. Five conservative Justices controlled the Court in its 2012 term, with \textit{Grutter}-dissenter Justice Anthony Kennedy holding the decisive vote. Justice Alito, viewed by many as hostile to affirmative action, replaced Justice O’Connor, the author of the Court’s \textit{Grutter} decision. Furthermore, the recusal of Justice Elena Kagan because of her prior involvement in the case as Solicitor General hampered the Court’s liberal wing. Justice Kagan holds the seat previously held by Justice John Paul Stevens, a member of the \textit{Grutter} majority.

Advocates of affirmative action hoped for a narrow ruling. In previous cases, Justice Kennedy rhetorically rejected colorblindness (“The enduring hope is that race should not matter; the reality is that too often it does”\textsuperscript{10}) and expressly supported Justice Powell’s

\begin{itemize}
  \item \textsuperscript{6} See Brief for Petitioner, supra note 5, at 38–42. The undergraduate student body of the UT in the Fall of 2010 was 50.4% white, 20.0% Hispanic, 17.9% Asian, and 4.6% African-American, although those numbers vary by gender. For example, the ratio of Black females to males is roughly 2:1. Updated reports on the demographics of enrolled first-time freshmen are available from UT at Top 10\% Reports, U. TEx. AT Austin (last updated Jan. 2, 2014), http://www.utexas.edu/student/admissions/research/admission_reports.html.
  \item \textsuperscript{7} Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587, 608, 612 (W.D. Texas 2009), aff’d, 631 F.3d 213 (5th Cir. 2011).
  \item \textsuperscript{8} Petition for a Writ of Certiorari, Fisher, 133 S. Ct. 2411 (No. 11-345); Fisher v. Univ. of Tex. at Austin, 132 S. Ct. 1536 (2012) (granting petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit).
  \item \textsuperscript{9} Fisher, 133 S.Ct. at 2411; Jeffrey Toobin, The Other Big Supreme Court Case, The New Yorker (May 1, 2012), http://www.newyorker.com/online/blogs/comment/2012/05/the-other-big-supreme-court-case.html; Lyle Denniston, Argument preview: Is affirmative action about to end?, SCOTUSBLOG (Oct. 9, 2012, 12:02 AM), http://www.scotusblog.com/2012/10/argument-preview-is-affirmative-action-about-to-end/.
  \item \textsuperscript{10} Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. 11 No. 1, 551 U.S. 701, 787 (2007). Justice Kennedy’s rhetoric reflects his concern that a formalism and dogmatic interpretation of a colorblind constitution may ignore and insulate the realities of unequal educational provision. He refused to join passages of the plurality in \textit{Parents Involved} on this basis, noting:
The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Id. at 788.

11. 438 U.S. 265 (1978). Allan Bakke, a white male, had twice applied for admission to the University of California Medical School at Davis. He was rejected twice. The school reserved sixteen places in each entering class of one hundred for “qualified” minorities, attempting to redress persistent and unfair minority exclusions from the medical field. Bakke argued that he was excluded from admission solely on the basis of race. Id. at 265–66. The Court in Bakke was deeply divided and no opinion gained majority support. Justice Powell’s opinion was considered, under some tests, controlling, and announced the judgment of the court. In Grutter, Justice O’Connor did not resolve the issue of how to determine binding precedent in fractured opinions, but did endorse Justice Powell’s opinion as the correct statement of law. Grutter, 539 U.S. at 325.


13. See discussion supra note 11. The Court’s opinion in Grutter draws heavily from Justice Powell’s opinion in Bakke, with thirty-one references and citations in the majority opinion alone. 539 U.S. at 311–44.

14. See Grutter, 539 U.S. at 387 (Kennedy, J., dissenting). The reason for Justice Kennedy’s dissent in Grutter was not disagreement with the majority’s endorsement of the standard of law announced by Justice Powell in Bakke, but rather his disagreement over the Court’s application of that standard with respect to narrow tailoring, and what he viewed as a flawed narrow tailoring analysis.

15. Parents Involved, 551 U.S. at 797–98 (2007) (Kennedy, J., concurring). For more on the importance of Justice Kennedy’s assertion that a compelling interest exists in avoiding racial isolation, see John A. Powell & Stephen Menendian, Parents Involved: Mantle of Brown, The Shadow of Plessy, 46 U. LOUISVILLE L. REV. 631, 632 (2007) (“Justice Kennedy’s opinion is also significant because of his holding that there exist compelling government interests in the [sic] avoiding racial isolation and in achieving a diverse student population in primary education. Along with the four dissenting Justices, a majority of the Justices on the Court have now voiced approval of a new compelling interest that may sustain race-conscious policies under the strict scrutiny framework.”).
proclaimed that “[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”

Supporters of UT’s admissions policy feared that even a narrow decision—one that upheld the principles first announced in Bakke, left Grutter undisturbed, but overturned UT’s race-conscious admissions plan—would chill the already sparse race-conscious admissions plans still in operation. Even if universities could successfully defend such plans under the legal standards announced in Fisher, the overturning of a major university policy would ultimately receive more press and invite more litigation than the subtle doctrinal silver linings or nuanced parsing of that decision. TPP supporters could point to the consequences of previous decisions as examples. Following the Supreme Court’s decisions in Parents Involved and Meredith v. Jefferson County Board of Education, which struck down voluntary integration plans in Louisville, Kentucky and Seattle, Washington, school districts around the nation seemed more reticent about integration and less willing to pursue that goal as educational policy.

Ultimately, the terse 7–1 decision in Fisher is more remarkable for what it did not say than for what it did. The Court did not strike down UT’s holistic admissions policy, did not overrule Grutter, did not purport to revise or otherwise alter the constitutional standards announced in Grutter, did not hold that UT’s admissions policy failed the narrow tailoring test, did not suggest deficiencies in the UT policy, and barely mentioned the TPP. One reading of Fisher is that it introduced no new law, but that it was merely a black letter restatement of Bakke, Grutter, and Gratz v. Bollinger. This reading is not only suggested by the Court itself, but is also advanced by defenders of affirmative action and UT’s admissions policies, who

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17. Meredith, 548 U.S. 938 (2006), was argued in tandem with Parents Involved.
18. Indeed, the Seattle School District abandoned its integrative efforts following the Parents Involved decision. Parents Involved in Cnty. Sch. IV, 377 F.3d 949, 958 (9th Cir. 2004). See also Seattle Public Schools, Student Assignment Plan (2009), available at http://district.seattleschools.org/modules/groups/homepagefiles/cms/1583136/File/Departmental%20Content/enrollment%20planning/New%20Student%20Assignment%20Plan.pdf?sessionid=64c033b3ac6b7e05be38f260be29d18.
20. See Fisher, 133 S. Ct. at 2421 (“In Grutter, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed ‘serious, good faith consideration of workable race-neutral alternatives.’ As noted above, the parties do not challenge, and the Court therefore does not consider, the correctness of that determination.”) (internal citations omitted).
would prefer to avoid weakening *Grutter.* This reading is unpersuasive, though appealing. Upon a closer reading, *Fisher* is a departure from settled law in a number of critical respects.

This Article investigates the potential ramifications of *Fisher v. Texas* and the future of race-conscious university admissions. Although one cannot predict the ultimate significance of the *Fisher* decision, its brief and pregnant statements of law portends an increasingly perilous course for traditional affirmative action programs. Part I explores the opinions filed in *Fisher,* with a particular emphasis on Justice Kennedy’s opinion on behalf of the Court. We focus on the ways in which the *Fisher* decision departs from precedent, proscribes new limits on the use of race in university admissions, and tightens requirements for narrow tailoring.

Part II investigates the limits of the exhaustion requirement as a matter of logic, law, and policy. We focus on the necessity and exhaustion prongs of narrow tailoring with respect to the use of race in admissions. We will complicate the necessity analysis by illustrating the practical difficulties of employing race-neutral alternatives and by highlighting how this inquiry is fraught with administrative and conceptual challenges.

Part III underscores the challenges presented in Part II by attempting to navigate the distinction between general race-consciousness and the use of individual racial classifications. We will explore the possibilities for university admissions committees to pursue racial and socio-economic diversity, including the opportunity-enrollment model. As a reference, we will survey integrative alternatives used in the wake of the *Parents Involved* decisions and suggest how colleges and universities could apply a similar set of principles and methods. We will also note the challenges facing such approaches on the scale of university admissions.

We will conclude by arguing that race-conscious admissions are necessary, yet increasingly administratively challenging. The standards for narrow tailoring demand expertise beyond the skills and the resources of university admissions committees and call for more administratively cumbersome university standards. Given the extant realities of our educational system, courts should provide more leeway, not less, to universities pursuing the compelling interests of promoting student body diversity and reducing racial isolation. In the absence or relative unavailability of such resources and technical expertise, and until such deference from courts is forthcoming,

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universities should rely on the Supreme Court’s safe harbor by aggressively pursuing viable race-neutral alternatives with promising outcomes.

I. NEW DEPARTURES IN FISHER v. TEXAS

The Supreme Court’s opinion in Fisher purports to do little more than to correct the Fifth Circuit’s error in applying established law. However, the Court’s terse opinion departs from established precedent in several important ways while creating new law. This Part will explore these departures. The Court ultimately remanded the case to the Fifth Circuit for reconsideration under the standards announced in its decision.22 The Court explained that because the case arose from cross-motions for summary judgment, rather than appeal after a trial, the lower courts in the first instance must assess whether UT offered evidence “sufficient . . . to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”23

Justice Kennedy delivered the opinion of the Court, Justices Scalia and Thomas authored concurring opinions, and Justice Ginsburg delivered a brief dissenting opinion. Justice Scalia’s opinion merely notes that he joined the Court’s opinion in full, despite his objection to Grutter, because Petitioner did not ask the Court to overrule Grutter.24 Justice Thomas’ lengthy concurrence, in contrast, calls for the Court to overturn Grutter.25 Justice Thomas also parts with the opinion of the Court by asserting that the interest in racial diversity is not compelling, comparing so-called “benign” intentions to those of slaveholders and Jim Crow segregationists.26

22. Fisher, 133 S.Ct. at 2421 (“[B]ut fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis.”). Following the Court’s decision, the Fifth Circuit denied the University of Texas’s request that it remand the case to the District Court for further proceedings. See Appellee’s Statement Concerning Further Proceedings on Remand at 7, Fisher v. Univ. of Tex. at Austin, No. 09-50822, (5th Cir. July 23, 2013), available at http://tarlontguides.law.utexas.edu/loader.php?type=d&id=812884; Proposed Schedule for Supplemental Briefing and Response to Appellee’s Statement Concerning Further Proceedings on Remand at 9, Fischer v. Univ. of Tex. at Austin, No. 09-50822, available at http://lgdata.s3-website-us-east-1.amazonaws.com/docs/971/812890/PROPOSED_SCHEDULE_FOR_SUPPLEMENTAL_BRIEFING_AND.pdf.

23. See Fisher, 133 S.Ct. at 2414.

24. Id. at 2422 (Scalia, J., concurring).

25. Id. (Thomas, J., concurring).

26. Id. at 2430 (Thomas, J., concurring) (arguing that “segregationists similarly asserted that segregation was not only benign, but good for black students. . . . Following in these inauspicious footsteps, the University would have us believe that its discrimination is likewise benign. I think the lesson of history is clear enough: Racial discrimination is never benign.”).
Perhaps the most surprising aspect of the Court’s Fisher decision is that the members of the Court split by a 7–1 vote, with only Justice Ginsburg dissenting. In Parents Involved, Justices Souter, Ginsburg, and Stevens joined Justice Breyer’s eighty-page dissent, which not only argued that the school district’s limited use of race to promote integration should survive strict scrutiny but also that efforts to promote educational diversity should be subject to a less stringent standard of review.27

By noting the legal and ethical difference between segregative and integrative efforts Justice Breyer echoed Justice Stevens’ famous admonition that subjecting both “invidious” and “benign” racial classifications to the same standard of review is akin to equating a “welcome mat” and a “no trespassing sign.”28 As Justice Breyer wrote, “no case . . . has ever held that the test of ‘strict scrutiny’ means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same.”29 He explained that “a more lenient standard than ‘strict scrutiny’ should apply in the present context” and that doing so “would not imply abandonment of judicial efforts carefully to determine the need for race-conscious criteria and the criteria’s tailoring in light of the need.”30 Although protesting the plurality’s use of strict scrutiny review, Justice Breyer acquiesced to the realities of the Court’s jurisprudence and nonetheless applied strict scrutiny review in his analysis. He concluded that the voluntary integration plans under review in Parents Involved survive constitutional scrutiny under strict scrutiny or any lesser standard.31

Given the length, intensity, and logic of his dissenting opinion in Parents Involved, it is puzzling that Justice Breyer would join Justice Kennedy’s opinion in Fisher. Justice Kennedy’s statement of law is inconsistent with Breyer’s equal protection jurisprudence. Similarly, it is puzzling that Justice Sonia Sotomayor, a more recent appointee and Justice Souter’s replacement, would join Justice Kennedy’s opinion. In her autobiography, Justice Sotomayor stressed the value of affirmative action in higher education, citing herself as

27. Parents Involved, 551 U.S. at 803 (Breyer, J., dissenting).
28. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (“The consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.”).
29. Parents Involved, 551 U.S. at 832 (Breyer, J., dissenting). In his view, the purpose of the Equal Protection Clause was to “forbid[] practices that lead to racial exclusion.” Id. at 829.
30. Id. at 836.
31. Id. at 863 (“To show that the school assignment plans here meet the requirements of the Constitution, I have written at exceptional length.”).
an example.\textsuperscript{32} Her pointed questions during oral argument, often critical of the Petitioner, reinforce that reading.\textsuperscript{33} By joining Justice Kennedy’s opinion, Justices Breyer and Sotomayor establish, for the first time, that seven Justices endorse the proposition that the use of racial classifications in university admissions is subject to strict scrutiny review and that strict scrutiny demands the kind of tailoring set out in Justice Kennedy’s opinion. Although not a change in law, this represents a symbolic departure and appears to consolidate the re-orientation of equal protection jurisprudence announced in \textit{Bakke} away from the principles announced in \textit{Carolene Products}.\textsuperscript{34} The tenuous hold of strict scrutiny over all racial classifications, invidious or remedial, by just five Justices appears to have given way to broader support, at least insofar as the votes of the Justices in \textit{Fisher} are predictive.

Given their support for the use of racial classifications in remedial and integrative public policy, it is not evident why Justices Breyer and Sotomayor would join Justice Kennedy’s opinion and further entrench the view that strict scrutiny applies to all racial classifications. Possibly, these Justices were able to secure a narrower ruling by joining Justice Kennedy’s opinion.\textsuperscript{35} For this to be true, Justice Kennedy or the other conservative Justices must have been willing or have indicated a willingness to announce a more stringent standard of law, or even to strike down UT’s policy on the merits unless Justices Breyer or Sotomayor joined them. Another possibility is that Justices Breyer and Sotomayor were persuaded to

\textsuperscript{32} See \textit{Sonia Sotomayor, My Beloved World} 119 (2013) (describing a conversation she had during the admissions process and after she received an acceptance letter from Princeton); id. at 145–46, 191 (discussing the need for affirmative action to open doors). Further, in an interview with \textit{Time} magazine while \textit{Fisher} was pending, Justice Sotomayor was asked whether affirmative action is working today. Although she declined to speak specifically about her views on affirmative action, Justice Sotomayor expressed her belief that the country will not reach “complete equality” unless “employers and everyone else are sensitive to the fact that it is a valuable goal for society.” Belinda Luscombe, \textit{10 Questions for Sonia Sotomayor}, \textit{Time}, Feb. 11, 2013, at 60.

\textsuperscript{33} See Transcript of Oral Argument at 81–82, \textit{Fisher} 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter \textit{Fisher Oral Argument}] (Justice Sonia Sotomayor: “[You] don’t want to gut it.” Fisher’s attorney: “Excuse me?” Justice Sonia Sotomayor: “You just want to gut it. You don’t want to gut it, but you just want to gut it.” Fisher’s attorney: “Well—” Justice Sonia Sotomayor: “[N]ow you want to tell universities that once you reach a certain number, then you can’t use race anymore.”)


\textsuperscript{35} In other words, Justice Kennedy may either have expressed or implied a willingness to strike down UT’s plan unless other Justices joined a narrower opinion.
join the Court majority in the interests of preserving the Court’s institutional legitimacy by avoiding another deeply divided and politically contentious Court decision near the end of the term. Muting the Fisher decision may have been a tactical concession by both wings of the Court in a volatile term with looming victories and defeats for both progressives and conservatives in landmark marriage equality and voting rights cases. The liberal Justices may also have been more willing to acquiesce since Justice Kagan’s recusal weakened their position.

If these were considerations, their joining the majority may have little predictive significance. Regardless, their decision to join the majority helped deepen the precedent that all racial classifications—regardless of intent—are subject to strict scrutiny review. Furthermore, by joining Justice Kennedy, Justices Breyer and Sotomayor have lent their imprimatur to the proposition that consideration of race requires exhaustion of race-neutral alternatives. This is the second way in which Fisher departs from previous case law.

The most important aspect of Fisher is the Court’s holding regarding the exhaustion of “workable race-neutral alternatives.” Grutter instructed that narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives.” However, Grutter also cautioned that “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.” To the contrary, Justice Kennedy’s Fisher opinion asserts that “the reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.” He explained that consideration of race-neutral alternatives is necessary, but insufficient to satisfy strict scrutiny.

36. See Shelby County, Ala. v. Holder, 133 S. Ct. 2612 (2013) (holding that key provisions of the Voting Rights Act were unconstitutional); U.S. v. Windsor, 133 S. Ct. 2675 (2013) (holding that the Defense of Marriage Act’s definition of marriage was unconstitutional).
37. Again, this is the first time that seven Justices have clearly endorsed the proposition that all race-based classifications, whether benign or invidious, are subject to strict scrutiny review.
38. Fisher, 133 S. Ct. at 2420 (“But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”).
40. Id. at 309.
41. Fisher, 133 S. Ct. at 2420. Admittedly, there is a difference between “every conceivable” and “every workable” alternative, but it seems clear that the Grutter and Fisher decisions are in tension in this respect. Fisher’s more stringent exhaustion standard now replaces Grutter’s “good faith consideration.”
42. Id. (“Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny. . . .”)
The exhaustion requirement represents a departure from Grutter. Fisher appears to have re-written Grutter’s requirement of good faith consideration of race-neutral alternatives into a more stringent exhaustion requirement. Justice Kennedy does, however, temper the exhaustion requirement with the caveat that a non-racial approach must produce the educational benefits of diversity “about as well and at tolerable administrative expense.”

In addition to mandating exhaustion rather than mere consideration of race-neutral alternatives, the requirement that universities seriously consider workable race-neutral alternatives has been superseded by the requirement that reviewing courts be satisfied that these alternatives will not suffice. This represents a third departure from Grutter. In Fisher, the Court shifts responsibility for assessing the viability of workable race-neutral alternatives from the university to the courts. In Grutter, this element of narrow tailoring was to be conducted in “good faith” by the university. In Fisher, however, the “reviewing court” must be “satisfied” that “no workable race-neutral alternative” would suffice.

The Court also tightened narrow tailoring in other critical respects. The primary error the Supreme Court found with the Fifth Circuit’s decision in Fisher is that it accorded too much deference to the university in evaluating whether the program was narrowly tailored. The Court in Grutter suggested that courts offer some deference, grounded in First Amendment interests, to a University’s pursuit of its pedagogical goals, including the selection of its own student body. Drawing from Justice Powell’s Bakke opinion,

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43. This re-writing is semantically plausible depending on the meaning or construction of the words “serious, good faith consideration.” “Serious” could be given more weight than the Court may have suggested in Grutter. In that reading, “serious” carries some of the work that is now being offloaded to other words in a revised standard. See Grutter, 539 U.S. at 339.

44. Fisher, 133 S. Ct. at 2420. (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280 n.6 (1986)).

45. Grutter, 539 U.S. at 339–40 (“Petitioner and the United States argue that the Law School’s plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

46. Fisher, 133 S. Ct. at 2420.

47. See Grutter, 539 U.S. at 329. “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” Id. The Court continued: “In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: ‘The freedom of a university to make its own judgments as to education includes the selection of its student body.’” Id. (citing Bakke, 348 U.S. at 312).
the Court in *Grutter* reiterates that “good faith” in that judgment will be presumed.\(^{48}\) Although *Grutter’s* language of deference is found in passages discussing the compelling interest prong of strict scrutiny,\(^{49}\) it is not evident that *Grutter* distinguished between the deference in the narrow tailoring and compelling interest prongs as finely as *Fisher*.\(^{50}\) This observation is bolstered by Justice Kennedy’s dissent in *Grutter*, in which he complained that “[t]he Court confuses deference to a university’s definition of its educational objective [of student body diversity] with deference to the implementation of this goal.”\(^{51}\)

In its narrow-tailoring analysis, the *Grutter* Court only demanded “good faith” consideration of race-neutral alternatives by the university.\(^{52}\) While purporting not to challenge “the correctness of that

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48. *Id.* at 308.

49. *Id.* at 308, 329.

50. *See infra* Part II. The responsibility to consider race-neutral alternatives in good faith rested with universities in *Grutter*. In *Fisher*, the courts, not the academic institution, must be satisfied about the viability of race-neutral alternatives. This shift in responsibility underscores the degree of deference *Grutter* accorded universities, even in the narrow-tailoring prong.

51. *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). “In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued.” *Id.*

52. *Id.* at 339. The language of “good faith” also suggests or implies some deference. After all, as described *supra* at note 50, the court, not the university, must be satisfied about
determination,” Justice Kennedy’s opinion on behalf of the Court in Fisher adroitly excises this element out of the prevailing standard.\(^{53}\) As he explains, “Grutter did not hold that good faith would forgive an impermissible consideration of race.”\(^{54}\) Yet, whether such consideration of race is permissible or not depends, in large part, on whether it is narrowly tailored. Demanding a permissible use of race in the first instance introduces a circular logic that effectively eliminates or minimizes the good faith element in this aspect of narrow tailoring. The Grutter Court sanctioned “good faith consideration of workable race-neutral alternatives. . . .”\(^{55}\) The Fisher Court countenances neither mere ‘consideration’ nor simple ‘good faith’ but demands more.\(^{56}\)

The tendency to conflate standards for the narrow tailoring and compelling interest prongs, evident in Justice Kennedy’s critique of the Fifth Circuit, inheres in the structure of strict scrutiny itself. The required tailoring must account for the interest pursued and cannot be acontextually analyzed. The Court, however, sometimes conducts its narrow tailoring analysis entirely removed and abstracted from the interest being evaluated. The exhaustion requirement illustrates this deeper flaw in the Court’s narrow tailoring analysis. Narrow tailoring, by definition, tailors to the interest asserted. To determine whether a university’s use of race is narrowly tailored to serve a compelling governmental interest requires a careful understanding of that interest. The exhaustion requirement is not tailored to the interests asserted but appears to be acontextually imported. Chief Justice Roberts’ plurality opinion in Parents Involved is illustrative.

In Parents Involved, Chief Justice Roberts’ plurality opinion sidestepped analyzing the racial diversity interest advanced by the defendant-respondent school districts by asserting that, regardless of the interest at stake, the plans were not narrowly tailored. Roberts stated, “[t]he debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored. . . .”\(^{57}\) This makes little sense as a

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the viability of workable race-neutral alternatives after Fisher, whereas in Grutter, the university was responsible for considering alternatives, and then only in good faith.

53. Fisher, 133 S. Ct. at 2421.
54. Id.
55. Grutter, 539 U.S. at 339.
56. Good faith only applies, in the view of the Fisher Court, if the use of race is already narrowly tailored. Requiring that good faith only apply if the use of race is narrowly tailored in the first place effectively writes the good faith requirement out of the narrow tailoring test.
57. Parents Involved, 551 U.S. at 726.
matter of logic. After all, the interest asserted or accepted defines the scope of narrow tailoring. The question of whether the interest at issue was a broader or narrower concept of diversity necessarily affects whether the means used to pursue that end are properly tailored. Narrow tailoring is not an analysis without context, and yet that is how the Chief Justice treated it in *Parents Involved*.

The Chief Justice’s handling of the relationship between the compelling interest and narrow tailoring prongs in *Parents Involved* is inconsistent with his questioning during oral argument in *Fisher*. Chief Justice Roberts pressed Respondents to define the term “critical mass” so that he could determine whether the use of race was narrowly tailored:

> I understand my job, under our precedents, is to determine if your use of race is narrowly tailored to a compelling interest. The compelling interest you identify is attaining a critical mass of minority students at the University of Texas, but you won’t tell me what the critical mass is. How am I supposed to do the job that our precedents say I should do?^{59}

In *Parents Involved*, Roberts did not merely fail to follow the Court’s precedents. He failed to do the job he adamantly suggested was required.

One of the sources of confusion in narrow tailoring analysis is the subtly shifting purposes of strict scrutiny over time. This is yet another departure evident in *Fisher*. Strict scrutiny’s varied purposes may individually suggest differing legal standards designed to serve those ends. As those purposes change or shift in emphasis, so do the legal standards that arise from them. *Fisher’s* articulation of narrow tailoring reflects a larger, mostly implicit, shift in the underlying rationale for strict scrutiny.

In earlier racial classification cases, the Court explained that the primary function of strict scrutiny was to screen for illegitimate motives.^{60} In contesting the application of strict scrutiny to all racial

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58. See *powell & Menendian*, *supra* note 15, at 650–54 (providing a more detailed parsing of Chief Justice Robert’s narrow tailoring analysis in *Parents Involved*).

59. *Fisher Oral Argument*, *supra* note 33, at 46. Chief Justice Roberts’s inconsistency suggests a results-oriented jurisprudence. He either demands a precise definition of the compelling interest or sidesteps such an inquiry entirely, depending on whether it serves his presumed objective of striking down or limiting race-conscious policies.

60. See *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (explaining that heightened scrutiny applies because the Court must examine the statute’s purpose and justification to ensure that the purpose is not “invidious discrimination.”). Many cases reiterated this basic rationale, albeit in slightly different formulations. In *Loving v. Virginia*, the Court explained that “[t]he equal protection clause requires the consideration of whether the classifications
classifications, various parties and several Justices argued that the use of racial classifications in pursuit of remedial objectives or on behalf of benignly motivated legislation should be subject to a lower standard of review. By arguing that the purpose of strict scrutiny was to screen for illegitimate motives and saying that good intentions cannot be presumed, conservative jurists applied strict scrutiny even to ostensibly ‘benign’ or ‘remedial’ legislation. As the Court explained in *Croson*, “[a]bsent searching judicial inquiry into the justification for such race-based measures,” courts have no way to determine what “classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” However, in more recent cases, another ground or rationale for strict scrutiny is increasingly evident.

In *Grutter*, the Court explained its rationale for strict scrutiny: “We apply strict scrutiny to all racial classifications to ‘smoke out’ illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool.” In other words, the Court introduced an additional rationale for strict scrutiny: balancing the costs of a racial classification against its benefits. The Court’s assertion that the government’s use of race is “important enough” to justify its service on behalf of a compelling interest suggests an explicit cost/benefit rationale. The Court’s anti-classification jurisprudence has rested more prominently on the latter rationale, while it often frames its analysis in terms of the drawn by any statute constitutes an arbitrary and invidious discrimination.” 388 U.S. 1, 10 (1967). Two decades later, a similar parsing was found in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”).

61. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 245 (1995) (Souter, Ginsberg and Breyer dissenting) (“The consistency that the Court espouses would disregard the difference between a “No Trespassing” sign and a welcome mat. [. . .] The Court’s explanation for treating dissimilar race based decisions as though they were equally objectionable is a supposed inability to differentiate between ‘invidious’ and ‘benign’ discrimination.”). More precisely, in cases before *Croson* and *Adarand*, the Court was deeply divided on whether strict scrutiny review applied to all racial classifications. Previous cases had established that strict scrutiny was reserved for cases involving invidious discrimination but that ‘benign’ or ‘remedial’ legislation employing racial classifications was subject to a lesser standard of review, at least with respect to Congressional authority to pass remedial legislation through the enforcement clause of the Fourteenth Amendment. *See Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 638 (1990) overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Brad Snyder, How the Conservatives Canonized Brown v. Board of Education*, 52 Rutgers L. Rev. 383, 480–93 (2000).


64. *Grutter*, 539 U.S. at 326 (internal quotations omitted; emphasis added).
former. The decisive role of Justice Kennedy on the Court may explain this shift.

A careful reading of Justice Kennedy’s jurisprudence reveals a deep concern for individual dignity and autonomy, which he believes racial classifications impugn. His emphasis on dignity may be characterized as part of a broader jurisprudence of individualism. Justice Kennedy, like Justice O’Connor, is committed to the preservation of elite institutions, but is troubled by the fact that admissions (the allocation of a societally important and scarce resource) may be reduced to a single or a few factors rather than looking at an individual as a whole. Justice Kennedy’s jurisprudence suggests that he is attracted to policies and plans that view people as individuals rather than as a single metric, whether that be SAT scores or race.

Typical of his description of the harms of racial classification, Justice Kennedy asserted in Parents Involved that “[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.” Yet, in Fisher, he asserts, quoting Croson, that the rationale for strict scrutiny rests on the ground that the government must prove that “the reasons for any [racial] classifications [are] clearly identified and unquestionably legitimate.” Despite his assertion to the contrary, neither “clear identification

65. See, e.g., Rice v. Cayetano, 528 U.S. 495, 517 (2000) (“[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”).

66. In some cases, Justice Kennedy’s individualism acquires romantic overtones. In Planned Parenthood v. Casey, Justice Kennedy famously wrote: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life . . . .” 505 U.S. 833, 851 (1992). This core value finds expressions not only in his race cases but was also prominent in his Windsor opinion. United States v. Windsor, 133 S. Ct. 2675, 2689 (2013). It undoubtedly informed his decision to join the dissenters in the landmark 2012 term decision, Nat’l Fed’n of Indep. Bus. v. Sebelius, in which the Court narrowly upheld the Affordable Care Act from constitutional challenge. 132 S. Ct. 2566. In oral argument, Kennedy posed a question to the Solicitor General that suggested his concern over the ways in which the law may infringe individual liberty: “Here the government is saying that the Federal Government has a duty to tell the individual citizen that it must act, and that changes the relationship of the Federal Government to the individual in a very fundamental way.” Kennedy: Individual Mandate Fundamentally Changes Relationship of Gov’t., REAL CLEAR POLITICS (March 27, 2012), http://www.realclearpolitics.com/video/2012/03/27/kennedy_individual_mandate_fundamentally_changes_relationship_of_govt.html (quoting Justice Kennedy).


68. Fisher, 133 S. Ct. at 2413 (internal quotations omitted).
nor “legitimacy” is the overriding concern for Justice Kennedy. The lack of clarity for strict scrutiny produces a confusing analysis, especially with respect to narrow tailoring, which depends on both an understanding of the interest being evaluated as well as the rationale for strict scrutiny.

Without clearly understanding the rationale for strict scrutiny, assessing the logic of narrow tailoring or its requirements is difficult. Narrowly tailored efforts must not only be tailored to the interest asserted, but must also be comprehensible within the framework of strict scrutiny. If the purpose of strict scrutiny were simply to ensure benign motivation, then narrow tailoring would not be necessary, let alone a critical inquiry. This is because narrow tailoring itself has little bearing on the motives or interests asserted but primarily ensures that the use of race is as limited as possible.\(^\text{69}\) Narrow tailoring’s primary work is not to screen for or “smoke out” illegitimate motives but to minimize what the Justices perceive as the burden or cost to innocent parties.\(^\text{70}\) Understanding narrow tailoring’s function in this way helps explain the exhaustion requirement as well as the Court’s increasing emphasis on narrow tailoring in its strict scrutiny analysis in this context.

II. The Limits of Exhaustion

As noted, the Court’s holding that narrow tailoring requires the “reviewing court . . . be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity . . . about as well and at tolerable administrative expense”\(^\text{71}\) is the most important statement of law arising from Fisher. This articulation of narrow tailoring appears to be a departure from precedent. Although seeming to clarify narrow tailoring requirements, this holding instead may shift ambiguity from one area to another. While exhaustion of race-neutral alternatives is now a mandatory exercise, the precise meaning and scope of the exhaustion requirement remains unclear.

\(^{69}\) As noted supra note 66, the conservative Justices’ emphasis on narrow tailoring in recent cases suggests the more important function of strict scrutiny to minimize the harms of even sanctioned or compelling uses of race.

\(^{70}\) At times, the Court is more candid about this fact. As it explained in Grutter, “Even remedial race-based governmental action generally remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.” 539 U.S. at 341 (internal quotations omitted).

\(^{71}\) Fisher, 133 S. Ct. at 2420.
Although Justice O’Connor famously explained that strict scrutiny is not “strict in theory, but fatal in fact,” Justice Kennedy countered with the rhetorical rejoinder that strict scrutiny should not be “feeble in fact” either. What facts must be presented to satisfy a court that no workable race-neutral alternatives are viable? What degree of certainty is called for in order to satisfy the reviewing court? How are we to understand the standard of ‘tolerable administrative expense’? Where is the threshold for tolerable expense or the line between tolerable and intolerable expense?

The exact meaning and scope of the exhaustion requirement will be a focus of inquiry on remand. Although the University of Texas issued a statement that the Supreme Court’s decision would not affect their admissions policies following the ruling, on remand UT will be called upon to present evidence as to why race-neutral alternatives are insufficient to achieve its pedagogical objectives. In particular, the university will be pressed to explain why the TPP is insufficient to achieve its goals, especially given the ways in which the TPP has evidently increased the levels of racial diversity in the undergraduate student body after Hopwood.

Establishing the necessity of the additional race-conscious, holistic admissions procedure is not an impossible showing, but it will be arduous and fact-intensive. Specific findings regarding the limitations of the TPP in producing student body diversity in a variety of settings will be critical. Moreover, any social scientific research that

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72. Adarand, 515 U.S. at 237.
73. Fisher, 133 S. Ct. at 2421.
74. At the time of this writing, the briefing in the Fifth Circuit has not yet been completed, but Plaintiff-Appellant has already argued that race-neutral alternatives (such as the TPP) promote racial diversity as well, or about as well, as race-conscious efforts. See Plaintiff-Appellant’s Supplemental Brief at 34-35, Fisher v. Univ. of Tex. at Austin (5th Cir. argued Nov. 13, 2013) (No. 09-50822), 2013 WL 5603455 (“Even assuming that race was a decisive factor for each student admitted outside the operation of the Top 10% law, UT’s use of race still could only have added, at most, 58 African-American and 158 Hispanic students to an in-state class of 6,322.”).
75. See University of Texas President Responds to Supreme Court Ruling, The Univ. of Tex. at Austin (June 24, 2013), http://www.utexas.edu/news/2013/06/24/university-of-texas-austin-president-responds-to-supreme-court-ruling/ (last visited Nov. 13, 2013).
76. See Enrollment of First-Time Freshman Minority Students Now Higher than Before Hopwood Court Decision, The Univ. of Tex. at Austin (Jan. 29, 2013), http://www.utexas.edu/news/2005/01/29/ae_diversity/ (“A report by the university’s Office of Institutional Research for the 2002 fall/summer enrollment shows there were 266 African Americans, 932 Hispanics and 942 Asian Americans enrolled as first-time freshmen at the [UT] in 1996. The numbers of African Americans and Hispanics dropped after the Hopwood ruling, although the figures for Asian Americans increased. In 1997, the numbers for first-time freshmen were down to 190 African Americans, 892 Hispanics and 1,130 Asian Americans.”) Not until 2002—and many years after TPP became law in 1997—did first-time freshman enrollment for all three ethnic groups increase to a level above the 1996 pre-Hopwood figures. In the Fall of 2002, enrollment included 272 African Americans, 1,137 Hispanics and 1,452 Asian Americans. Id.
can be advanced on what may constitute a critical mass to create a
diversity of viewpoints, so that minority students are not tokenized,
may be relevant inquiries on remand.77 The sociological complexity
of race underscores the limits of exhaustion.

Race is best understood as a socio-cultural location in American
society.78 As a social construction, race is not an essential or static
characteristic but a dynamic one.79 Swedish sociologist Gunnar Myrdal,
in his epic treatise An American Dilemma: The Negro Problem and
Modern Democracy, was the first to understand that race was visible in
almost every domain of American life but wholly explainable by
none. What bound race together and made it comprehensible as an
independent variable was the effects of each domain on the
others.80 It is the interaction of domains such as housing, educa-

tion, employment, and health, to take but a few, that explains
racialized outcomes.81 The attempt to explain or measure the effects of racial discrimination in any particular domain is necessarily
incomplete.

If race is a socio-cultural location, then the more factors one con-
siders that correlate to race, the closer one may approximate race.
Conversely, a single-factor approach will fail to capture the disad-
vantage experienced by marginalized racial groups.82 Nonetheless, if race (both measured outcomes along racial categories and the

77. See Plaintiff-Appellant’s Supplemental Brief supra note 74, at 25–33.
78. See JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 54 (2012) (“Because of its socially constructed nature, the meaning attributed to a racially identified group or characteristic depends to a great extent on the sociohistorical context in which the racing occurs, and racial meaning varies across time and space.”).
79. Although race was perceived, like sex, to be an immutable, inherited characteristic, race as a social construction is no longer viewed that way. Rather, racial categories are folk taxonomies and are better understood as dynamic and fluid. A careful history of race illustrates this. See generally Michael Omi & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994); AUDREY SMEDLEY & BRIAN D. SMEDLEY, RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW (4th ed. 2012).
80. See GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 75-79 (1944). Myrdal explains, “The unity is largely the result of cumulative causation binding them all together in a system and tying them to white discrimination. It is useful, therefore, to interpret all the separate factors from a central vantage point—the point of view of the Negro problem.” Id. at 77. “In an interdependent system of dynamic causation there is no ‘primary cause’ but everything is cause to everything else.” Id. at 78.
mer.pdf.
82. MYRDAL, supra note 80, at 1069 (“This conception of a great number of interdepen-
dent factors, mutually cumulative in their effects, disposes of the idea that there is one
predominant factor, a ‘basic factor.’ . . . [T]his one-factor hypothesis is not only theoretically
unclear, but is contradicted by easily ascertainable facts and factual relations.”).
social construction of the categories or racial classification schemes themselves) is the emergent property of interacting factors, it is conceivable that race could be deconstructed into its constituent parts and retain much of the same analytic and explanatory force. Race may not be explainable in terms of any single variable, but if we disaggregate all of the variables that explain race, in theory we could employ those factors, in lieu of race, as race-proxies or correlates to accomplish the same ends that race is serving.

The argument that using race as a factor is necessary to achieve racial diversity or reduce racial isolation and, further, that race-neutral alternatives are insufficient, is not a conceptual or theoretical claim but primarily a practical one. The relative disadvantage of certain racialized populations results from dozens of demographic, social, and economic factors that vary across geographic areas and local conditions. The convergence of these factors with race makes race a particularly useful consideration in understanding life chances, but this clustering also makes it vexing to untangle and analyze the various factors that explain race. Given the number of the variables that contribute to racial disadvantage and complexity of their interaction, an admissions policy limited to race-neutral factors cannot easily capture their cumulative effect on educational opportunity. While there may be administrative reasons to view at race as the sum of its parts, this approach ignores the relationships between the parts, and the emergent properties of complex systems that result and constitute race itself.

Following the Supreme Court’s decision in Parents Involved, the Jefferson County School Board, under the leadership of Superintendent Pat Todd, adopted a revised student assignment policy designed to maintain student body diversity. The successfully

83. Id. at 75–79. See also Brief of Social and Organizational Psychologists as Amici Curiae Supporting Respondents, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345).

84. See Rebecca Blank, Tracing the Economic Impact of Cumulative Discrimination, 95 Am. Econ. Rev. 99 (May 2005) (“Current social science efforts to measure discrimination at a decision-point within a specific domain may seriously underestimate the impact of discrimination.”). Id. at 99–100. For a more comprehensive study of the cumulative effects of neighborhood conditions, see Robert Sampson, Great American City: Chicago and the Enduring Neighborhood Effect 100 (2013) (“I argue that disadvantage is not encompassed in a single characteristic but rather is a synergistic composite of social factors that mark the qualitative aspects of growing up in severely disadvantaged neighborhoods.”).

challenged assignment policy had used individual racial classifications. Rather than relying on the race of individual students, the revised student assignment policy looked at three geographic factors to devise new attendance zones: median household income, the percentage of non-white students, and the average educational attainment of adults. The idea of using multiple indicators in the construction of attendance zones was based on research that suggests a relationship between certain indicators and educational opportunity. Single indicator approaches have also proven successful, but they are less effective at creating racial diversity. These factors were used to draw attendance zones that would then be used in deciding student assignments and transfer requests. Elementary schools would be required to meet the district’s guidelines. Although this formula looked at race, it did so only at the neighborhood or aggregate level in drawing attendance boundaries. Thus, Jefferson County’s School Board sought to comply with the Supreme Court’s ruling by not employing individual racial classifications. These efforts, while maintaining some level of

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86. See Parents involved, 551 U.S. at 715–18 (describing the Jefferson County Public Schools plan).
89. Id. The degree to which SES indicators may generate racial diversity depends on a number of factors, including the strength of the regional correlation between race and class. One notable successful example is the Wake County student assignment plan, which adopted a race-neutral diversity policy based on income alone. See Bazelon, supra note 85, at 42 (“In 2000, after the U.S. Court of Appeals for the Fourth Circuit began to frown on the use of race in student assignment — a harbinger of the Supreme Court’s stance last year — the district began assigning kids to schools based on the income level of the geographic zone they lived in. The aim was to balance the schools so that no more than 40 percent of the students at each one come from a low-income area.”). In the first 2 years of the policy, 75% of schools complied with both academic and FRL caps, and just less than two-thirds were racially diverse. Kathryn McDermott et al., Diversity, Race-Neutrality, and Austerity: The Changing Politics of Urban Education 35–39 (Working Paper, Aug. 24, 2010), available at http://ssrn.com/abstract=1664683. See also Frankenburg & Diem, supra note 85, at 129.
90. A lawsuit against the District under the revised policy was dismissed for that reason. See Jefferson County Bd. of Educ. v. Fell, 391 S.W. 3d 713 (Ky. 2012) (reinstating the ruling of the Jefferson Circuit Court dismissing the complaint). Dakarai Aarons, Jefferson Co. Schools Sued Over Student-Assignment Plan, Education Week (June 17, 2010, 9:49 AM), http://blogs
diversity, have not proved as successful as the individual use of race.\footnote{91}

While multi-factor approaches may better capture particular forms of disadvantage, they are less effective at producing raw numerical racial diversity than individual racial classifications. The reason for this is self-evident: although race-neutral factors may correlate to race, they are necessarily less precise than race itself. In addition, the use of race at the neighborhood level may help compensate for the deficiencies in socio-economic considerations alone because socioeconomic status is an imprecise channeling mechanism for producing a diverse student body. For example, some white students residing in hyper-segregated and predominantly non-white neighborhoods are likely to be channeled through the consideration of neighborhood demographics that would otherwise not be re-assigned under a more direct assignment policy. To compensate for these deficiencies, more factors are needed to ensure greater precision in terms of desired outcomes. Consequently, while approximating race, these approaches are far more complex and resource intensive than using a simple race criterion, and require additional expertise or outside consultants.\footnote{92}

Other districts have followed suit and developed similar multi-factor approaches. The Berkeley Unified School District implemented a plan that manages parental choice for elementary schools using a similar diversity index that calculates the percentage of students of color, parental income level, and parental education

\footnote{91. The initial data suggests some wide variances in race enrollments that were not experienced in the original voluntary integrative assignment plan. In the 2008–09 operation, almost fifty percent of the elementary schools, for example, were outside of the desired range. See Sarah Diem, Design Matters: The Relationship Between Policy Design, Context, and Implementation in Integration Plans Based on Voluntary Choice and Socioeconomic Status (May 2010) (unpublished Ph.D. dissertation, The University of Texas at Austin), at 145–46, Figure 8, available at http://repositories.lib.utexas.edu/bitstream/handle/2152/ETD-UT-2010-05-909/DIEM-DISSERTATION.pdf?sequence=1. Part of the problem is that the plan was only phased in for K–2nd grades, but the plan still showed much greater variances than expected.}

\footnote{92. See Diem, The Relationship Between Policy Design, Context, and Implementation in Integration Plans, supra note 85, at 5. ("Whether or not a SES-based integration can succeed depends on a number of factors including: (a) the strength of association between race and income; (b) the policies defining socioeconomic integration; (c) the relationship between racial and income residential segregation in a school district; (d) the factors determining the school assignment; and (e) the effect of the SES-based integration policy on families' decisions as to where to enroll their child, which includes within the neighborhood school district, outside of the neighborhood district, or in private or public schools.")}
level. The California State Court of Appeal upheld this plan under California’s Proposition 209 on the grounds that it did “not consider an individual student’s race at all when assigning the student to a school” and therefore did not employ any racial classifications.

The Chicago Public Schools adopted a multi-factor plan that, in contrast, does not rely on race, even at the neighborhood level. Previously, the Chicago Public Schools had been under a desegregation mandate as part of a consent decree. After the decree was lifted in 2009, the school district abandoned the use of individual racial classifications. Subsequently, the Chicago Board of Education adopted a new system as a new way of creating social and economic diversity in the city’s selective schools. The key to the new system is the creation of four non-contiguous zones or “tiers.” The district evaluated its nearly 900 census tracts based upon five indicators: median income, adult education, percentages of single-family homes and homeowners, and the percentage of children living in non-English-speaking households. A sixth criterion was added for the 2011–12 school year: the performance of schools in that census tract. The increasing complexity of these plans in terms of number and sophistication of factors considered suggests the relative difficulty of promoting racial diversity without resorting to individual racial classifications, let alone race at the neighborhood level.

These plans have been laboriously developed using available demographic data with the help of consultants and student assignment experts. The question of whether a race neutral alternative

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93. See BUSD Student Assignment Plan/Policy, Berkeley Public Schools (last visited Mar. 2, 2014), http://www.berkeleyschools.net/information-on-berkeley-unifieds-student-assignment-plan/. The plan uses these factors to create “composite diversity averages” derived from the planning areas students live in. Using three composite diversity categories, students are then assigned proportionately to elementary schools.


would perform “about as well and at tolerable administrative expense” is critical, as the efficacy of these plans and others like them has borne out. The administrative expense of developing race-neutral plans goes far beyond the resources of most admissions committees, let alone school boards and administrative staff, when compared to the cost of using racial classifications in either student assignment or admissions review. Race-neutral alternatives are far more complex in design and operation, and the initial data from the Jefferson County Public School plan suggests that they may not be as effective as programs based on the individualized consideration of race. The other plans modeled on the JCPS plan have not yet been in operation long enough to be fairly evaluated.

The question of allowable tolerances and administrative expense and difficulty is a significant practical issue and may well loom larger on remand in Fisher and in future cases than members of the Court may have envisioned. Scaling multi-factor approaches to the university level requires not only far more data collection and analysis than is needed in other contexts, but at a much larger geographic scale, often state-wide or beyond. The practical consequence of exhaustion may well mean the abandonment of any effort to promote racial inclusion. It will be politically difficult to return to race-specific approaches once race-neutral alternatives have proven less effective or administratively intolerable.

III. BEYOND RACE UNCONSCIOUSNESS

In her brief dissent, Justice Ginsburg sarcastically noted that “only an ostrich could regard the supposedly neutral [ten-percent plan] as race unconscious.” As she accurately observed, “Texas’s percentage plan was adopted with racially segregated neighborhoods and schools front and center stage.” Since none of the

99. The Kirwan Institute was able to provide pro bono consulting to districts such as Jefferson County on account of the fact that it received generous grant support from the Ford Foundation.

100. Kathryn McDermott et al., supra note 89, at 20–22. The new policy has faced various challenges, particularly regarding issues of transportation and transfer requests. Some students have had to travel longer distances to school. Transfer requests from parents with students in Kindergarten and first grade significantly increased in 2009–10 school year and has continued to grow.

101. Experience suggests that the political will needed to implement a race-conscious student assignment plan is usually difficult to reassemble once it is has dissipated.

102. Fisher, 133 S.Ct. at 2433 (Ginsburg, J., dissenting).

103. Id.
other Justices argued or held that the TPP was race-blind, these remarks may appear non sequitur. However, Justice Ginsburg is addressing the characterization of the TPP as race-neutral by Abigail Fisher and her amici, \footnote{104. See Brief for Petitioner, supra note 5, at 5 (“Despite the success of its race-neutral system in increasing minority enrollment...”) (referring to the TPP); see also Brief For the Cato Institute as Amicus Curiae in Support of the Appellant Urging Reversal at 26, Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2013) (No. 09-50822) (“[T]he University enrolls more than ‘meaningful numbers,’ Grutter, 539 U.S. at 338, of both black and Hispanic students under Texas’s race neutral Top 10% Law.”).}
and her dissent underscores the fact that the TPP is only race-neutral in the narrow sense that it does not employ racial classifications. Indeed, it was designed and adopted to accomplish the same ends and yet evade heightened judicial scrutiny. \footnote{105. Fisher, 133 S.Ct. at 2433.}

Beyond rebutting the notion that the TPP is colorblind, Justice Ginsburg’s dissent also draws attention to the incongruity of strictly scrutinizing a race-conscious plan that uses race as one of many factors in admissions while tacitly endorsing another race-conscious plan designed to achieve the same goals without using race at the individual level. Although these plans share the same objective, the TPP represents a less direct means. \footnote{106. This is because the TPP only accounts for race at the district level, a larger unit than either individual racial classification, as were used pre-Hopwood, or neighborhood classifications, as were used in Jefferson County post-Parents Involved.}
To highlight this incongruence, Justice Ginsburg asserts her preference for policies that are explicit: “I remain convinced, those that candidly disclose consideration of race [are] preferable to those that conceal it.” \footnote{107. Id. at 2433 (Ginsburg, J., dissenting) (citing Gratz v. Bollinger, 539 U.S. 244, 305 n.11 (2003) (Ginsburg, J., dissenting)) (Internal quotations omitted).}

This, of course, runs contrary to the Court’s usual treatment of race, which incentivize government actors to conceal the extent of their race-consciousness in order to avoid heightened judicial scrutiny. \footnote{108. See Reva Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 YALE L. J. 1279, 1359 (2011) (arguing that the Court is concerned with the expressive nature of the use of race).}
insular minorities.” By preserving this distinction, Justice Ginsburg’s dissent indicates a willingness to fight another day.

The exhaustion requirement introduces a circular irony into strict scrutiny analysis. If the use of race requires the exhaustion of workable race-neutral alternatives to satisfy strict scrutiny, then the use of those alternatives would not trigger strict scrutiny in the first place. Consequently, in the case of race-neutral alternatives, the government interest being pursued need only be legitimate rather than ‘compelling’ or even ‘important’ as strict or intermediate scrutiny require. In addition, the means to achieve that objective need not be precise but only ‘rationally related’ to that interest.109

If narrow tailoring requires the exhaustion of race-neutral alternatives, then the interest those alternatives serve need not be compelling because strict scrutiny would not apply. Rational basis review would then presumably apply to race-neutral alternatives (such as socio-economic status), even though they are race-conscious. In Bakke, the Court rejected the argument that “remediating societal discrimination” was a compelling governmental interest that justified the use of racial classifications.110 Yet, that interest may well be (and probably would be) considered legitimate under rational basis review.111 That interest could be pursued relentlessly through the use of race-neutral alternatives because race-neutral alternatives would not trigger strict scrutiny review. In other words, the exhaustion requirement demands evaluation of approaches that would not be subject to strict scrutiny review and, therefore, narrow tailoring.

Justice Ginsburg’s Fisher dissent underscores the strange gulf between the scrutiny applied to race-conscious policies that employ racial classifications and the scrutiny applied to race-conscious policies that do not employ individual racial classifications. With respect to the latter, Justice Kennedy’s concurrence in Parents Involved is perhaps the most illuminating statement on the range of

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110. See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid, and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”). This is an example of rational basis review and the standard for rational basis review.

111. Bakke, 438 U.S. at 307 (referring to societal discrimination as “an amorphous concept of injury that may be ageless in its reach into the past.”). Parents Involved, 551 U.S. at 789 (“These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”).
permissible race-neutral alternatives, because it provides a functional guidance checklist of permissible race-conscious, but simultaneously race-neutral, possibilities:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.\(^{113}\)

How might we apply these ideas to a post-Fisher environment? Within the parameters of the law set out in Grutter, universities enjoy wide latitude to fashion student bodies best suited to their pedagogical goals. Since virtually all universities, even elite private colleges, include the service and improvement of the society as part of their mission,\(^ {114}\) as well as the development the next generation of leaders, admissions criteria may logically emphasize the role of universities as a ladder of economic and social mobility. An opportunity index methodology is one method for accomplishing this.

Multi-factor approaches are compelling because they not only paint a more vivid portrait of the underlying structural conditions but are also more narrowly tailored to particular forms of disadvantage. As described in Part II, a single indicator cannot capture the myriad factors that influence an individual’s life chances. For this reason, all admissions processes rely on more than one indicator to

\(^{113}\) Parents Involved, 551 U.S. at 789. Illustrating the guidance function of Justice Kennedy’s concurrence, the Departments of Justice and Education issued joint guidance that quotes and relies on Justice Kennedy’s statement. See U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (last modified 2012), available at http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html.

\(^{114}\) See generally Lani Guinier, Comment, Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 Harv. L. Rev. 113 (2003) (describing the incongruence between university and professional schools’ mission statements—which are very public-oriented—and their admissions policies).
select admitted students. However, traditional forms of merit-based selection typically reward socioeconomically advantaged students. SAT scores, for example, correlate more strongly to grandparent wealth than any other factor, even IQ. Affirmative action programs and similar attempts to identify historically disadvantaged students seek to compensate for the limitations present in traditional admissions criteria. Opportunity scoring is a sophisticated multi-factor methodology that better captures disadvantage than a single indicator.

Opportunity scoring creates an index of factors which correlate to and causally explain life outcomes and projected life chances. Over time, this methodology has become more sophisticated and refined as additional indicators are added under key opportunity domains. The opportunity mapping methodology seeks to understand the distribution of opportunity over space. Given this geographic dimension, these indices can be represented using geographic information technology in the form of opportunity maps.

This methodology has been applied in numerous contexts: siting for low-income housing, targeting areas for employment and infrastructure investment, deployment of social services, and, following Parents Involved, creating attendance zones for K–12 student assignment policies. At the Kirwan Institute, we assisted in developing a

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116. Seventy-four percent of the students at the 146 most selective four-year colleges and universities in the US come from the top socioeconomic quarter of American families, compared to only three percent who come from the bottom quarter. Robert Haveman and Timothy Smeeding, The Role of Higher Education in Social Mobility, OOPORTUNITY IN AMERICA, VOL. 16, NO. 2 (Fall 2006), available at http://futureofchildren.org/publications/journals/article/index.xml?journalid=35&articleid=90&sectionid=550.

117. Mary Beth Marklein, SAT Scores Show Disparities by Race, Gender, Family Income, USA TODAY (Aug. 26, 2009), http://usatoday30.usatoday.com/news/education/2009-08-25-SAT-scores_N.htm. In 2009, the highest average score on the SAT was posted by students who reported their family income as greater than $200,000 annually. Id.

118. Opportunity scoring is an example of the kinds of sophisticated and expensive approaches the Court is demanding, as noted in Part II.

119. See generally Opportunity Mapping Initiative and Project Listing, Kirwan Institute for the Study of Race and Ethnicity (last visited Mar. 2, 2014), http://kirwaninstitute.osu.edu/opportunity-communities/mapping/. The opportunity scoring process is the predicate for the development of maps. "Opportunity mapping is a research tool used to understand the dynamics of ‘opportunity’ within metropolitan areas. The purpose of opportunity mapping is to illustrate where opportunity rich communities exist (and assess who has access to these communities) and to understand what needs to be remedied in opportunity poor communities. Opportunity mapping builds upon the rich history of using neighborhood-based information and mapping to understand the challenges impacting our neighborhoods." Id.

120. For a list of initiatives, see id.

121. See id. See also Kirwan Institute for the Study of Race and Ethnicity (last visited April 5, 2014), http://kirwaninstitute.osu.edu/school-assignment-planning-montclair-new-
sophisticated opportunity index that was implemented in Montclair, New Jersey.\textsuperscript{122}

The Superintendent of Montclair schools, Dr. Frank Alvarez, reached out to the Kirwan Institute after Parents Involved and requested technical support and expert advice to ensure the district’s magnet school student assignment policy complied with the decision. The district convened a subcommittee to begin reviewing the magnet school assignment plan. The committee worked with the Kirwan Institute to develop recommendations for a new school assignment policy that would reduce economic and racial isolation, guarantee a high quality education for every child, and comply with the law.

The Kirwan Institute’s research on census and district level data suggested that a neighborhood schools policy would produce dramatic resegregation within the district, particularly at schools in the northern and southern areas of town.\textsuperscript{123} In addition, a longitudinal review of the district’s enrollment patterns under the magnet school plan revealed that although the district wide magnet school system had succeeded in producing elementary schools that are far more racially integrated than the district as a whole, Montclair had experienced slippage over time on account of changing demographics.

The Kirwan Institute recommended that the district use four opportunity indicators along with neighborhood racial demographics to develop geographic zones that would inform magnet school assignments.\textsuperscript{124} These opportunity factors were weighted into a composite index, which divided the district into either two, three,

\begin{footnotesize}

\textsuperscript{123} See Presentation: Preserving Strong and Integrated Schools in Montclair, supra note 122, at 15–16 (neighborhood schools map).

\textsuperscript{124} After careful review, the opportunity indicators selected were median household income, parental education levels, free or reduced lunch, and poverty concentration.
\end{footnotesize}
or four zones. The school district could use these opportunity zones to approximate student profiles, ensuring that students from different backgrounds are distributed throughout the school system. Such a plan was intended to ensure equitable educational opportunities for each child and maximize student achievement.

Using zones, as opposed to requesting individual data, is also less intrusive since it would not require any additional data collection from parents. The opportunity index does not displace the use of other factors, such as special needs, siblings, or ESL (English as Second Language), and functions within the context of a parental choice mechanism. Parents would rank their preferred school choices, and those choices would be maximized to the extent possible within the zone assignment ranges. The district would use the opportunity index to create zones that would have both a floor and a ceiling on student representation from each zone within each school and would pursue parental choice within those limits. Students from underrepresented zones would then have an advantage in assignment to those schools. In this way, integration would work in all directions. Students from low opportunity zones would be given preference for schools that have a disproportionate number of students from higher opportunity neighborhoods and vice versa.

The Kirwan Institute mapped a two-zone, three-zone, and four-zone plan, both with and without race as a factor, and presented these plans to both the district’s subcommittee and selected school board members. That committee adopted our recommendation to use the opportunity zone plan and forwarded the “three-zone plan with race included” to the school board, which then approved this plan.


126. The data used to create opportunity index scores may be sensitive personal data derived from aggregate census sources. A school district’s request for individual data on information such as race, education, and income may be perceived as intrusive and unnecessary when it can be obtained from census or other data sources.

127. Siblings, special needs, and ESL students would all be given priority placement above diversity assignment within the opportunity zone methodology. Sibling placement ensures that siblings attend the same schools. Students with special needs may require access to special needs programs located in specific schools.

128. The “with race” plan refers to a plan in which race at the neighborhood level was used as one of the index factors.

Universities can use opportunity index scoring to target the most educationally disadvantaged students and generate racial and other forms of diversity. Applicants can be given an opportunity score based on a mixture of individual and geographic characteristics. For example, given an index of a particular region, universities could go so far as to set a firm quota that 20% of their admittees are accepted from low opportunity census tracts. Opportunity indices are generally divided into quintiles: very high, high, moderate, low, and very low. The school could also award a mechanical bonus in the admissions process to students who were raised or currently reside in neighborhoods in low or very low opportunity census areas. This would not violate the Court’s prohibition against racial quotas or mechanical use of race, because such bonuses are based on geographic residence, not race. This process employs a mixture of geographic and socio-economic diversity. Yet, because the vast majority of African American families reside in low or very low opportunity census areas, this would have a positive effect on racial diversity. In addition, the intense hyper-segregation of Black and Latino families increases the probability that a geographic diversity plan would work.

The primary restriction on race-conscious admissions is in using racial classifications; that is, admitting or denying admission to an

130. Research at the Kirwan Institute suggests that African-Americans and Latinos tend to be disproportionately located within the lower opportunity areas, even after controlling for income level. The Kirwan Institute’s two-year research study of Ohio found that Black Ohioans are disproportionately concentrated into the lowest opportunity neighborhoods. See Kirwan Institute for the Study of Race and Ethnicity, The State of Black Ohio: At a Crossroads on the Pathway to Opportunity 47 (2010), available at http://gis.kirwaninstitute.org/reports/2010/03_2010_TheStateofBlackOhio.pdf. Nearly three in four Black Ohioans, one in two Latino Ohioans, and one in four Asian and White Ohioans were found in the State’s very low and low opportunity neighborhoods (which represent two-fifths of the State’s total census tracts). Id. at 48–49. In Massachusetts, ninety-percent of African-American and Latino households in 2000 were isolated in the lowest opportunity neighborhoods in the State. See Jason Reece & Samir Gambhir, Kirwan Institute for the Study of Race and Ethnicity, The Geography of Opportunity: Building Opportunity in Massachusetts 2 (2009), available at http://www.kirwaninstitute.osu.edu/reports/2009/01_2009_Geography ofOpportunityMassachusetts.pdf. By contrast, only 31% of White, Non-Latino households were found in low-opportunity neighborhoods. Low-income Whites were not as concentrated in low-opportunity communities as other races. Only 42% percent of low-income White households were living in low-opportunity communities, compared to more than ninety-five percent of low-income Latinos, and ninety-three percent of low-income African-Americans. Id. at 3. In a study of Florida’s four major metropolitan regions, Miami-Dade, Orlando, Tampa, and Jacksonville, seven out of ten African Americans and half of all Latinos live in low opportunity areas, while only three out of ten non-Hispanic Whites live in such areas. Jason Reece et al., Kirwan Institute for the Study of Race and Ethnicity, How Fair Is Florida? Recession, Recovery, Equity and Opportunity in Florida 9 (2009), available at http://www.kirwaninstitute.osu.edu/reports/2009/10_2009_FL_RecessionRecoveryEquity.pdf.
individual when that individual’s race is a factor in the decision matrix. There is no presumption against using race in a nondiscriminatory and non-individualistic ways, such as considering the racial composition or demographics of an applicant’s neighborhood or high school. Universities that seek to promote racial diversity are not only free to create recruitment programs targeting non-white neighborhoods or communities or to use opportunity enrollment as either a bonus or a quota, but they may also target predominantly non-white educational environments.131

Race and class increasingly segregate K–12 educational environments. One out of every six Black and one out of every nine Latino students attend a hyper-segregated school—one in which the student population is 99–100% racially or ethnically homogenous.132 Roughly two out of every five Black or Latino students in the United States attend “intensely segregated schools,” where 90–100% of the student body is racially homogenous, a percentage that is up from one out of three in 1988.133 More than three quarters of these schools are high-poverty schools.134

According to a 2012 report from The Civil Rights Project, 74% of Black students attend majority nonwhite schools (50–100% minority) and 38% of Blacks attend intensely segregated schools (those with only 0–10% of whites students) across the nation. 15% of Black students attend “apartheid schools” across the nation, where whites make up 0–1% of the enrollment. Apartheid schools are even more pervasive in areas with large concentrations of Black and brown residents. For example, in Chicago and the surrounding metropolitan area, half of the Black students attend apartheid schools. In New York, one third of Black students attend such schools.

It is important to recognize that these patterns reflect re-segregation by both race and class. Latino students attending intensely

131. See, e.g., UNIV. OF CAL., BERKELEY, BUILDING ON EXCELLENCE: GUIDE TO RECRUITING AND RETAINING DIVERSE GRADUATE STUDENTS AT UC BERKELEY, available at http://diversity.berkeley.edu/sites/default/files/Graduate_Diversity_Guide.pdf (emphasizing going “beyond the ‘usual’ range of institutions from which you recruit to include minority serving institutions such as historically black colleges and universities.”)


133. Id. at 31.

segregated schools rose fourfold to 43% in 2008 from 12% in 1968 in the west.\textsuperscript{135} Similarly, Latino students are concentrated among low-income students, and now nearly two-thirds of their classmates are low-income, compared to one-third in the early 1990s.\textsuperscript{136} Moreover, this segregation is more pronounced across and between school districts than within them.\textsuperscript{137} Since inter-district segregation is now more salient than intra-district segregation, this presents an opportunity for approaches like state or university “percent plans” to generate the student body diversity reflected in their states. Similarly, it is also an opportunity to use other forms of geographic diversity. For example, universities could set a hard quota for predominantly non-white school districts. This would channel isolated student populations into diverse educational environments.

Given extant patterns of racial and socioeconomic segregation, which appear to be accelerating as income inequality drives more refined neighborhood differentiation,\textsuperscript{138} percentage plans will be an effective means of ensuring that all students have an opportunity to compete for admission to public universities for the foreseeable future. However, opportunity methodology may answer some of the concerns critics of percentage plans raise.

Some opponents of the TPP argued and continue to argue that less qualified students are admitted through the TPP, as students who fall outside of the top ten percent of more competitive school districts may be better prepared and qualified than students from the top ten percent of less competitive districts.\textsuperscript{139} Opportunity indexing acknowledges the differential educational opportunities primary and secondary education afforded students and emphasizes redressing those disadvantages as a public policy rather than as a matter of college competitiveness or individual merit. Other critics of the TPP argue that it is flawed because it relies on underlying patterns of segregation, which we should be working to integrate,\textsuperscript{140} and that we should not abandon racial diversity as an explicit goal even as we pursue other forms of diversity. Opportunity indexing acknowledges the differential access different racial groups enjoy.

\textsuperscript{135} Id. at 12.
\textsuperscript{136} Id. at 10.
This methodology would continue to produce racial diversity, even as integrative efforts are pursued at the local level, by providing a more granular portrait of each applicant's educational opportunity. Such a portrait would not rely on underlying patterns of segregation, as the TPP does, to define that opportunity.

**Conclusion**

Purporting to extend or affirm existing precedent, *Fisher* marks a departure in both substance and form. This Article explored the ways in which Fisher departed from precedent and proscribed new limits on the use of affirmative action in higher education. In doing so, this Article investigated the limits of the exhaustion requirement in both theory and practice and suggested an alternative methodology for fostering student body diversity and achieving the benefits of racial diversity in lieu of individual racial classifications.

*Fisher* may preserve affirmative action in theory but will increasingly burden such approaches in practice. The narrow tailoring standards announced in *Fisher* are nearly impossible to satisfy and, if satisfied by establishing the infeasibility of race-neutral alternatives and necessity of race-explicit means, may foreclose the possibility of returning to race-explicit measures as a political matter. Local communities rarely adopt race-explicit measures except as part of a settlement and, once such measures are abandoned, they are even less likely to be reinstated.

One way to address the Court's narrow tailoring concerns is to demand that both lower courts and educational institutions clarify and more deeply investigate the nature of the interests being pursued. As noted, narrow tailoring is a context sensitive inquiry and cannot be conducted or assessed beyond the interest being pursued. Determining whether a university’s use of race is narrowly tailored to serve a compelling governmental interest requires a careful understanding of that interest. If the interest being pursued is racial diversity or a critical mass of non-white students, the educational entity must have some role in defining that interest and assessing tolerable expenses. *Grutter* recognized this and accorded educational institutions some deference in this regard. The degree of deference and whether such deference is strictly limited to the compelling interest prong or extends to the narrow tailoring prong is a debate between the Supreme Court and the Fifth Circuit in *Fisher*, but it is largely beside the point. The inherent relationship between the compelling interest and narrow tailoring prongs renders such a debate irrelevant at best and semantics at worst.
The narrow tailoring and exhaustion requirements pose severe administrative and technical challenges for admission committees seeking racial diversity. This problem is a manifestation of a deeper error that began in *Bakke* heightened review for integrative measures. This error began when Justice Powell abandoned the framework established under *Carolene Products* footnote four.\(^{141}\)

*Carolene Products* set out the framework for heightened scrutiny.\(^{142}\)

The predicate for footnote four’s heightened judicial scrutiny for minority groups is not race or religion, but a “discreteness” and “insularity.”\(^{143}\) *Plessy* had demanded only rational basis review for race-based equal protection claims, and that extended only to legislation ‘intended to oppress or stigmatize.’\(^{144}\) *Carolene Products* overturned that framework with its famous footnote four. *Bakke* broke with that framework by disconnecting heightened scrutiny from either discreteness or insularity, declaring us a “nation of minorities” and rejecting the view that either discreteness or insularity were preconditions for strict scrutiny.\(^{145}\)

Justices Breyer and Ginsburg established in previous cases that they would not subject integrative measures to strict scrutiny review.

Racial classifications should not trigger strict scrutiny unless they are connected to discrete and insular minorities, because it is those conditions that warrant special constitutional solicitude. Unfortunately, seven Justices have lent their imprimatur to strict scrutiny for all racial classifications. Consequently, universities should explore the possibilities for race-conscious approaches that do not run afoul of the Court’s racial classification jurisprudence. An opportunity-enrollment model is an alternative or complementary admissions policy, despite the administrative challenges to develop and implement this model on the scale of university admissions. Pursuit of policies such as these will illustrate for the courts the limits of a strict exhaustion requirement. But it may also spur the development of admissions processes that can better measure forms of advantage relative to discrete and insular minorities for those willing to incur the administrative expense.

\(^{141}\) See *Bakke*, 438 U.S. at 293–95.

\(^{142}\) Id. at 1075.

\(^{143}\) See powell, *supra* note 34, at 1075–76.

\(^{144}\) See powell & Menendian, *supra* note 15, at 690 (“The Court asks if the legislation mandating segregation is oppressive or stigmatizing.”).

\(^{145}\) See *Bakke*, 438 U.S. at 92 (“During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities.”).
We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. . . .

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.


**Introduction**

The discourse in America about segregation is dishonest. On the surface, we pretend that the values of Brown v. Board of Education have been met, although most of us know in our hearts that the current system of public education betrays those values. In this essay, I reflect on how residual, *de facto* segregation and the stratified architecture of opportunity in our nation contribute to the achievement gap that has made race-based affirmative action necessary. Despite the Supreme Court’s compromise decision in Fisher v. Texas, affirmative action is on life support. As this essay goes to print, the Supreme Court has heard argument, but has not issued a decision in the case of Schuette v. Coalition to Defend Affirmative Action, which challenges the ability of Michigan voters to ban affirmative action. At oral argument, conservative justices seemed

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*Professor of Law, Georgetown University Law Center. This essay is adapted from parts of the following works: Place, Not Race: Affirmative Action and the Geography of Opportunity, in Controversies in Affirmative Action, (James Beckman, ed., forthcoming 2014) and Place, Not Race: A New Vision of Opportunity in America (2014).
inclined to uphold the ban. Conservative opponents will continue to attack the policy in courts and through politics however the Court rules: there will always be another Abigail Fisher. Eight states have banned affirmative action programs: six through ballot measures (California (1996), Washington (1998), Michigan (2006), Nebraska (2008), Arizona (2010), and Oklahoma (2012)); one by executive order (Florida (1999)); and another by legislative act (New Hampshire (2011)).

Ultimately, I argue that one important response to the demise of race-based affirmative action should be to incorporate the experience of segregation into diversity strategies. A college applicant who has thrived despite exposure to poverty in his school or neighborhood deserves special consideration. Those blessed to come of age in poverty-free havens do not. I conclude that use of place, rather than race, in diversity programming will better approximate the structural disadvantages many children of color actually endure, while enhancing the possibility that we might one day move past the racial resentment that affirmative action engenders.

While I propose substituting place for race in university admissions, I am not suggesting that American society has become post-racial. In fact, much social science research supports the continued salience of race, especially in the subconscious of most Americans. My proposal accounts for the racial architecture of opportunity in this country through the race-neutral means of place. Ultimately, I conclude that the social costs of racial preferences outweigh any marginal benefits when race-neutral alternatives are available that will create racial diversity by expanding opportunity to those most disadvantaged by structural barriers. The truly disadvantaged—black and brown children trapped in high-poverty environs—are not getting the quality of schooling they need, partially because backlash wedge politics undermine any possibility for common sense public policies. Affirmative action as currently practiced in admissions at most elite institutions does little to help this group and may make matters worse by contributing to political gridlock borne of racial cleavage. I would not make place the only dimension for consideration of affirmative action, but I do think that, given how large it looms in structuring educational opportunity and

5. See generally Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489 (2005).
6. See infra Part I.
outcomes, it should be given much greater weight and attention than it currently receives in diversity programs. I would also give considerable weight to another factor that disproportionately affects blacks and Latinos: low family wealth. Finally, I call on universities to radically reform admissions processes and jettison concepts of “merit” that are unrelated to their professed missions.

As a post-civil rights baby, I attended integrated public schools in Alabama during the era when America was making good on the promise of Brown v. Board of Education. In 1980, I graduated from S.R. Butler High School in Huntsville. At that time, it was one of the largest schools in the state. Our mascot was the Butler Rebel, a Confederate colonel who appeared more avuncular than defiant. Butler was an integrated, but majority-white, powerhouse in sports and a place where a nerd like me could take Advanced Placement classes and gain entrance to elite colleges. Kids from housing projects and sturdy, middle-class neighborhoods attended the same school, albeit with a degree of sorting into racially identifiable academic tracks. We played on sports fields together, attended the same “fifth quarter” dances, and generally got along.

At our thirtieth reunion, my classmates and I bemoaned Butler’s demise. Enrollment at the school where we had thrived and which we had loved had dwindled to thirty-five percent of capacity, depleted by demographic change. Butler had become an impoverished, predominately black school and a source of derision despite its string of state basketball championships in the 2000s. Barely half of its seniors graduated, and its students were being “left behind” as families with options moved on and standardized test scores declined. Middle-class people exited the neighborhoods surrounding the school, opting for greener, higher-opportunity acres in rapidly growing suburban Madison County. The state accelerated the school’s isolation when it built an interstate highway connector that mowed down scores of homes in Butler’s attendance zone. This created a concrete firewall between the affluent majority-white and declining majority-black sides of town, with predictable results for our alma mater. A similar story of race and class segregation in public schools and neighborhoods could be told in most American cities with a critical mass of people of color.
A recent report on school segregation issued by the Civil Rights Project of UCLA paints a stark picture. The overwhelming majority of Latino and black students (eighty and seventy-four percent respectively) now attend majority-nonwhite schools. Meanwhile, the typical white student attends a school that is seventy-five percent white. Asian public school students come closest to living the ideal of Brown v. Board of Education. They are more likely than any other group to attend a multiracial school.

Exposure to poverty is also typical for black and Latino children and much less common for white and Asian kids. The average black or Latino public school student attends a school where nearly two-thirds of her peers are poor. Meanwhile, the average white and Asian student attends a school where at least sixty percent of her peers are not poor.

School segregation exists largely because school districts have returned to neighborhood school assignment plans. The Supreme Court essentially absolved school districts of any obligation to overcome racial segregation in neighborhoods that was not of the district’s own making in a series of decisions in the 1990s. In the 2007 case of Parents Involved in Community Schools v. Seattle, the Court prohibited school districts from considering the race of individual children in school assignments, thus striking down voluntary school integration plans. In sum, even if the local political consensus favors race-conscious integration strategies, the Court limits those possibilities.

Schools, then, tend to track the racial and economic demarcations of the neighborhoods in which they are located. Admittedly, our nation is less segregated than it used to be. In large metropolitan areas, it is increasingly difficult to find what we used to refer to

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8. Id. at ix.
9. Id. at x.
10. Id. at 20.
11. Id. at 26.
12. Id.
in the South as a “lily white” neighborhood. In post-civil rights America, residential markets are freer, and black, brown, and yellow people have begun to add color to formerly all-white environs. That said, a considerable degree of racial segregation persists in our life space.

The average non-Hispanic white person in metropolitan America resides in a neighborhood that is approximately seventy-five percent white. Meanwhile a typical African American lives in a neighborhood that is only approximately forty percent white. In the largest metropolitan areas, most black people can be found living in environs where they predominate. Latinos also tend to live in neighborhoods with a large presence of people of color and very few white neighbors. Asians are the most integrated of so-called minorities; the largest share of their neighbors, on average, is non-Hispanic white. Thus, whites, blacks, Latinos, and Asians tend to experience diversity very differently in their daily lives.

This differential experience of place greatly affects opportunity. Exposure to extensive poverty is the norm for most blacks and Latinos, while the opposite is true for most whites and Asians. Only about thirty percent of black and Latino families reside in neighborhoods where fifty percent or less of the people are poor. Put differently, less than one third of black and Latino children live in middle-class neighborhoods where middle-class norms predominate. Meanwhile, more than sixty percent of white and Asian households live in neighborhoods where the majority of people are not poor. As demographer John Logan succinctly put it, “It is especially true for African Americans and Hispanics that their neighborhoods are often served by the worst performing schools, suffer the highest crime rates, and have the least valuable housing stock in the metropolis.”

Race appears to play a more dominant role than class in determining where one lives. Even affluent blacks and Latinos suffer from neighborhood inequality. In the last two decades, black and
Latino households with annual incomes greater than $75,000 experienced more average exposure to poverty in their neighborhoods than did poor whites. Elsewhere, I have written extensively about the causes of residential segregation, including persistent discrimination in housing markets, weak antidiscrimination enforcement, and exclusionary zoning, whereby affluent jurisdictions intentionally prevent affordable housing, even apartments, from invading their turf. That the state no longer maintains a de jure commitment to racial exclusion is irrelevant to children who endure economic isolation. Whether intentional or de facto, racial and economic segregation beget racial inequality, which in turn implicates the debate over whether and how to maintain affirmative action.

The Kirwan Institute at Ohio State has pioneered research on neighborhood structure and opportunity, accumulating five decades of research that demonstrates what common sense tells us. Low- and very low-opportunity neighborhoods depress life outcomes with high poverty, limited employment, underperforming schools, distressed housing, and violent crime. They create a nearly closed loop of systemic disadvantage, in which failure is common and success aberrational. A dearth of successful models, lack of networks that lead to jobs, unsafe streets, recurrent multi-generational family dysfunction, or the general miasma of depression that can pervade high poverty contexts may inhibit the success of even the most motivated.

In his public speeches, John Powell, former head of Kirwan and a leading authority on neighborhood opportunity analysis, likens living in a low-opportunity neighborhood to running up the “DOWN” escalator.

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24. LOGAN, supra note 15, at 18 (defining “poor” as households with incomes under $40,000 during the time period 2005–2009).
25. Id. at 5.
26. See CASHIN, supra note 13, at ch. 3.
economic mobility showed that living in a high-poverty neighbor-

Meanwhile, those privileged to live in high-opportunity neigh-
borhoods rise easily with the benefits of exceptional schools and
social networks. As powell observes, it is like riding on the “UP”
escalator. Anyone who has experienced a high-opportunity neigh-
borhood knows intuitively what this means—the habits you observe,
the people and ideas to which you are exposed, and the books you
are motivated to read. These systems work in areas of low poverty
and rich employment. Unfortunately, this opportunity structure
continues to be highly racialized. The vast majority of whites and
Asians live in neighborhoods with a poverty rate below fourteen percent while

The Kirwan Institute has per-
formed opportunity-mapping analyses in ten states or localities
nationwide. In Massachusetts, for example, ninety percent of blacks
and Latinos live in areas of low opportunity compared to only
thirty-one percent of whites.\footnote{KWABENA AGYEYAN, CHAUNCEY ROBBS & CRAIG RATCHFORD, KIRWAN INST., THE GEO-

In King County, Washington, seventy-
five percent of the black population is isolated in low and very low

Whites do not want to hear about these statistics. They may trig-
ger what social scientists call “cognitive shutdown,” prompted by
factors such as fear of being labeled racist for entering any debate
about race or weary perception that whites are being blamed for

But this isn’t a blame game. In fact,
the same forces that create geographic disadvantage for many blacks and Latinos also disadvantage average white folk.

In an American metropolis stratified into areas of low, medium, and high opportunity, place is a disadvantage for anyone who cannot afford to buy a home in a premium neighborhood. The iconic, picket-fence spaces that once nurtured middle-class American dreams have shrunk along with real wages. A recent study found that only forty-four percent of American families now live in middle-class neighborhoods, down from sixty-five percent in 1970. This is due to the rising segregation of the affluent and the poor from everyone else. While income segregation has grown fastest among black and Hispanic families, high-income families of all races are now much less likely to have middle- or low-income neighbors.

Proponents of affirmative action should worry about neighborhood inequality. A large body of social science research suggests that where one lives can directly affect one’s social, economic, or physical outcomes. This is especially true of low-income children’s school performance. A recent study conducted in Montgomery County, Maryland, for example, demonstrated greatly improved achievement among black and Latino public housing residents when they moved to a middle-class neighborhood and attended middle-class schools. A control group of children of color who remained in public housing and were assigned to high poverty schools with extra resources were not as successful as those allowed to integrate into higher opportunity schools. Among the proffered explanations for the impact of poverty are poorer quality teachers, fewer resources that tend to attach to high poverty

40. Id.
schools, and an oppositional culture that tends to denigrate learning. This oppositional culture has been identified not just in high poverty African American and Latino communities but also in high poverty white areas.

The challenge of overcoming negative cultural influences in high poverty settings is one of the reasons I have steadfastly advocated for race and class integration, even though that goal often feels quixotic. An alternative to meaningful school integration would be to dramatically reduce class sizes and place excellent, experienced teachers in the most impoverished schools. This, too, feels like an irrationally idealistic strategy in a time of partisan gridlock and public scarcity.

It is not at all surprising, given the structural disadvantages of segregation described above, that black and Latino youth lag behind whites in math and reading on the National Assessment of Educational Progress. Achievement gaps at the elementary and secondary levels are replicated in SAT scores. In 2008, African American students lagged behind white students in the critical reading portion of the SAT by nearly 100 points on average. In math, they generally lagged behind Asians and whites by 155 and 111 points, respectively. According to a study published in the Sociology of Education, selective colleges enroll 9.2 percent of black immigrants compared to only 2.4 percent of non-immigrant black high school graduates. Possible explanations for why immigrant blacks are disproportionately competitive in university admissions include that they tend to live in less segregated neighborhoods, experience less violence and disorder as they come of age, possess an immigrant identity that renders them much less susceptible to peer influences, and often have better educated parents than do their

42. Id
43. See Cashin, supra note 13, at ch. 6 (providing a more detailed overview of the social science and arguments regarding public education).
46. Id
African American peers. As long as segregation exists, inequality of inputs (less experienced teachers, fewer resources, more violence, and an oppositional culture in high poverty settings) will exist with attendant unequal outcomes. This begs the question of how and whether affirmative action should compensate for these structural disadvantages.

II. THE DEMISE OF RACE-BASED AFFIRMATIVE ACTION

Ideologically conservative members of the Supreme Court have embraced a colorblind constitutionalism that, as Justice Scalia put it in Adarand Constructors v. Peña, requires the “Constitution[ ] [to] focus upon the individual . . . and [reject] dispositions based on race, or based on blood.” In practical terms, this has meant that the Court does not distinguish between invidious uses of race—Jim Crow forms of racial caste and exclusion—and modern attempts to include status minorities through affirmative action. Since the 1995 ruling in Adarand, any use of race by the state will invoke the strictest of scrutiny under Fourteenth Amendment equal protection analysis. The Court’s 2003 decision in Grutter v. Bollinger, upholding the University of Michigan Law School’s holistic affirmative action program was a rare example of state consideration of race surviving strict scrutiny. Justice O’Connor, author of the Grutter opinion, injected a degree of realism into the equal protection analysis. The Grutter majority deferred to universities, conceding that they had a compelling interest in diversity in higher education and according them discretion to use race as one flexible factor among several as a means to achieving that end. O’Connor’s speculation that affirmative action might no longer be necessary in a quarter-century was actually a call to action. America was on notice that it had better get to work closing racial gaps of achievement because use of race by the state would be time-limited.

With O’Connor’s retirement and replacement by Justice Alito, an opponent of racial preferences, proponents of affirmative action have pinned their hopes on Justice Kennedy, now the most moderate of the conservative voices on the Court. When it comes to racial

51. Id. at 328, 336-37.
preferences, however, that hope seems misplaced. Kennedy dis-
settled in *Grutter* and has been an advocate for colorblindness. In a
series of cases, including *Parents Involved*, *Grutter*, and *Rice v.
Cayetano*, he has suggested that consideration of the race of indi-
viduals is not only unconstitutional but inherently demeaning. In
*Rice* he stated, “[o]ne of the principal reasons race is treated as a
forbidden classification is that it demeans the dignity and worth of a
person to be judged by ancestry instead of by his or her own merit
and essential qualities.”

In his dissenting opinion in *Grutter*, Kennedy agreed with the ma-
jority that universities have a compelling interest in a diverse
student body and stated that “[t]here is no constitutional objection
to the goal of considering race as one modest factor among many
others to achieve diversity . . . .” But he reasoned that strict scruti-
ny required that universities deploy “sufficient procedures” to
ensure that each applicant receives individual consideration and
that race does not become a predominant factor in admissions deci-
sions. In Kennedy’s view, the concept of critical mass deployed by
Michigan’s School of Law operated as a quota whereby race became
determinative for those students left to compete for the final fifteen
to twenty percent of places offered to the entering class.

In *Fisher*, Justice Kennedy seems to have made his peace with the
*Grutter* decision by putting his gloss on it. Writing for the majority
he reaffirmed that universities have a compelling interest in the ed-
ucational benefits of diversity and that they deserve deference on
why diversity produces those benefits. Kennedy made it clear,
however, that any use of race must be narrowly tailored and that
judges, not universities, must decide whether that prong of strict
scrutiny has been met. When an affirmative action plan is chal-
lenged in court, the court must be satisfied that there are “no
workable race-neutral alternatives” to achieve the educational
benefits of diversity. In theory, a race-based affirmative action plan
can survive strict scrutiny. But the Court imposed an exacting stan-
dard for narrow tailoring that will be difficult to meet and may
invite litigation as demographic change and experimentation en-
hance possibilities for achieving diversity without using race.

52. *Grutter*, 539 U.S. 495 (2000) (involving voting rights of non-native Hawaiians for election of
public trustees of a fund to assists native Hawaiians).
53. Id. at 517.
55. Id. at 393.
57. Id. at 2419-2420.
58. Id. at 2420.
Race-based affirmative action had been declining in university admissions even before Abigail Fisher’s case arrived at the Court. Since Ward Connerly kick-started a state-by-state political mobilization against affirmative action in the mid-1990s, the percentage of public four-year colleges that consider racial or ethnic status in admissions has fallen from about sixty percent to thirty-five percent. Only forty-five percent of private colleges still explicitly consider race; elite schools are more likely to do so, although they, too, have retreated. The Court’s holding in Fisher is likely to depress that number even further as private institutions contend with law suits, regulations, and public angst on the question.

Politics also make race-based affirmative action increasingly untenable. 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%). African Americans were the only subgroup that clearly favored racial preferences in admissions; Latinos were mixed and the vast majority of whites were opposed. 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.

These results are not hard to understand. Although proponents of affirmative action argue that such programs advance only qualified minorities and do not disadvantage others, “voters see a zero-
sum game in which someone—generally white males—loses when someone else gains.”\textsuperscript{65} For the parent who fills Adderall prescriptions for a white teenager for whom “above average” is not good enough, observing Cosby kids in that range advance is a provocation.

Inconveniently for affirmative action proponents, the policy has a black face and retains power as a dog whistle for political mobilization, even though legions of non-blacks and women have also benefitted. It is hard for non-blacks to see blacks as disadvantaged and needing affirmative action when examples of black success are ubiquitous, from Obama to Oprah to Jay-Z, not to mention the black bosses to whom non-blacks may report, the fictional black surgeons and lawyers they encounter on TV, and the well-dressed black people driving expensive cars that they occasionally notice on their daily commute. While non-blacks see real and virtual examples of black success every day, they do not see black poverty because they are removed from the deprivations of ghetto neighborhoods. Not surprisingly, only forty-nine percent of participants in a 2009 Pew survey believed that African Americans were subject to “a lot of discrimination.”\textsuperscript{66} A majority of survey participants did perceive other groups as enduring serious discrimination: Latinos (52%), Muslims (58%), and gays and lesbians (64%).\textsuperscript{67} In fact, whites are more apt to perceive discrimination against themselves than against people of color. A recent study found that both blacks and whites in America think progress has been made against anti-black bias.\textsuperscript{68} Whites, however, perceived that progress as coming at their expense, and they viewed anti-white bias as a bigger social problem than anti-black bias.\textsuperscript{69}

Opponents of affirmative action have succeeded in harnessing such public opinion. With the exception of a proposed constitutional ban that was narrowly defeated in Colorado in 2008, state voters have chosen to end affirmative action whenever the issue has been placed before them. Republican legislators have spearheaded the three most recent state initiatives against affirmative action. They have taken up the movement Ward Connerly started, bypassing the need for expensive ballot initiatives in states where they

\textsuperscript{65} Quinnipiac Univ. Polling Inst., supra note 63, at 2.


\textsuperscript{67} Id.


\textsuperscript{69} Id. at 216-17.
In Arizona and Oklahoma, voters approved constitutional bans proposed by GOP legislators. In New Hampshire, Republicans gained control of the legislature in 2010 and introduced a measure to prevent the state’s university and community college system and all state agencies from considering “race, sex, national origin, religion, or sexual orientation” in recruiting, hiring, promotion, or admissions. It passed overwhelmingly in both houses in the spring of 2011 and became law when the Democratic Governor, John Lynch, took no action.

Indeed, opposing affirmative action has been a venerable plank in Republican politics for three decades. While affirmative action has eroded in popularity and usage at public and private institutions, the GOP in the 1980s and 1990s used the policy to achieve an enduring political realignment through a cynical wedge politics of racial resentment. Ronald Reagan ran for president in 1980 on a GOP platform that labeled affirmative action’s goals and timetables as inherently discriminatory quotas. His coded appeals regarding a cluster of race-oriented issues resonated in the South and the white ethnic suburbs of the Midwest and Northeast, swelling the ranks of “Reagan Democrats.” Soon, these voters began to identify the GOP as the “white party” and the Democrats as the “black party.” Such identification created no incentive for racial reconciliation and great incentive for Republicans to create political majorities by dividing whites from blacks and other people of color.

Ultimately Reagan’s main vehicle for undermining affirmative action was to gut enforcement. He cut funding for the EEOC and the civil rights division, and by 1984 the EEOC was filing sixty percent fewer cases than it did at the onset of his first term. Civil rights cases against segregation in schools or housing that traditionally had been filed by the Justice Department virtually disappeared by 1984. Reagan also replaced proponents of affirmative action on the Civil Rights Commission with vigorous opponents.

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75. See THE LEADERSHIP CONF. ON CIVIL AND HUMAN RIGHTS & THE LEADERSHIP CONFERENCE EDUCATION FUND, supra note 73.
76. Cashin, supra note 15, at 8.
to affirmative action and black-associated civil rights became a key aspect of the Reagan zeitgeist.

Subsequent Republican candidates also used racial wedge issues, such as affirmative action, busing, crime, capital punishment, and Willie Horton, to make inroads with white working class voters who had been dependable Democrats from 1932 to 1960. The stagflation of the 1970s and economic restructurings of the 1980s fueled these voters’ resentments about race. In some blue-collar areas, race seemed to be the predominant factor in whites’ transition from the Democratic to the Republican column. Macomb County, Michigan, just north of Detroit, offers a potent example. It went from being the most Democratic suburban county in the country in 1960, voting sixty-three percent for Kennedy that year, to voting sixty-six percent for Reagan in 1984.

In focus groups, Democratic pollster Stanley Greenberg found that racial resentment animated much of the switch:

Blacks constitute the explanation for their vulnerability for almost everything that has gone wrong in their lives . . . [They see] the federal government as a black domain where whites cannot expect reasonable treatment . . . There was a widespread sentiment . . . that the Democratic [P]arty supported giveaway programs, that is, programs aimed primarily at minorities.

Fortunately race-coded politics now seem more apt to backfire than to resonate with the American electorate. You cannot yell “Macaca” at a crowded campaign rally or rail against welfare for “blah people” and succeed in getting yourself elected in a largely tolerant, multihued nation. But the overtly race-coded politics of a bygone era did break up the multiracial coalition that made the New Deal and civil rights possible. The New Deal model of politics pitted a winning coalition of economically marginal black and white Democrats against a small minority of wealthy Republicans. That model was replaced by a modern Republican Party that managed to unite many affluent, middle-, and working-class white voters. In the 2012 presidential election, fifty-nine percent of whites voted Republican, up from fifty-five percent in 2008 and about

77. Id.
78. Id.
79. Id.
equal to the fifty-eight percent of whites who voted for George Bush in 2004.\textsuperscript{82} This is significantly higher than the GOP’s share of the white vote in past presidential elections: fifty-five percent in 2000, forty-six percent in 1996, and forty-one percent in 1992.\textsuperscript{83} The racial divide is even sharper among men. In 2012, sixty-two percent of white men voted for Mitt Romney while men of color heavily favored Barack Obama (eighty-seven percent of Black men; sixty-five percent of Latino men; and sixty-six percent of all other races).\textsuperscript{84}

Our nation lives with political gridlock born of racial cleavage. The ascendance of political conservatism in the late twentieth century—an ideology of limited government, individual responsibility, and traditional values—coincided with the ascent of color blindness, and the one ideology fueled the other. As Harvard professor Jennifer Hochschild has argued, opponents of affirmative action gained cultural and political traction in part because their message fit with our most cherished values: the dream that in America anyone can prosper through sheer ambition and hard work, regardless of race, sex or other background.\textsuperscript{85} This ideology of individualism, in turn, animates the anti-statist attitudes and consequent Republican obstructionism in Congress.\textsuperscript{86}

In light of this backlash, those who continue to champion race-based affirmative action must consider whether its benefits are worth the costs of continued racial cleavage. Empirical studies of the impact of affirmative action show that the policy did help create the black middle-class.\textsuperscript{87} According to Hochschild, however, affirmative action was not nearly as influential as other less controversial strategies like antidiscrimination enforcement, raising educational achievement of students of color, and reducing barriers to voting


\textsuperscript{84} Races and Results, CNN Election Center (Dec. 10, 2012, 11:22 AM), http://www.cnn.com/election/2012/results/race/president (follow “Exit Polls” hyperlink; then scroll down to “Vote by Gender and Race” horizontal bar chart).


\textsuperscript{86} Id.

\textsuperscript{87} Id. at 348.
and holding office. While affirmative action had critical influence in raising minority presence at selective colleges in the 1980s, it seemed to play little to no role in admissions at the non-elite schools that eighty percent of college students attended.  

The relevant debate is not whether we should have had affirmative action in the first place. That question is moot. Given the inevitable demise of race-based affirmative action, the relevant question is, what is its logical replacement? Political constraints born of a perception gap between whites and nonwhites about the need for government interventions to redress racial inequality are likely to harden with rising demographic diversity. Institutions necessarily are changing to accommodate both emerging racial complexity and globalization. Latino enrollment in U.S. colleges grew by a whopping twenty-four percent between 2009 and 2010, an increase of 349,000 students. In the same one-year period, enrollment by blacks and Asians also grew while non-Hispanic white enrollment fell by 320,000.  

Increased diversity will result naturally from such demographic change. The future is Rice University: today, at this elite school founded on a “whites-only” charter, less than half of the undergraduates are white Americans. With the browning of America and the pressures of globalization, all institutions face a diversity imperative to maintain relevance and market share. White anxiety will continue to rise as more and more whites experience a loss of majority status. If whites are to engage with diversity instead of resenting it, they must perceive the rules of competition as fair to them and everyone else.

III. An Alternative: Place-Based Affirmative Action

Proponents of race-based affirmative action argue that the numbers of blacks and Latinos at elite schools will plummet without it.

88. Id.
89. Id.
91. Id.
93. Students & Scholars Enrollment by Race & Ethnicity, Rice University Office of Institutional Research Factbook, http://oir.rice.edu/Factbook/Students/Enrollment/Race_and_Ethnicity (select “Undergraduate” under “Customize Your View” menu; then scroll down to view pie chart).
This has been the initial pattern in states that have banned use of race in admissions. In a 2003 study of five selective law schools in California, Texas and Washington, enrollment rates declined by nearly two-thirds among African Americans and nearly one-third among Latinos once race was removed from the admissions process.94 Similarly precipitous declines in black enrollment have occurred at elite public undergraduate institutions immediately after bans on affirmative action. Black and Latino undergraduate enrollment at UC Berkeley fell by half immediately after Prop 209 took effect in California.95

The picture is better when the lens is widened. A recent study of the impact of affirmative action bans in four states (California, Washington, Texas, and Florida) found that total enrollment of unrepresented minorities did not change at four-year universities.96 The decline did occur at selective schools, with black and Latino enrollment falling 4.3 percent overall at those schools.97

And yet, some degree of diversity has endured, even in the wake of bans on the use of race. In California, demographic change alone is raising the numbers of Latinos attending college. Among Golden State residents admitted to the University of California system for the fall of 2012, thirty-six percent are Asian American, twenty-eight percent white, twenty-seven percent Latino, and four percent African American.98 The state itself is roughly fourteen percent Asian, forty percent white, thirty-eight percent Latino, seven percent black and four percent multiracial.99 Of course, diversity’s proponents would like to see better representation of African Americans and Latinos. In the Fisher case, leaders of the University of Texas and University of California systems filed briefs arguing that they could not achieve critical levels of diversity in all classrooms without consideration of race.

Yet this blunt use of race has unintended, if perverse, consequences. At America’s most selective institutions, admissions officers achieve optical diversity by admitting those applicants of color who are most prepared to compete and come from a socio-economic background not unlike that of applicants admitted

95. Id. at 100.
96. Id.
97. Id.
without affirmative action. As Walter Benn Michaels, professor of the University of Illinois frankly put it, “[w]hen students and faculty activists struggle for cultural diversity, they are in large part battling over what skin color the rich kids have.”

One of the more perverse aspects of the optical diversity currently being pursued at selective colleges and universities is that it benefits the children of African immigrants, who, on average, are the best educated of all racial and ethnic subgroups. Among the undergraduates that might be counted as black at Harvard in 2012 are fifty-seven students from sub-Saharan Africa and the Caribbean. Nigeria and Ghana were among the highest feeder countries. According to an analysis of census data by the Journal of Blacks in Higher Education, almost half of all African immigrants in the United States are college graduates, a rate slightly higher than that of Asian immigrants, nearly twice the rate for native-born whites and nearly four times the rate of college attainment for native-born blacks.

Ironically for proponents of affirmative action, who seem most worried about how African American youth will continue to be represented on college campuses without consideration of race in admissions, non-immigrant black strivers might fare better under programs based upon economic or structural disadvantage. A well-designed, place-based diversity program might better approximate the actual obstacles that many non-immigrant black children face on the path to college. For non-immigrant black youth, those disadvantages are three-fold.

First, as established in Part I above, black and Latino children are more likely to have had to overcome the effects of concentrated poverty in segregated schools and neighborhoods. Second, black and Latino youth are more likely than whites to suffer the deprivations of low net worth. The traditional wealth gap between whites and people of color, worsened by the Great Recession and the bursting of the housing bubble, intersects with the disadvantages of segregation. According to the 2010 census, median household wealth of white families was twenty-two times that of black families.


102. *Id.*

($111,000 to $5000) and fifteen times that of Latino families ($111,000 to $7500).\textsuperscript{104} Research shows that low net worth affects a family’s ability to purchase a home in a high opportunity neighborhood with good schools and affects a student’s confidence that working hard will enable her to attend college.\textsuperscript{105} Finally, black children are disproportionately disadvantaged by growing up in single-parent households, with less child supervision and support than is typically available in two-parent households.\textsuperscript{106} Richard Kahlenberg has argued that building these three elements of disadvantage—exposure to concentrated poverty, low wealth, and single-parent household status—into a class-based affirmative action program would fairly consider factors known to affect educational outcomes while also disproportionately benefiting students of color.\textsuperscript{107} I agree but would give special significance to place and other radical reforms that remove unnecessary exclusion from admissions.

Such a holistic design would answer criticisms that race-neutral, class-based affirmative action favors whites who do not have to deal with the accumulated restrictions of race, regardless of their economic status. William Julius Wilson supports class-based affirmative action but does not view it as a substitute for race-based affirmative action for several reasons. Middle-class black kids often suffer the restrictions of segregated neighborhoods and America’s racial history can make a black family’s hold on middle-class status more fragile.\textsuperscript{108} Wilson and others are correct in their assertion that mere consideration of income differences does not adequately reflect the structure of disadvantage in the United States. Promoting affirmative action based upon class rather than race is not enough when there is a racialized, separate, and unequal K-12 pipeline. As noted earlier, low-income whites tend to be less economically segregated than affluent blacks.\textsuperscript{109} On average, they are less exposed to concentrated poverty and have a higher probability of living in middle-class settings that offer genuine opportunity and better schools.

\begin{itemize}
\item \textsuperscript{106} \it Id.
\item \textsuperscript{107} \it Id. at 12.
\item \textsuperscript{109} \textit{See supra text accompanying notes 16-22.}
\end{itemize}
That said, whites who do live in impoverished environs or attend high-poverty schools are no less deserving of special consideration—as is anyone who is actually disadvantaged by economic isolation. If a middle-class black applicant is disadvantaged along some dimension other than place, as I argue below, a holistic approach to admissions would enable consideration of such actual disadvantage. Recent research on class-based affirmative action that considered a complex range of factors beyond parental income, including parental education, language, neighborhood, and high school demographics, found that such programs would raise African American and Latino enrollment nearly as much as race-based affirmative action and also increase economic diversity. Among ten universities that adopted race-neutral plans, seven met or exceeded the levels of black and Latino student representation they had previously achieved using racial preferences. If we are honest about the extant data on the effects of moving from race-based to place-based methods of affirmative action, the debate is really about how and whether African Americans will retain a meaningful presence at the most selective colleges and universities. UC Berkeley and UCLA, California’s most elite public higher education institutions, currently meet or exceed the numbers of Latino students they had before Proposition 209, but they have yet to recover fully in terms of black student representation.

Among civil rights advocates, a familiar justification for continued use of race in college admissions is its necessity to ensure that a diverse leadership class emerges from elite private and public institutions. During the Fisher oral argument, UT’s lawyer asserted that the ability to give extra consideration to a hypothesized son of a black dentist from a Dallas suburb was important. Mr. Garre reasoned:

[T]he minority candidate who has shown that . . . he or she has succeeded in an integrated environment, has shown leadership and community service . . . is precisely the kind of candidate that’s going to . . . come on campus, help to break

111. Id. at 12.
112. See generally Patricia Gándara, The Civil Rights Project, California: A Case Study in the Loss of Affirmative Action 5 fig. 1-2 (2012). I deeply regret that Native Americans are invisible in this debate, largely because of a lack of reported data about them.

Such candidates seemed more desirable to Garre (and possibly UT’s admissions officers) because, he stated, “the minorities who are admitted [under the Top Ten Percent Plan] tend to come from segregated, racially-identifiable schools.”\footnote{114. Id. at 43:15-17.}

As a passionate advocate for integration, I believe in the value of diversity and the idea that people should be exposed to “the other.” Still, there was something unseemly about UT’s argument, as Justice Alito pointed out in his rejoinder:

Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don’t think I’ve ever seen before. The top 10 percent plan admits . . . lots of Hispanics and a fair number of African Americans. But you say . . . it’s faulty because it doesn’t admit enough . . . who come from privileged backgrounds.\footnote{115. Oral Argument at 43:19-44:2, Fisher v. Texas, 133 S. Ct. 2411 (2013) (No. 11-345), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf.}

UT, unlike its elite private competitors, has a surfeit of “minorities” from “segregated” communities because of the operation of the Ten Percent Plan. Unvarnished, UT’s logic appears to be that they want to be able to compete for the most palatable or assimilated black and brown students. This argument is just as unseemly as the fact that the primary beneficiaries of affirmative action at the nation’s most selective private institutions are those that are most advantaged by parental education, neighborhood, or school quality.\footnote{116. See supra text accompanying notes 99-102.}

Let’s face it: fewer African Americans enter elite institutions under an affirmative action system based upon structural disadvantage than under race-based affirmative action. This raises the question of whether the marginal benefits of getting more blacks into elite institutions—hypothetically, an eight percent black class using race vs. a four percent black class using other criteria—are worth the political costs of continued racial division. I think not,
especially when the harms that flow from a racially divided electorate include mass incarceration and underinvestment in both public education and the social safety net. In any event, if I am correct in my prediction that law or politics will eventually render race-based affirmative action extinct, it would make sense to get started on race-neutral reforms that have the potential to create real diversity and more social cohesion.

I prefer strategies that will render centers of learning more racially and economically diverse while encouraging rather than discouraging cross-racial alliances. Notably, the Texas Ten Percent Plan emerged from a cross-racial coalition of black, Hispanic, and rural white members of the Texas legislature who represented districts that were not sending large numbers of students to UT institutions. The Texas and Florida plans that send the top ten and twenty percent of high school graduates, respectively, to state universities are imperfect alternatives that rely on racial segregation to achieve racial diversity by ostensibly race-neutral means. They are a rare first step among diversity policies toward accounting for residential segregation and its attendant disadvantages, albeit indirectly and incompletely. California has also adopted a similar place-based program that guarantees admission to the UC system to the top nine percent of graduates of each local high school. The UC system has also eliminated legacy preferences, as have some universities like Texas A&M and the University of Georgia.

The University of Michigan is rare in that it has incorporated place—“residence in an economically disadvantaged region”—expressly into its program design although it is unclear what weight this factor is given in a context of holistic admissions review. UM also adopted geography-based scholarships as part of its strategy to increase racial diversity in a race-neutral way. The fact that place has not played a more prominent role in states where race-based affirmative action has been banned suggests a lack of awareness geography’s role in creating racial structures of opportunity or, more likely, a desire to admit racial minorities who are less challenged by circumstances of racial and economic isolation. After all, admitting middle- or upper-middle-class students of color who graduate from strong, integrated high schools is likely to be less costly in terms of

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118. Id. at 82.
119. Id.
120. See Kahlenberg & Potter, supra note 105, at 18.
121. Id. at 53.
financial aid awards and less threatening to *U.S. News* rankings because those students have higher average test scores than inner-city strivers.

If an institution is sincere about achieving diversity and wishes to or is forced to do so without considering race, then place is an important, underutilized, and fair tool. An admissions process that affords holistic, individualized review of a variety of factors should give extra weight to living in a low opportunity neighborhood (e.g., a poverty rate above twenty percent) or attending a high poverty school. This would benefit those who most need and deserve affirmative action. It could also have the salutary benefit of encouraging racial and socioeconomic integration in low opportunity neighborhoods. A strategic middle-class family might decide to stay in or move into a historically low-opportunity neighborhood in order to receive the benefit of this plus factor in college admissions.

I would not make place affirmative action’s only consideration but it should be given much greater weight and attention than it currently receives in diversity programs, given how large it looms in structuring educational opportunity and outcomes. Low family wealth should also receive considerable weight as another factor that disproportionately affects blacks and Latinos. Exposure to concentrated poverty and low family wealth are both “structural” forms of disadvantage because their racial dimensions can be traced to conscious, racist policy choices that endured for decades.122

While single-parent status is another factor that disproportionately affects African American youth, the degree of government culpability is less clear (and frankly beyond my realm of expertise). In any event, diversity programs can capture single-parent status and other forms of disadvantage by allowing individual applicants to state what obstacles they have overcome. On the order of magnitude currently given to race in race-based affirmative action programs, the structural disadvantages of segregation and low wealth should be given far more consideration and weight.

This proposal might not help middle-class black kids who live in medium- or high-opportunity environs, especially those aiming to enter elite institutions. But affirmative action should be reserved for students of any color who are challenged by serious disadvantages. For those who are not, I think it is healthy to send a message that most global aspirants have already absorbed: rewards come to those who work exceedingly hard. In our bewilderingly diverse future, no one is entitled.

122. *See Castan,* supra note 13, at 83–126 (providing an overview of this history).
IV. RACIAL RECONCILIATION AND RADICAL REFORM

Statistically, poor and working-class whites are more likely to live in middle-class surroundings than blacks and Latinos, but they also face structural constraints to upward mobility. Even working-class whites that have the test scores and grades to gain entrance to college are not attending commensurate with their numbers because the current system of college admissions and financial aid works against working class white people in insidious ways. A cottage industry of tutors, test preparers, consultants, learning centers, and other resources that only the affluent can tap has sprung up around college admissions and the elementary and secondary training that precedes it. Performance on the SAT is tightly correlated with family income.\textsuperscript{123} It has no correlation whatsoever to university mission statements, unless a college is willing to rewrite its mission to say: “Our purpose is to preserve advantages of wealth and income in America.” Using cumulative high school GPA to evaluate college applicants is a more legitimate measure of merit because it is a better predictor of likely performance throughout college, and it has less adverse impact on disadvantaged and underrepresented minority students.\textsuperscript{124} Yet selective colleges slavishly accept exclusionary criteria propagated by the College Board and \textit{U.S. News and World Report} as merit. “Merit-based” financial aid, as opposed to “need-based” financial aid, also works against entry by white working-class students.\textsuperscript{125} These exclusionary practices render working-class whites as alien and alienated on college campuses as children of the ghetto. Progressives should not be surprised that anti-intellectualism and denigration of “liberal elites” has become a common cultural sensibility among blue-collar whites or those who would lead them.\textsuperscript{126}

If the American Dream is to be more than a platitude, the avenues to opportunity must be real, and universities have a unique


\textsuperscript{125} Cashin, \textit{supra} note 15, at 57-58.

\textsuperscript{126} Id. at 61.
role to play in countering the structural injustices that exist in our nation. Indeed, centers of learning may be the only remaining institutions in American society capable of transcending partisan gridlock to repair the social contract. In diverse, fragmented America, a widely shared value is that no one’s access to opportunity or pursuit of happiness should be limited based upon immutable characteristics like race, ethnicity, or nationality. Proponents and opponents of affirmative action alike invoke this ideal of equality, embodied in the Fourteenth Amendment, even if they do not agree on what such equality should mean in practice. The so-called American Dream, however tattered, is also premised upon equality among the classes. According to a favored shibboleth, all Americans, regardless of economic station are supposed to be able to get ahead and prosper by dint of hard work.

Restoring the American Dream might begin with a principle of universal fairness based on the American values we profess to revere: freedom, opportunity, and universal human dignity. A true commitment to these ideals requires institutions and employers to replace their traditional practices because existing systems are simply replicating and reinforcing socioeconomic advantage. Universities are not immune from this need to change, since these inequalities are contrary to the their missions to serve the country and advance the whole of human knowledge. A country where the avenues of upward mobility are open mainly to affluent individuals living concentrated in advantaged environs contradicts the professed values of centers of learning.

In addition to explicit using place in any diversity calculus, several other reforms may be necessary to revive social mobility and the social contract in the United States. First, I would jettison the phrase “affirmative action,” with its loaded meanings. Most universities and employers have stopped using the term anyway, favoring an amorphous concept of “diversity” that does not challenge existing exclusionary norms. I prefer the term “diversity practice” because it conveys acceptance of a diverse society and the constant effort required to create practices and structures that are truly inclusive. Colleges and employers should be forthright about how and why they value diversity, what diversity means to them, and the (fair) practices they undertake to achieve it. In this way, all applicants will know a given institution’s commitments and they can form realistic expectations or apply elsewhere. Transparency about diversity commitments and practices will promote actual fairness as well as a perception of fairness.
Second, institutions and employers should clarify their mission. Truly committed institutions will explicitly incorporate diversity into their mission statements. Then, institutions and employers should define merit in terms that are directly tied to advancing their mission. In fact, one study suggests that affirmative action entrants, with their lower test scores, become the alumni that most exemplify universities’ frequently stated mission of cultivating community leaders who give back to society.127 For example, aspiring firefighters need to be able to demonstrate that they can deploy relevant technology to put out fires. A standardized test that merely performs a gatekeeping function and does not test for skills relevant to extinguishing fires is neither useful nor fair.

The same could be said of most standardized tests. A student’s high school GPA is the best available predictor of how a student will perform in college,128 although it cannot alone predict how and whether an applicant will promote a university’s mission. In sum, universities should rethink ill-defined, exclusionary concepts of “merit.” In my field of legal education, for example, the ability to publish theoretical articles in elite law journals is more valued among select law faculties than the ability to teach students how to practice law in the real world.

An institution truly committed to diversity and universal access to opportunity would offer financial aid solely based upon demonstrated financial need. It would make the SAT and ACT optional or not use them at all, as is increasingly the case at hundreds of colleges.129 It would not give special consideration to race, ethnicity, or legacy status. Instead, in addition to the standard application form, all applicants would be invited to submit an optional statement on what disadvantages they have had to overcome. All forms of disadvantage would be considered, but structural disadvantages like living in a high-poverty neighborhood, attending a high-poverty school, or low household wealth would receive extra weight.

My argument about legacies is simple. Research establishes a correlation between parental educational attainment and student educational achievement.130 Being the son or daughter of someone

128. See Douglas S. Massey and LiErin Prohasco, Divergent Streams: Race-Gender Achievement Gaps at Selective Colleges and Universities, 7 Du Bois Rev. 219, 241, 244 (2010).
who has attended a university, especially an elite one, offers its own advantage. Legacy applicants are well prepared to compete. As with advantaged racial minorities, legacy applicants do not need or intrinsically deserve any special consideration.

Finally, institutions should hire more admissions staff to ensure that every individual applicant receives careful, holistic consideration. The goal of the admissions process should be to identify highly qualified applicants of all races and classes who personify the university’s mission. The goal for society, over time, is to ensure that getting ahead is not a function of circumstances of birth.

Admittedly, these ideas swim against a tide of entrenched practice and privilege. While many people complain about the unfairness of racial preferences, far fewer voices engage with the evidence of de facto class preferences in university admissions. Professor Lani Guinier is a notable exception. If universities are unwilling to rethink conventional practices or reexamine what really counts as merit, as Guinier has suggested, an experimental lottery for some of the places in an entering class is preferable to the current certainty of class advantage. A university could define a baseline GPA and standardized test score that would be acceptable and let applicants roll their dice. At least then all strivers would have a modicum of hope and systems would retain an aura of fairness.

**Conclusion**

Proponents of affirmative action or diversity should take the long view: power is in numbers. Creating a racially diverse politics in which working class whites and people of color share a common agenda will have a more transformative impact than affirmative action programs, which currently tinker at the margins of opportunity on behalf of those who least need help. Unless and until we recognize the mutual oppression of economically marginalized people of any race and undertake the labor-intensive work of building political alliances among them, the American Dream will remain just that—a dream that mocks the forty-six million Americans who live the nightmare of poverty and the millions more who eke out a

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132. *Id.*
middle-class existence. While we are gathering multiracial power, the all Americans must ask how can we prepare more black and brown kids to compete without racial preferences, since those preferences will eventually disappear.

The system is rigged against all middle-income and poor people. Performance on the SAT mirrors family income. Access to an excellent public school depends heavily on buying your way into an affluent neighborhood. Employment opportunities depend on whom you know and having skills that you may not be able to afford to acquire. Even those middle-class people blessed with a regular paycheck, healthcare, and a sound roof over their heads struggle to form or raise a family in a way that prepares the next generation to prosper. Social mobility in the “land of opportunity” has ground to a halt. Meanwhile, without a multiracial majority that consistently represents at least fifty-five percent of voters in elections and policy battles, there is little chance of enacting sound policies that might correct the underlying structures that create racial and economic inequality. In the case of anti-democratic measures like super-majority requirements to break a filibuster in the U.S. Senate or to pass a revenue measure in the California Legislature, even more cross-racial political cohesion is required.

Nothing will get better, then, without reconciliation between sizeable numbers of whites and people of color. What we need is a politics of fairness, one in which people of color and the white people who are open to them move past racial resentment to form an alliance of the sane. There are plenty of common sense ideas about how to create more, not less, opportunity in this country. A “Sanity Alliance” might get some things done for the common good of us all.

Being intentional in our choice of policies and language can help us begin to reconcile, to move past racial resentments, and to create a politics of fairness. One first step is to base affirmative action upon structural disadvantage, not race. Working-class whites need a signal that they are welcome to enter the multiracial tent and this would be one such signal.

However, jettisoning race-based affirmative action is the beginning, not the end, of creating a fairer society. While we should not favor one race for preferential treatment, we also should not single out one group for discriminatory treatment. That, too, is un-American. Mass incarceration and racial profiling come to mind. Our best hope to redress both forms of unfairness is a language based upon
common harms and the common weal. For example, California is sagging under the weight of its prison budgets due to a racially unfair and fiscally insane War on Drugs. California spends more on prisons than it does on higher education, and its public schools, once the envy of the nation, now rank near last in performance and per-pupil spending. Fortunately the state is beginning to self-correct. On November 6, 2012, Californians voted to raise taxes in order to invest six billion dollars annually in education and they approved a measure that moderated the state’s infamous “three-strikes” law that had required life sentences even for non-violent, three-time felons. Democrats also gained the necessary legislative supermajority to raise revenues. These developments, like the 2012 presidential election itself, suggest the emerging promise of multiracial politics. I write this not as a cheerleader for the Democratic party but as citizen who longs for a functional democracy in which parties and politicians vigorously compete for all of the votes in a multiracial electorate.

Once we get started on a “Sanity Alliance” and begin to build trust and relationships, we can begin to have more honest, refreshing discussions about how racial harms do damage to society as a whole. A “Sanity Alliance” might identify public and private policies that disproportionately discriminate against people of color in a way that harms the common good, including mass incarceration, the War on Drugs, and predatory lending. Then, this coalition of the willing should organize state and local movements to reform those policies. Washington D.C. is nearly impossible these days. A better place to start is with numerous multiracial, faith-based coalitions that are already working in scores of communities, often in a bipartisan manner. Elsewhere I have written about this wonderful, righteous work.

Throughout American history, economic elites have used racial categories and racism to drive a wedge between working class whites and people of color. In the colonial era, indentured servitude gave

133. See Cashin, supra note 15, at Ch. 5 (2014) (providing a detailed overview of the best strategies and rhetoric for creating an effective multiracial politics that redresses common harms).


135. Id.

136. Id.

137. Id. See also Sheryll Cashin, Shall We Overcome? Transcending Race, Class and Ideology Through Interest Convergence, 79 ST. JOHN’S L. REV. 253 (2005).
way to white freedom and black slavery so that white servants would no longer join blacks in revolt as they did in Bacon’s Rebellion. In the late 19th century, Jim Crow laws proliferated after a biracial farmers’ alliance threatened to change unfair financial policies imposed by elites. And the GOP devised a cynical, race-coded southern strategy that broke up the multiracial alliance that made the New Deal possible. Given this history and its current manifestations, intentional efforts are sorely needed to begin to rebuild trust among “we the people” and to recapture a sense of collective will to protect the common good.

Race-based affirmative action in a context of ascending diversity will continue to fuel white resentment and division and is unnecessary when place-based alternatives that track actual disadvantage are available. I would substitute “low opportunity neighborhood” for race as a plus factor in the type of formulas that university’s use in admissions decisions because race is too blunt an instrument and too costly politically.
THINKING HARD ABOUT “RACE-NEUTRAL” ADMISSIONS

Richard Sander* & Aaron Danielson**

INTRODUCTION

The Supreme Court’s June 2013 decision in Fisher v. University of Texas at Austin held that universities may not use racial preferences until they have convincingly proven that “race-neutral” alternatives cannot produce a level of student diversity consistent with the university’s educational mission.1 Earlier Supreme Court decisions have seemed to restrict the use of race in higher education admissions,2 but without much measureable effect.3 Though the differences are subtle, the language in Fisher seems significantly tougher and harder to evade than the language of earlier Court decisions. It is plausible—and “plausible” will become “very likely” if new Fisher-like lawsuits are filed—that higher education leaders will take the new opinion seriously and start looking more closely at race-neutral alternatives and how they might work.4

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1. 133 S. Ct. 2411, 2420 (2013) (“The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense, then the university may not consider race.”) (citations and internal quotation marks omitted).


3. See generally SUSAN WELCH & JOHN GRUHL, AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS 107–32 (1998) (demonstrating that the growth in minority enrollments in medical and law schools after Bakke was negligible and that Bakke “largely served to institutionalize existing patterns and practices”). Our research suggests that, if anything, racial preferences used by universities increased after these decisions. See Richard Sander, Why Strict Scrutiny Requires Transparency: The Practical Effects of Bakke, Gratz, and Grutter, in New Directions in Judicial Politics 277 (Kevin T. McGuire ed., 2012).

4. For example, the Lumina Foundation and the Century Foundation sponsored a conference in Indianapolis in August 2013, attended by a range of higher education leaders, devoted to assessing the impact of Fisher and the possible ways universities can adapt to the post-Fisher environment.
Yet the available research on “race-neutral” affirmative action is surprisingly thin. When one contemplates how a particular university might pursue “race-neutrality,” a number of questions suggest themselves, and higher education officials have almost no place to turn for useful answers. Consider a few of the complications:

1) It is axiomatic that no “race-neutral” factor or system can be as efficient as using race itself to achieve racial diversity through an admissions program. Thus, for example, if a selective university is currently using racial preferences to achieve a student body that is eight percent African American and there is a large gap in the average academic credentials between black and other applicants, then there is no way to use a “race-neutral” alternative to achieve an eight percent black entering class (from the same applicant pool) without these alternative preferences being both larger and broader than the racial preferences. The question of “race-efficiency” in race-neutral systems is thus an important one, but one on which there is little or no available literature.

2) The predominant construction of “diversity” in higher education focuses on race or, specifically, on “underrepresented minorities.” It rarely explicitly includes socioeconomic (SES) diversity, and officials often assume that SES diversity follows naturally from racial diversity, despite the overwhelming evidence otherwise. Yet many of the rationales for diversity on campus apply with at least equal force to SES diversity. This raises a host of questions—for which few good answers are available—

5. For a few examples, see generally Anthony P. Carnevale & Stephen J. Rose, Socioeconomic Status, Race/Ethnicity, and Selective College Admissions, in America’s Untapped Resource: Low-Income Students in Higher Education 101 (Richard D. Kahlenberg ed., 2004) (using longitudinal data from the National Center for Education Statistics and related data to analyze outcomes at the 146 most competitive four-year colleges); Richard H. Sander, Experimenting with Class-Based Affirmative Action, 47 J. Legal Educ. 472 (1997) (evaluating some of the results of the UCLA School of Law’s decision to incorporate detailed class-based preferences into its admission system in 1996).


8. See Richard H. Sander, Class in American Legal Education, 88 Denv. U. L. Rev. 631, 631–33 (documenting the intersection of race and socioeconomic status at American law schools). Sander shows, for instance, that approximately two-thirds of blacks at elite American law schools come from families in the top quartile of the SES distribution. Id. at 652.
about the relationship between racial and SES diversity, the tradeoffs created by racial versus SES preferences, and clearer articulation of just what diversity goals we are trying to achieve. There is, for example, a good deal of legal discussion about “critical mass,” a notion at issue in both Grutter and Fisher. Why should critical mass not involve SES considerations as well as racial ones?

3) Many states and university systems have banned the use of race in university admissions, and both researchers and policymakers tend to assume that these schools are ideal exemplars of the operation and effects of race-neutral policies. Yet, a small but growing body of research suggests that compliance with race-preference bans is irregular; “race-neutral” universities often do appear to give weight—sometimes substantial weight—to race. This means we should be cautious in making assumptions about how and why these universities are able to maintain racial diversity. It also means that when voters, courts, or government agencies promulgate policies restricting the use of race, they cannot take compliance for granted and

10. Grutter v. Bollinger, 539 U.S. 306, 335–36 (2003) (deciding whether the goal of attaining a “critical mass” of underrepresented minorities constitutes a quota); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415 (2013) (providing that the University of Texas had committed itself to achieving a “critical mass,” which involved increasing racial minority enrollment on campus).
11. Voters in California, Washington, Michigan, Nebraska, Arizona, and Oklahoma have passed statewide bans on racial preferences in government programs, and Florida enacted a similar ban by executive order, as did New Hampshire’s legislature. Richard D. Kahlenberg & Halley Potter, A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences, CENTURY FOUNDATION 31–66 (2012), available at http://tcf.org/assets/downloads/tcf-abaag.pdf. (“In two states (Texas and Georgia), lower court orders struck down the use of race for a period of time, and leading institutions in those states . . . chose not to reinstate racial affirmative action programs, even after the U.S. Supreme Court cleared the way for them to do so.”). Id. at 4.
12. See id. at 11–26 (discussing the states and schools that have banned the use of race and adopted new programs).
13. See infra, Part IV, for examples; for prior research see, e.g., Danny Yagan, Law School Admissions Under the UC Affirmative Action Ban 25 (Dec. 2012) (unpublished manuscript) (on file with author), available at http://emlab.berkeley.edu/users/webfac/moretti/e251_s13/yagan.pdf (finding that the 1996 UC affirmative action ban reduced the black admission rate to thirty-one percent, four times the estimated eight percent rate that would have prevailed if all pre-ban applicants had been subject to white admission standards); Marc Luppino, Partial Compliance with Affirmative Action Bans: Evidence from University of California Admissions 22 (Oct. 29, 2013) (unpublished manuscript) (on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347148 (finding that most UC campuses did not fully eliminate preferences for minority applicants after the UC affirmative action ban).
must recognize the importance and difficulty of enforcing those policies.

4) Over the past decade, research on the effects of preferences on student learning and outcomes has dramatically increased. The “mismatch hypothesis,” still controversial but endorsed as important by a growing range of influential observers and policy-makers,14 posits that a student’s learning and interactions with other students are harmed if the student’s academic preparation is too far below her classmates’.15 Most of those who are concerned about mismatch agree that small preferences may have no harmful effects or that positive effects may significantly outweigh negative ones.16 It seems prudent that any reasonable conversation about preferences should be very concerned about the size of those preferences; but this issue, too, is often entirely absent from discussions of affirmative action.

5) Finally, discussions about university admissions policies tend to focus on single institutions and admissions offices in isolation and thus overlook the extraordinary interconnectedness of what universities do. The degree to which any change in policy is successful, or can even be seriously contemplated, depends in important ways upon what a school’s peers are doing. Current public policy restricts cooperation among schools,17 but collective action problems are pervasive.

14. See infra Part II.D and accompanying text (showing studies in peer-reviewed social science journals and related materials finding strong evidence of mismatch effects). The Journal of Economic Literature and the Annual Review of Economics have both commissioned reviews of the mismatch literature for 2014 issues, a sure sign of a major emerging topic. Influential commentators such as David Books and Malcolm Gladwell have written about mismatch, noting the controversy on the topic but nonetheless finding the evidence compelling. See David Brooks, Speed of Awest, N.Y. Times, June 25, 2013, at A25; Malcolm Gladwell, David and Goliath 91–93 (2013).


17. See discussion infra Part IV.
Though each of these questions are complicated and our analysis is exploratory rather than definitive, we find that even a relatively simple examination of these problems yields striking insights and suggests many basic, common-sense principles and policy prescriptions. Indeed, many of these policy implications are ones that transcend some of the current ideological battle-lines on affirmative action, and thus might catalyze compromise and consensus in an often contentious debate.

Our exploration is organized as follows. In Part I, we sympathetically consider the very difficult dilemmas facing higher education leaders. Understanding the often irreconcilable pressures that constrain university administrators is essential if we are to envision the plausible policies they might undertake. In Part II, we draw on a range of data to illustrate some of the “properties” of admissions systems and, in particular, the ways in which race, SES, and academic preparation interact dynamically both within individual schools and across the educational spectrum. Partly because the questions we examine here have been so little studied, ideal data does not exist, but there are enough government and university sources of data to grasp many key dynamics. In Part III, we turn to the “compliance” question—how have major schools conformed with or evaded the requirement of race-neutral policies? We examine in some depth admissions data from the University of California and the University of Michigan and find strong evidence of non-compliance in both cases. What does their conduct tell us about the operation of these policies? In Part IV, we detail a tentative policy agenda that follows from our findings.

I. THE UNIVERSITY’S PERSPECTIVE

A. What Universities Try to Maximize

Although the vast majority of educational institutions are nonprofits, it is a great mistake to assume that colleges and universities are therefore largely immune to market forces. A dominant fact of life for most selective institutions is that they operate in a highly competitive marketplace for students.18 Indeed, selective colleges

18. See generally Derek Bok, Higher Education in America 18–19 (2015) (discussing competition in higher education); see also Robert Klitgaard, Choosing Elites: Selecting the “Best and Brightest” at Top Universities and Elsewhere 1–84 (1985) (discussing the admissions processes at the nation’s elite universities). Perhaps the other dominant concern of university leaders is the competition for faculty, which raises some analogous issues but is largely separable from the competition for students.
and professional schools operate in an admissions market so styl-
ized as to push schools towards very elemental forms of
competition. Unlike, say, an electronics company, which can com-
pete by delivering unusually high quality products or by innovating
entirely new product categories, most higher education institutions
compete on only a few, crucial characteristics, including “level of
eliteness” (or “ranking”), school size, and geographic region.19

Of course, colleges pursue an array of strategies to strengthen
themselves; they decided to emphasize certain curricular areas, tar-
get certain kinds of faculty recruitment, build distinctive facilities,
and so on. But administrators at selective colleges we have spoken
to tend to see admissions decisions as more tightly constrained.

As innumerable college catalogs proclaim, elite schools are in-
deed interested in “well-rounded” students.20 Their ideal student is
energetic, highly motivated, very smart, passionate about some spe-
cial interests, athletic, and socially skilled. Such students tend to do
dwell in the admissions competition if they can distinguish them-
selves from the thousands of other applicants trying to convey those
same qualities. But within the general search for the well-rounded
star, universities feel intense pressure to satisfy more specific goals.
They have athletic coaches to satisfy, orchestras to fill, and alumni
parents to placate. They have a limited amount of scholarship
money. There is the diversity imperative, which generally means
that the proportion of black and Hispanic students admitted should
at least approximate, and preferably exceed, those students’ pro-
portions in the applicant pool. And, above all, the university must
admit a group of students with strong enough conventional criteria
to preserve the university’s academic stature.

This last task can be an incredibly specific, even obsessive, quest.
It is not uncommon for law schools, for example, to finely calibrate
admissions, weeks before the academic year begin, to search for in-
dividual students and an exact class size that will give the entering
class a particular LSAT median score to report to national ranking
systems.21 Such things are thought to matter because each year’s

19. See Russell B. Korobkin, In Praise of Law School Rankings: Solutions to Coordination and
Collective Action Problems, 77 Tex. L. Rev. 403, 417–18 (1998); Gianni De Fraja & Elisabetta
Iossa, Competition Among Universities and the Emergence of the Elite Institution, 54 Bulletin of
2438/877/1/00-09.pdf.

20. See Jerome Karabel, The Chosen: The Hidden History of Admission and Exclu-
sion at Harvard, Yale, and Princeton 4–6 (2006) (exploring the origins of the “well-
rounded” ideal in university admissions).

21. This was particularly obvious in the fall of 2013, when many law schools, as a result of
smaller applicant pools, shrank the size of their entering classes so as to keep the median
credentials of their students high. See generally Jacob Gershman, LSAT Scores at Top Law
ranking influences next year’s applicant pool. Every school wants a “virtuous cycle,” where steady improvements in ranking produce steady increases in the size of the applicant pool. This permits the school to be even more selective and thus further improve its ranking. Nearly every school fears that it will slip into the opposite, “negative cycle,” where a drop in the “objective” quality of the admitted pool hurts the school’s rankings, leads to fewer applications, reduces the school’s selectivity, and sets off an unending round of declines.

Consider, now, the dilemmas the “diversity” constraint pose. Unlike athletics (where only some selective schools really have reputations that require constant vigilance), nearly all elite schools feel bound to have reasonable diversity numbers. This is so not merely because minority constituencies at the school closely watch each year’s level of minority enrollment, but also because racial diversity has become a sort of proxy for the school’s level of social responsibility and a signal that it does care about things other than test scores and selectivity ranking. Falling below the acceptable diversity range risks very bad publicity and is a concrete danger to any campus leader.

For virtually all selective colleges, however, the diversity constraint involves significant compromises for the school’s academic standards. At such schools, the median SAT score of black applicants is about a full standard deviation (roughly two hundred points on the traditional 1600 point scale) below the median white applicant’s score. The black/white gap in high school grades (measured in national percentiles) is only a little smaller. American Indian and Hispanic applicants have more modest, but still...
sizeable, weaknesses in academic preparation. This means that minority admissions will tend to lower the school’s mean credentials. It also means, substantively, that minority admits will have greater academic difficulties: lower grades, higher attrition from the sciences, and probably lower graduation rates than other students. Schools are caught in a bind between satisfying the diversity constraint and avoiding harm to either the general academic standing of the school or the particular students admitted.

Schools often deal with this conflict by admitting the strongest students who nominally satisfy the “diversity” constraint. When colleges first introduced large racial preferences, they justified them as a means of rectifying a long-standing neglect of disadvantaged populations and often launched significant outreach efforts to find and admit students from truly distressed environments. The results were often academically disastrous, in part because colleges gave little thought to providing academic support to the new students. Over time, the black and Hispanic students admitted to select colleges generally came from a much more privileged group. Colleges also began to admit many more of their “diversity” students from overseas or from immigrant populations and counted multiracial students as minorities. These shifts somewhat mitigated the academic dilemmas the diversity constraint created, but they also lessened the nexus between “diversity” and “disadvantage.”


32. See Sander & Taylor, supra note 15, at 249.

B. The Tensions Race-Neutrality Creates With These Goals

When courts or policy-makers talk about race-neutral admissions policies, they almost always mean policies that will increase the presence of under-represented groups on college campuses without explicitly evaluating individual applicants using “race.” Most commonly, such policies use socioeconomic criteria in admissions to increase the number of students from disadvantaged backgrounds and create a “racial dividend” for the university. 34 From the university’s point of view, race-neutral methods can have three significant disadvantages:

—First, if the racial dividend is less than one hundred percent (as is inevitable), the school must admit significantly more students with the “race-neutral” criteria to achieve its diversity constraint, thus broadening the use of preferences;

—Second, the university may have to use larger preferences with its race-neutral criteria to achieve an acceptable racial dividend (a point we will demonstrate in Part II), thus deepening existing preferences;

—Third, to the extent that the race-neutral criteria produce a larger number of economically disadvantaged students, the college will have to provide more financial aid to enroll those students.

Each of these probable conditions is a significant deterrent for colleges considering (or being pushed toward) race-neutral criteria. If preferences broaden, this threatens the school’s ranking and selectivity. If preferences deepen, they increase the academic challenges the school faces and may lower the school’s academic output. If more students need financial aid, this directly undermines the school’s ability to use merit scholarships to attract high-credential students that will burnish the school’s academic reputation.

34. Scott Warner, Pete Land, Kendra Berner, The U.S. Supreme Court’s Decision in Fisher v. University of Texas at Austin: What It Tells Us (and Doesn’t Tell Us) About the Consideration of Race in College and University Admissions and Other Contexts, 60 Fed. L. Rev. 48, 56 (2013) (“Examples of race-neutral alternatives that have been considered by various institutions include: basing decisions on applicants’ socioeconomic status, admitting a certain percentage from each high school in the state (i.e., Texas’s Top Ten Percent Law), removing any preference for “legacy” students, enhancing recruitment of and financial aid programs for financially challenged students, establishing partnerships with K-12 schools in locations with populations more likely to enhance diversity, and facilitating community college transfers.”).
These are some of the leading reasons why colleges are not enthusiastic about “race-neutral” admissions, why they have generally maneuvered around the strictures of past Supreme Court decisions that seemingly restricted race-conscious admissions, and why many schools flout the law in states that explicitly ban the use of race in college admissions. This has created a “culture of resistance” in higher education that makes it even harder to change existing university practices.

C. Changing the University World-View

A key to reforming university admissions is to encourage a change in mind-set from the single institution to higher education’s collective goals and effects. This does not mean that universities should stop giving priority to their own interests—that would be unrealistic and perhaps not even desirable. But it does mean we should work towards institutional arrangements and incentives that encourage constructive and deter destructive forms of competition.

An obvious example is merit aid. Over the past generation, universities increased the share of their budgets dedicated to scholarships aimed at luring academically gifted students to their campuses either tuition-free or with steep discounts. Merit aid has become such a large cost that it fuels tuition increases to finance it, which in turn further increase the cost of merit aid. Academic scholarships also directly compete with need-based aid, which suffers greatly as a result. College presidents realize that merit-based aid produces little net improvement in collective educational opportunity and has a variety of ill effects. Yet current federal policy places no limitations on merit aid and restricts colleges from cooperating to limiting merit-based aid.

35. See Sander, infra note 8, at 667–68 (discussing the claim that despite Supreme Court decisions restricting the use of race in admissions, racial preferences seem to have increased in university admissions).

36. See discussion infra Part III and supra, note 13.


39. Id.

40. See id.

Similar dynamics arise in the pursuit of racial diversity. As Stuart Taylor and Sander demonstrated in *Mismatch*, competition for minority students among colleges produces a number of perverse effects. When the most elite schools use preferences to meet their diversity constraint, they actually increase the size of preferences that slightly-less elite schools must use to meet their objectives, and this “cascade” continues down the spectrum of schools. But since this problem runs up against colleges’ concern with admitting students who cannot succeed, second- and third-tier schools end up having significantly fewer minority students than top-tier schools. This not only reduces optimal sorting from a “diversity” point of view, but it also can undermine minority student achievement.

Yet, when we pull back from the dilemmas faced by individual colleges competing in a marketplace, and consider the collective goals of these institutions, the commonality of vision is striking. Most higher education leaders (and commentators) would like the largest possible percentage of students who can benefit from a college education to enroll. We would especially like to increase college enrollment among low-SES students, who currently have a much lower enrollment rate than any other identifiable group (when we control for their level of academic preparation). We would like financial aid to be related to need as closely as possible. We would like every campus to have significant diversity, both racially and socioeconomically, and we would like diversity to be structured so that it has the maximum social and educational benefit on all the students. We would also like every student to attend the school that maximizes their likelihood of both short-term and long-term success. And we would, of course, like to maximize the amount of learning that occurs at colleges.

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43. Id. at 23–24 (explaining that the most selective schools are in the unique position to admit the top black students—who require no preference—as well as using modest preferences to admit other strong black candidates; the next tier must use larger preferences and nonetheless ends up with fewer black enrollees). See also Peter Arcidiacono, Shakeeb Khan, Jacob L. Vigdor, *Representation Versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?*, 95 J. PUB. ECON. 1, 3 fig. 1 (2011).


45. See discussion of mismatch infra Part II.D.

This disconnect between the common values universities share, and the strategies they individually feel constrained to adopt from competitive pressure, suggests a need to think about these problems in system-wide terms. We need to make it easier for colleges to cooperate to achieve collective goals, to increase transparency, and to improve our measures of college outcomes. Then, it is easier for all players to see which institutions do a better job and which environments are optimal “matches” for particular students. We also need to develop incentives that push college policies to serve the public interest rather than the ranking game. After looking at individual school dilemmas more closely in Parts II and III, we will try to spell out a systemic policy approach in Part IV.

II. Empirical and Structural Principles of Race-Neutral Admissions

A. The Race/SES Paradox

In the run-up to the Supreme Court’s Fisher oral arguments, the Century Foundation released a report advocating for the wider use of socioeconomic preferences. The report was deservedly influential on many counts, but it featured a graph that left some readers scratching their heads. The chart reported that the “cost of disadvantage” for black students was equivalent to fifty-six points on the SAT I, but that the comparable “cost of disadvantage” for low-SES students was 399 points. What implication should one draw from such a claim: that being low-SES is six times as great a hardship as being black in American society or that socioeconomic preferences should be seven times greater than racial ones? Neither of those inferences is correct; however, the Century Foundation figure does illustrate the ease with which discussions of race and class can become tangled.


47. Kahlenberg & Potter, supra note 11, at 5.
48. Id. at 5 fig. 1.
49. Id.

50. Id.
percentile—a difference of about two hundred points on the traditional (1600-point) SAT scale. In secondary school achievement tests, the median black high school senior scores at a level comparable to the median white eighth-grader. Somewhat more than half of this gap remains when one controls for a range of standard socioeconomic characteristics, such as parental income and education. As for the “socioeconomic” test gap, much depends on just how “wide” a comparison one makes. The test-score gap between someone in the twenty-fifth and seventy-fifth percentiles of a standard SES scale—a reasonable definition of “high” and “low” SES—is about one-half of a standard deviation. But the gap between someone in the tenth SES percentile and someone in the ninety-fifth SES percentile can be as large as 1.2 standard deviation.

If racial differences in test-score performance are entirely driven by environmental factors—as is the consensus among social scientists and the weight of available research—then true racial differences are zero. In 2004, using data from an especially careful longitudinal study, Roland Fryer and Steven Levitt found that controlling for seven background characteristics could essentially eliminate the test-score gap between black and white five-year-olds. The factors they controlled included not only conventional SES measures but also other environmental factors, such as the number of books at home, the number of hours a television is on at home, and the child’s birthweight. Some of these factors—as well as other things that have been linked to test score differences, such as consistent bedtimes and the number of different words parents use around their young children—are partly cultural and are thus “socioeconomic” only in a very broad reading of that term.

53. See WAYNE J. CAMARA & AMY ELIZABETH SCHMIDT, GROUP DIFFERENCES IN STANDARDIZED TESTING AND SOCIAL STRATIFICATION 7 (College Board 1999), available at http://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-1999-5-group-differences-standardized-testing-social-stratification.pdf (discussing various differences that persist when parental income and education are held constant).
54. Analysis by the authors using data from the National Educational Longitudinal Study data (“NELS”). See also COLLEGE BOARD, supra note 27.
56. Id. at 447–48.
57. See CHRISTOPHER JENCKS & MEREDITH PHILLIPS, THE BLACK-WHITE TEST SCORE GAP 24 (1998) (“[C]hanges in parenting practices might do more to reduce the white-black test score gap than changes in parents’ educational attainment or income.”). It is now common
This context helps explain the Century Foundation's numbers. If one controls for enough individual variations in background and compares the most and least advantaged percentiles of Americans, one obtains a very large "SES" gap and only a very small, unexplained racial residual. But in the actual world of higher education admissions, administrators have only a limited set of indicia to work with, and these are of varying reliability. In this world, making race irrelevant is considerably more difficult.

B. Class Underrepresentation is More Pervasive Than Racial Underrepresentation in Contemporary Higher Education

Blacks typically make up about five to nine percent of enrollment at selective and very selective schools. Since blacks make up about fourteen percent of the college-age population, this means that they are significantly underrepresented in colleges and professional schools by a factor of one-and-a-half to nearly three. This is certainly a problem. But compare this with low-SES students. Students from the bottom quartile of the American socioeconomic distribution make up only about three percent of enrollment at selective and very selective schools. This translates to an underrepresentation factor of eight. Even middle-income students are far less well-represented at America’s most selective schools than blacks.

Another way of seeing this point is to consider a high school senior’s chances of attending a four-year college given all his or her predictive characteristics, including school performance. In this

for thoughtful commentators discussing performance gaps and educational performance to note the need for attention to parenting practices. See, e.g., Nicholas Kristof, Do We Invest in Preschools or Prisons?, N.Y. TIMES, Oct. 26, 2013, at SR13.

58. In my own recent survey of university admissions practices, in which I sought undergraduate admissions data from sixty selective public universities, the handful of schools that actually collected and appeared to consider SES in a systematic way did not report even these limited data.

59. Peter Arcidiacono, Shakeeb Khan, and Jacob L. Vigdor, "Representation versus Assimilation: How do Preference in College Admissions Affect Social Interactions?" 95 JOURNAL OF PUBLIC ECONOMICS 1 (2011), Figure 1.


61. See Carnevale & Rose, supra note 5, at 106 (demonstrating that only three percent of students in the top tier of college selectivity come from the lowest socioeconomic quartile); Sander, supra note 8 at 646–49 (discussing the “relative representation” of various groups in law schools).

62. Recall that this partly reflects the high level of affluence of most blacks at elite schools. See Sander, supra note 8 and accompanying text.
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analysis, blacks, as a group, are more likely than whites to go on to a four-year college by a margin of about thirty percent.\textsuperscript{63} The same analysis by “class” finds that low-SES students (regardless of race) are about seventy percent less likely to attend a four-year college than high-SES students.\textsuperscript{64}

These patterns should not surprise anyone involved in admissions at most selective schools, which often do not even ask applicants about their social or economic background. As discussed in Part I, these schools operate under a powerful racial constraint and have strong incentives to respect it. They are under no comparable pressure to pay attention to socioeconomic diversity, and they have had important (financial) reasons to avoid it. There are exceptions: Harvard, Amherst, Columbia, and several other selective schools have all made significant recent efforts to improve outreach, admissions decision-making, and financial aid—all with a view towards improving their SES diversity.\textsuperscript{65} Public universities in states that have banned or limited the use of racial preferences have often used similar outreach efforts.\textsuperscript{66} In general, however, most elite institutions seem oblivious to the overwhelmingly privileged character of their student bodies.

C. How Efficient are Conventional Metrics of SES?

Suppose a college decides to increase socioeconomic diversity and asks applicants to report their parents’ income. Let us assume that students know and report this information accurately. The school translates this income data into an index, averages this index in with other indices it uses to assess the academic and extracurricular strengths of applicants, and then uses this aggregated index to make its admissions decisions. How well will this approach create a more socioeconomically diverse student body?

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\textsuperscript{63} Sander & Taylor, supra note 15, at 251. However, blacks have far higher attrition from college than whites, for a variety of reasons, including fewer financial resources and mismatch effects. So blacks are about twenty percent less likely than comparable whites to actually earn a bachelor’s degree.

\textsuperscript{64} Id. at 253.


\textsuperscript{66} Kahleenberg & Potter, supra note 11, at 26–62.
For a number of reasons, this approach will probably not work well. First, family income is a rather noisy measure, not least because it varies significantly from year to year (this is particularly true at the low and high ends of the economic spectrum). A household that has a poverty-line income in Year One may have a lower-middle-class income in Year Two. Second, a child with low-to-modest income parents and strong enough academic qualifications to win admission is disproportionately more likely to have better-educated parents than that child’s similarly financially-situated peers.

Third, even within the pool of academically strong high school students from low-income backgrounds, those who have the confidence, know-how, and desire to effectively apply to an elite college are disproportionately likely to have other socioeconomic traits that, in effect, make them less disadvantaged, such as an affluent grandparent or uncle or access to an unusually good secondary education. Legal scholar Deborah Malamud has called this problem “the return of the repressed.”

The comparisons made below in Table 1 between a national sample of high school students conducted in the 1990s and applicants to the Berkeley campus of the University of California during the same period illustrate this idea. Students are classified according to their parents’ income quartile (quartile “1” means, for example, that a student’s parents had a total household income that placed

67. Particularly at the top and bottom end of the economic spectrum, transitory changes in income (due at the bottom to such factors as unemployment, or at the top to such factors as capital gains) make annual income figures somewhat unreliable. Thus, the U.S. Department of Labor’s Survey of Consumer Expenditures for 2012 shows that, for the lowest-income twenty percent of American households, expenditures were more than double reported income. This in large measure reflects the substantial year-to-year variation in income at the bottom of the distribution; short-term increases in income are used to pay off debts incurred when there is little or no income. See U.S. BUREAU OF LABOR STATISTICS, BLS REPORTS 8 (Mar. 2014). Some authors argue that income fluctuations are large enough to produce significant overestimates of society-wide levels of income inequality. See, e.g., Ezro F.P. Luttmer, Measuring Economic Mobility and Inequality: Disentangling Real Events from Noisy Data 30–33 (May 2002) (unpublished manuscript) (on file with the National Bureau of Economics Research), available at http://users.nber.org/~luttmer/mobility.pdf.


69. Malamud accordingly argues that socioeconomic preferences are very flawed strategies for achieving educational diversity and that schools are better off relying on traditional racial preferences. Deborah C. Malamud, Class-Based Affirmative Action: Lessons and Convents, 74 Tex. L. Rev. 1847, 1897 (1996). But there are two flaws in Malamud’s argument. First, this same “return of the repressed” occurs when race alone is used as a measure of diversity (because the most affluent, biracial, non-African American blacks will tend to be those admitted). Second, one can improve SES measures by making them multi-dimensional. See Sander & Taylor, supra note 15, at 247–58.
them in the first quartile of all family households in the United States), which is then cross-tabulated with the highest educational level achieved by either of the student’s parents. If we examine the data closely, two interesting patterns emerge. On the one hand, low-income Berkeley graduates were far more likely to have a college-educated parent (compare columns b and d)—illustrating Malamud’s argument. On the other hand, a great many Berkeley applicants from low-income backgrounds also had poorly-educated parents (compare columns a and c). In other words, “income” by itself not only seems to identify many students with multiple hardships, but also identifies a significant number of students who are, at least arguably, “false positives.”

### Table 1:

**Parental Income, Parental Education, and Presence in the Orbit of a Selective School**

<table>
<thead>
<tr>
<th>INCOME QUARTILE</th>
<th>PARENTS OF NELS (NATIONAL) SAMPLE</th>
<th>PARENTS OF BERKELEY APPLICANTS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(A) % HS DIPLOMA OR LESS</td>
<td>(B) % COLLEGE GRADS</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(C) % HS DIPLOMA OR LESS</td>
</tr>
<tr>
<td>1</td>
<td>59%</td>
<td>2%</td>
</tr>
<tr>
<td>2</td>
<td>35%</td>
<td>5%</td>
</tr>
<tr>
<td>3</td>
<td>21%</td>
<td>12%</td>
</tr>
<tr>
<td>4</td>
<td>11%</td>
<td>32%</td>
</tr>
</tbody>
</table>

*Source: Analysis of NELS and UCOP data by Dr. Yana Kucheva.*

Increasing the number and sophistication of SES indicators used to determine someone’s level of disadvantage can greatly ameliorate the problem of “false positives.” We can (and some existing preference programs do71) take into account not only family income, but also parental education, family wealth, neighborhood, and schooling quality. Moreover, we can develop good algorithms

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70. In part, the “false positives” we observe are an inevitable part of what statisticians call “regression to the mean.” If a student has parents with incomes at the twentieth percentile, and that student’s test scores place him at the ninetieth percentile (within the Berkeley pool), then it would not only be plausible, but probable, that the student’s parental education will fall somewhere between those two extremes.

71. At UCLA Law School, Sander helped to develop an SES diversity program that used seven distinct measures of each applicant’s SES status. The program was not particularly complex to administer and produced dramatic gains in SES diversity. See Sander, *supra* note 8, at 472–73.
to assess how well our targeting works. Schools can also develop auditing mechanisms to ensure that student self-reports of SES characteristics are accurate.

The take-away here is that simple, one-dimensional measures of socioeconomic diversity are likely to be unreliable indicators of true disadvantage. Colleges and universities should instead develop multi-dimensional measures of SES diversity and should adopt auditing mechanisms to ensure both the internal and external validity of the measures they use.

**D. When Do Preferences Become Too Large?**

The “mismatch” literature that has arisen over the past decade or so, gathering considerable steam in the past few years, considers the effect on students when they are admitted as a result of large admissions preferences. Three sorts of consequences have attracted most of the research: learning effects, competition effects, and social effects. Let us consider each of these briefly in turn.

“Learning mismatch” can occur if teachers calibrate the difficulty of instruction to the “middle” of their classes. If there is a wide range of academic preparation among students in a classroom, then those at the top end of the spectrum will be bored and those at the bottom will be lost. Students at either extreme would learn more in a classroom where they were closer to the middle—i.e., where they are close in academic preparation to most of their

72. Consider a simple numerical example. Suppose that we scaled each of the SES variables we use on a 1-to-100 scale. Thus, a parental income of $30,000 might have a scale value of 20, because 20% of all adults with college-age children have family incomes of $30,000 or less. The tendency for privilege to seep back into the system means that if our only SES measure is parental income, and we give a preference to (and admit) a student who scores a “20” on the parental income scale, that student’s parents probably have a significantly higher education than others at the same income level. The parents’ education level might score a “60” on our scale. The large 40-point gap between the factor we consider (income) and the factor we don’t consider (education) signifies a poorly-targeted program. Suppose we then broaden our measures, using parental income, parental wealth, father’s education and the median income of the census tract of the student, and suppose we admit a student who scores an average of “20” on these factors. We would predict that when we then look at a previously unobserved characteristic (e.g., mother’s educational level), that score will be much closer to 20 than before (though it will still tend, on average, to be higher than 20). If it is, say, 30, then we can be satisfied that we have a rather well-targeted system.

73. See Sander & Taylor, supra note 15, at 33–111 (discussing the primary strands of mismatch research in science and academia, law school, social interaction, and career success).

peers. Learning mismatch has been demonstrated experimentally in classrooms, but it is generally hard to measure this effect in American higher education because few have attempted to measure learning in a uniform way across college classrooms. Such measures do exist in American legal education, where nearly all graduates are required to take a bar exam to become licensed attorneys. Sander published an analysis in 2005 that used bar passage data to argue that learning mismatch effects were significant and serious for African Americans receiving large preferences to law schools. Although this claim has been hotly debated and remains controversial, its critics have been effectively rebutted, and the most authoritative study of this issue concludes that law school mismatch effects are real and sizeable.

“Competition mismatch” is perhaps best illustrated by the problem of “science” mismatch. Suppose that a high school senior


78. See Williams, supra note 74, at 173–76, 187–93 (directly rebutting the Ayres & Brooks and Rothstein & Yoon papers); Sander, supra note 8, at 933–50 (directly rebutting both papers). In the fall of 2012, in response to an amicus brief submitted by Sander & Taylor to the U.S. Supreme Court, a group of empirical scholars submitted a brief (the “Empirical Scholars Brief”) which purported to rebut mismatch generally and law school mismatch in particular. But this appeared to be chiefly a rhetorical exercise. None of the central critiques of the brief were even factually accurate, as one of us pointed out to the authors of the brief in a July 2013 letter; none of the authors have responded and there has been, so far as we know, no follow-up attempt by the authors to publish their claims. For a discussion of the affair, see Richard Sander, Mismatch and the Empirical Scholars Brief, 48 VALPARASO UNIV. L. REV. (forthcoming, June 2014).

79. See generally Williams, supra note 74, at 178–93. The Williams paper is powerful because it (a) uses models that directly build upon those of the leading critics, and shows that such models generally produce strong evidence of mismatch; (b) shows that its mismatch results are powerful by testing (and presenting full results for) several dozen different models; and (c) was published in perhaps the leading peer-reviewed journal for empirical legal studies (none of the critiques were published in peer-reviewed journals). Id.

80. See Sander & Taylor, supra note 15, at 35–44 (introducing the science mismatch issue). “Competition mismatch” is also well-illustrated by the problem of “academic mismatch,” where students who aspire to academic careers and receive a large admissions preference into college see their grades suffer from the greater competition and lose interest in an academic career. See Stephen Cole & Elinor Barber, Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students 13–17, 22–25, 187–212 (2003) (examining academic fit as one possible determining factor in black students’ career selection, particularly as to academia).
aspires to become a chemist. If she has a solid high school performance and attends a good college, the odds are about four in ten that she will attain a bachelor’s degree in chemistry or some other “STEM” field. But what if she receives a large admissions preference and attends an even better college, where most of her peers have higher test scores and more advanced preparation in the sciences? In that case, she is likely to struggle in her first-year science courses (which are generally graded on a tough curve) and, because these courses teach a series of topics that build upon one another, difficulty in the first month will likely lead to even greater difficulty in the months ahead. The result can be low grades in STEM courses, disenchantment with science, and a decision to either transfer out of the sciences or to drop out of college altogether.

A growing number of unrebutted studies have shown that the effect on science students is pervasive and serious among those who receive preferences to selective schools. Students of any race who wish to pursue a STEM degree and who receive a large preference to a selective school are at a dramatically greater risk of dropping out of science or of college altogether than students who are otherwise identical but do not receive a preference (or receive a smaller one). Science mismatch increasingly seems like a leading suspect in explaining a long-standing paradox: even though African American high school seniors have greater interest in STEM careers than

81. See A. Christopher Strenta et al., Choosing and Leaving Science in Highly Selective Institutions, 35 RES. IN HIGHER EDUC. 513, 541–44 (1994).
82. Id.
83. See generally Frederick L. Smyth & John J. McArdle, Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice, 45 RES. IN HIGHER EDUC. 353, 372–76 (2004) (providing a particularly powerful analysis of the effects of science mismatch); see also Rogers Elliott et al., The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, 37 RES. IN HIGHER EDUC. 681 (1996); Peter Arcidiacono, Esteban M. Aucejo, Ken Spenner, What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice, IZA J. LAB. ECON. (2012) (examining the role of science mismatch primarily in black students’ choice of college major and the resulting effect on GPA spreads across all ethnicities); Peter Arcidiacono, Esteban M. Aucejo, V. Joseph Hotz, University Differences in the Graduation of Minorities in STEM Fields: Evidence from California (Natl Bureau of Econ. Research Working Paper No. 18799, Feb. 2013), available at http://public.econ.duke.edu/~psarcidi (demonstrating that science mismatch has a greater effect on students who receive admissions preference than students who receive no admissions preference and that more black students would graduate with science degrees if they had attended less selective universities).
84. Smyth & McArdle, supra note 83, estimate that a large preference reduces by roughly half the odds of a student achieving a STEM degree.
do white seniors, blacks are only about one-seventh as likely as whites to achieve a doctorate in a STEM field.\textsuperscript{85}

Research on “social mismatch” examines how large preferences affect social dynamics on campus. Scholars at Duke have found that college students at selective schools, regardless of race, tend to form friendships with other students who have similar levels of academic preparation before college and that such friendships tend to last longer.\textsuperscript{86} Thus, many white-black friendships formed during students’ first months at Duke disappeared by junior year as students sorted themselves into friendships according to academic interests and proficiency.\textsuperscript{87} The end result was that African American students at Duke had no more interracial friendships in college than in high school, even though nominally the college was far more racially diverse than most of the students’ high schools.\textsuperscript{88}

The social mismatch literature has profound implications for the effect of large preferences for the general campus environment as well as the students who receive them. A central rationale for affirmative action—and seemingly the principal legal rationale—is that a diverse student body confers important educational benefits on all students. But if large preferences undermine student friendships and if an easily-identified group on campus is primarily there by virtue of large preferences, then affirmative action can have the effect of fostering segregation and even cross-racial hostility or negative stereotyping. Uniformly, the extensive pro-preference literature on the “educational benefits of diversity” fails to take into account the way that preference levels affect social dynamics and inter-racial learning on campus, which is one reason this literature is often dismissed as ideologically biased and unscientific.

All three forms of mismatch suggest that preferences can be harmful if they are very large. But importantly, none of the mismatch literature contends that small preferences are harmful, and there are good empirical and theoretical reasons to think that small admissions preferences might avoid all of these harms or at least


\textsuperscript{86} See Arcidiacono, Aucejo, Spenner, supra note 83, at 2, 7–10, 13; see also Arcidiacono et al., Racial Segregation Patterns in Selective Universities, 56 J. L. & Econ. 1039, 1058–59 (forthcoming 2014).

\textsuperscript{87} See Arcidiacono et al., Racial Segregation Patterns in Selective Universities, 56 J. L. & Econ. 1039, 1058–59 (forthcoming 2014).

\textsuperscript{88} Id.
that in those cases the benefits are greater than the harms.\textsuperscript{89} A crucial question, then, is when preferences shift from helpful or benign to mostly harmful. Thus far, mismatch literature has generally not identified such thresholds, partly because the available data is generally too blurry to allow analysts to draw such distinctions.\textsuperscript{90}

Any prudent university leader, we think, should draw two conclusions from the current literature on mismatch: first, that there are compelling reasons to be very wary of large preferences, regardless of the basis on which they are offered, and second, that universities should foster the sort of data transparency and research that would help social scientists determine the “sweet spot” above which preferences have predominantly beneficial effects.

\textbf{D. What are the Racial Dividends of Socioeconomic Preferences?}

The degree to which socioeconomic (“SES”) preferences can provide “race-neutral” diversity is, for many in higher education, the beginning and end of their interest in such preferences.\textsuperscript{91} This is not true of the general public, which has long supported “class” over “race” as a basis for preferences.\textsuperscript{92} And the much-discussed increase in economic inequality and the apparent decline of class mobility in America has probably contributed to the marked increase in value some education leaders attach to SES diversity in recent years.\textsuperscript{93} Nonetheless, the degree to which SES preferences produce racial diversity is a central question we must address.

\textsuperscript{89}. See Duflo et al., supra note 75. In the experiment described by this paper, students were divided by skill level into two “tracks,” and their learning sharply increased compared to untracked control groups. Since there was a continuum of student skill levels, there were students within each track who had academic skills well below the mean of their peers, but the level of potential “mismatch” was effectively cut in half. The implication is that mismatch effects are curvilinear and decline disproportionately as the size of the credential disparity within the classroom is reduced.

\textsuperscript{90}. The limitations in current data on law school mismatch and the effects of those limitations are nicely discussed in Williams, supra note 74. Williams notes that much more accurate analysis would be possible if the California Bar would make its extensive dataset on bar scores available. In December 2013, the California Supreme Court ruled that there was a public right of access to this very data, so it is possible that accurate estimates of the relationship between preference size and mismatch effect will be forthcoming. Sander v. State Bar of California, 314 P.3d 488, 504–06 (2013).


\textsuperscript{92}. Sander & Taylor, supra note 15, at 188.

\textsuperscript{93}. See discussions of the need for colleges to act as drivers of social mobility. E.g., Emily DeRuy, Why Few Poor Kids at Top Colleges Matters, NAT‘L J. (Dec. 4, 2013), http://www.nationaljournal.com/next-america/education/why-few-poor-kids-at-top-colleges-matters-20131204; Catharine Hill, Improving Socioeconomic Diversity at Top Colleges and Universities, HUFFINGTON
A good place to start is by thinking about the strength of the association between SES measures and race. It turns out that this association varies greatly, depending on the particular measure of SES and the particular race under consideration. We commonly use correlations to measure the strength of association between two continuous variables, but racial categories are dichotomous (someone either is or is not of a particular race), and many SES variables are categorical (taking on one of limited number of defined values, such as one’s level of educational achievement). Sophisticated measures exist that are specifically designed to evaluate the association between such variables, but we will use correlations here in the interest of keeping this discussion straightforward and reasonably intuitive, even though this oversimplifies and to some extent distorts the actual relationships.

As most readers know, correlations can vary from -1 to 1; a correlation between two factors of 1.0 (or -1.0) means that they predict one another perfectly; a correlation of 0 means that the two factors are not associated at all. If an SES factor were correlated with a particular race at 1.0, then its racial dividend would be 100% and it would be a fungible substitute for race.

Many observers tend to assume that the correlation between social disadvantage and race is extremely high; that is why, for example, many educators erroneously assume that racial preferences do a good job of creating SES diversity on campus. They might point out that median black household income in the United States is still only a little more than sixty percent of the “white” (non-Hispanic white) median; surely this must mean that household income and race are highly correlated? But group correlations are often a very poor predictor of individual-level correlations; the actual correlation between black/non-black and household income, for a typical national sample of households, is about .20—a level that, as we will see, implies a pretty poor dividend either when race is used to produce income diversity or vice versa.

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94. For example, one could use “rank-order” correlation instead of a Pearson’s correlation to compare ordered groups. See Perry Hinton, Statistics Explained 207–15 (2d ed. 2004).

95. This, of course, was the point of departure for Richard Kahlenberg’s landmark book, The Remedy (1996).

96. See Table 2, infra.
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. Yet it is the latter group that supplies most of the relatively high-achieving students that elite colleges would like to admit. The following table illustrates the dilemma:

**Table 2:**
**Correlation of a General Measure of SES with Black/White, National Sample of Students, 1992**

<table>
<thead>
<tr>
<th>SES QUARTILE</th>
<th>SES CORRELATION WITH BLACK/WHITE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bottom</td>
<td>.22</td>
</tr>
<tr>
<td>Lower-middle</td>
<td>.15</td>
</tr>
<tr>
<td>Upper-middle</td>
<td>.13</td>
</tr>
<tr>
<td>Top</td>
<td>.08</td>
</tr>
<tr>
<td>All quartiles</td>
<td>.20</td>
</tr>
</tbody>
</table>

Source: Analysis of NELS data by Yana Kucheva for the authors.

There is some good news, however. Richer measures of socioeconomic disadvantage suggest that such factors as household wealth and neighborhood poverty are important positive and negative predictors of a child’s long-term outcomes, and these measures are more closely associated with race. These factors can improve the SES/race correlation and increase the validity of our SES measures of disadvantage. These can increase our SES/race correlation to

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97. We obtained this data from UCLA through a public records request, and have posted it here (the "pre-holistic, 2004–06 UCLA admissions data"): http://seaphe.org/?page_id=678.


the neighborhood of .45—perhaps somewhat higher or lower, depending on the sophistication of the measures, the part of the country from which applicants are drawn, and other intangible factors.

To understand the practical import of these issues, it is useful to explore in some depth a fairly realistic example. Tables 3 and 5 present the results of a series of simulations using data adapted from UCLA’s undergraduate admissions over three years, from 2003–04 through 2005–06. UCLA is a useful example because it gathers an unusually broad array of socioeconomic data and—during the period we use—developed them into innovative indices of disadvantage. If we consider just black and white applicants in UCLA’s applicant pool, the correlation between “white” and “parent’s educational attainment” is about .25; the correlation between “white” and “parental income” is about .31; and the correlation between “black” and a “life challenges” score, assigned by admissions officers based on reading applicants’ files, is .39. We made slight modifications to these three SES measures so that they had “weak,” “medium,” and “strong” correlations with race of .15, .30, and .45 respectively.

For the simulations in Tables 3 and 5, we assumed that twenty percent of the applicants were “underrepresented minorities” and that the majority and minority applicants had the same distribution of academic credentials as white and black applicants to UCLA. We assigned each applicant an “academic index”—a weighted combination of SAT I scores and high school grades—that is scaled by the performance of all high school seniors. Thus, a value of ninety on this scale means that a student’s credentials put him at roughly the ninetieth percentile of all high school seniors. From this pool, our hypothetical school admits twenty percent of its applicants.

For each of the twelve simulations in Table 3, we report several types of outcome. Let us illustrate these by discussing the first two rows. Simulation (a) bases admission strictly on the academic credentials of applicants; they are arrayed from highest academic index to lowest and admitted from the top. This produces a class

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100. The point is to illustrate the range of likely correlations that SES indices might have with race. The “modifications” consisted of mixing a random element into the educational variable (to lower its correlation from .25 to .15) and mixing in a small sampling of the race variable into the income and life-challenge indices to slightly raise them (from .31 to .35, and from .39 to .45, respectively).

101. During this period, UCLA in fact admitted about twenty-two percent of its applicants, and the mean credential of its students was at about the ninety-second to ninety-third percentiles. For calculations by the authors from UCLA’s released admissions data, see UCLA Undergraduate Admission, Profile of Admitted Freshmen, http://www.admissions.ucla.edu/prospect/adm_fr/frosh_prof.htm (last visited Apr. 1, 2014).
that has few minority students (only 4% of the admits, though minorities are 20% of the applicants) and few students from the bottom half of the SES spectrum (only 6% of the admits, though they are also about 20% of the applicants). Admitting only by academic index of course maximizes the credential eliteness of the school’s student population (ninety-fifth percentile, as reported in column 4), and it means that no students are admitted who fall below the ninety-first percentile (column 5). Finally, column 6 tells us about the average academic gap between majority and minority students. Since there are no preferences in this simulation, that gap is small—only about three percentile points.

### Table 3:

**Admissions to a Hypothetical School**

<table>
<thead>
<tr>
<th>METHOD</th>
<th>WEIGHT (1)</th>
<th>MINORITY PRESENCE (2)</th>
<th>MODERATE SES PRESENCE (3)</th>
<th>MEAN ACADEMIC PERCENTILE (4)</th>
<th>PERCENTILE CUTOFF FOR ADMISSIONS (5)</th>
<th>MEAN RACE ACADEMIC GAP IN PERCENTILES (6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>n/a</td>
<td>4%</td>
<td>6%</td>
<td>95</td>
<td>91</td>
<td>3</td>
</tr>
<tr>
<td>b.</td>
<td>n/a</td>
<td>4%</td>
<td>6%</td>
<td>95</td>
<td>91</td>
<td>3</td>
</tr>
<tr>
<td>c.</td>
<td>10%</td>
<td>20%</td>
<td>9%</td>
<td>93</td>
<td>66</td>
<td>16</td>
</tr>
<tr>
<td>d.</td>
<td>30%</td>
<td>4.5%</td>
<td>13%</td>
<td>93</td>
<td>89</td>
<td>4</td>
</tr>
<tr>
<td>e.</td>
<td>50%</td>
<td>7%</td>
<td>24%</td>
<td>90</td>
<td>70</td>
<td>7</td>
</tr>
<tr>
<td>f.</td>
<td>10%</td>
<td>4%</td>
<td>8%</td>
<td>94</td>
<td>89</td>
<td>4</td>
</tr>
<tr>
<td>g.</td>
<td>30%</td>
<td>6%</td>
<td>13%</td>
<td>93</td>
<td>83</td>
<td>5.5</td>
</tr>
<tr>
<td>h.</td>
<td>50%</td>
<td>10%</td>
<td>24%</td>
<td>90</td>
<td>70</td>
<td>7</td>
</tr>
<tr>
<td>i.</td>
<td>10%</td>
<td>4.5%</td>
<td>8%</td>
<td>94</td>
<td>89</td>
<td>4.5</td>
</tr>
<tr>
<td>j.</td>
<td>30%</td>
<td>7%</td>
<td>13%</td>
<td>93</td>
<td>83</td>
<td>6</td>
</tr>
<tr>
<td>k.</td>
<td>40%</td>
<td>8.5%</td>
<td>18%</td>
<td>91</td>
<td>76</td>
<td>8</td>
</tr>
<tr>
<td>l.</td>
<td>50%</td>
<td>12%</td>
<td>24%</td>
<td>89</td>
<td>70</td>
<td>10</td>
</tr>
<tr>
<td>m.</td>
<td>60%</td>
<td>19%</td>
<td>34%</td>
<td>83</td>
<td>65</td>
<td>10</td>
</tr>
</tbody>
</table>

Source: Calculations by the authors; see text for methods.

Simulation (b) is a simplified version of an admissions system that relies predominantly on racial preferences to achieve diversity. The simulation admits the top 20% of “majority” applicants and the top 20% of “minority” applicants. Minorities are thus represented among admittees (column 2) at the same rate as they are applicants. This approach generates a little bit of extra socioeconomic diversity, but not much, since most of the minority applicants with the strongest academics are from affluent households. It also produces a very large gap in the academic credentials of “majority” and “minority” students. In this simulation, the majority is even stronger academically than in simulation (a), because the school is admitting fewer such students and is thus more selective. But simulation (b) replicates among admits the large gap between average majority and minority credentials in the admissions pool. The mean “minority” admit is roughly at the eighty-first percentile of
academic qualifications, and some students are admitted with credentials as low as the seventy-second percentile. This system thus has very high potential for mismatch effects.

Simulations (c) through (m) rely purely on socioeconomic preferences to achieve diversity. These ten variations use three SES measures that have progressively higher correlations with race; these in turn are each applied with three progressively higher weights in the balance with academic factors. Thus, in simulation (c), the SES index has a correlation of .15 with race (quite weak), and admissions officers give an SES index that is one standard deviation above the applicant mean one-tenth the weight of a one standard deviation increase in the academic index.102 If the SES index weight is one-tenth, and the academic index weight is ninetenths, then this means we give nine times as much weight to academics as to SES. Table 4 illustrates how this plays out for several alternative weights. Note a fundamental difference in our treatment of SES and race: with race, there is no “weighting” race against academic credentials, because admissions decisions essentially operate independently for majority and minority applicants. In our simplified model, this looks very much like a quota. While racial quotas have been held unconstitutional by the Supreme Court,103 most selective schools that explicitly account for race use other techniques, such as targets or race-norming that have very much the same effect.104 Socioeconomic factors are different: they are matters of degree, rather than fixed characteristics. One could simply define a socioeconomically disadvantaged group and use targets to admit that specific group, but few universities do this and that is not the approach we take here. One can better understand the nature of an SES preference system and its interaction with other factors by treating it as something that varies across a wide spectrum, thus considering each applicant’s relative contribution to SES diversity. That is essentially what this weighting system does.

102. Since the weighting is done by standard deviations, there is no need for the SES and academic measures to be on the same scale; they must simply be made as “continuous” as possible.
In considering these simulation results, several interesting patterns emerge. Note that very small SES preferences (i.e., those with a weight of ten percent) have only modest effects on the SES composition of the class and make trivial contributions to racial diversity. Moderate preferences (weight thirty percent) do produce meaningful SES diversity and, when there is a relatively high SES/race correlation in the index (e.g., simulation (j)), they produce nearly twice as many minority admittees as the race-blind system (simulation (a)). Giving SES preferences a weight of .5 produces very substantial SES diversity. In scenarios (e), (h), and (l), applicants from roughly the bottom half of the SES distribution make up twenty-four percent of the admitted class (and since they are only twenty percent of applicants, they are slightly overrepresented in that sense).

Just as important as the racial and socioeconomic effects of these various strategies are the academic effects. Here, several patterns are notable. First, there is a large academic price to be paid for using substantial SES preferences, at least in this admissions pool. This is partly because SES preferences potentially affect a much larger proportion of applicants than do preferences for a racial minority, and also, seemingly paradoxically, because the proportion of low-SES students in this applicant pool is modest. Thus, a very large proportion of applicants receive some kind of SES boost in many of these simulations. We can also see in the data a fundamental challenge in any system that uses race-neutral methods to achieve racial diversity: the academic costs of augmenting the racial dividend go up at an increasing rate. That is, each additional minority admit exacts a slightly higher academic cost to the overall strength of the student body. This is not nearly as true of traditional racial preferences, since the size of the preference in those systems has no direct effect on how majority students are chosen.

On the other hand, the mere fact that these preferences lower the average academic strength of the admitted students and the fact that preferences are not limited to racial minorities mean that the

<table>
<thead>
<tr>
<th>Weighting Level</th>
<th>SES Weight</th>
<th>Academic Weight</th>
<th>Academic to SES Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>10%</td>
<td>10%</td>
<td>90%</td>
<td>9</td>
</tr>
<tr>
<td>30%</td>
<td>30%</td>
<td>70%</td>
<td>2 1/3</td>
</tr>
<tr>
<td>50%</td>
<td>50%</td>
<td>50%</td>
<td>1</td>
</tr>
<tr>
<td>60%</td>
<td>60%</td>
<td>40%</td>
<td>2/3</td>
</tr>
</tbody>
</table>
academic gap between majority and minority students is much smaller in all of these simulations than it is under the racial preference regime.

The high academic cost of the larger SES preferences in these models would, we think, render it unpalatable to most selective schools. A college that rejected so many of its academically strongest applicants would find that, in the next admissions cycle, its applicant pool was not quite so strong, and the school would be in great danger of entering the negative feedback loop we discussed in Part I.

This then leads to an interesting question: What happens if we mix small racial preferences into a system largely based on SES preferences? Table 5 illustrates several possibilities, focusing on SES measures that start out with a high racial correlation (i.e., of .45).

<table>
<thead>
<tr>
<th>METHOD</th>
<th>WEIGHT</th>
<th>MINORITY PRESENCE (1)</th>
<th>MODERATE SES PRESENCE (2)</th>
<th>MEAN ACADEMIC PERCENTILE (3)</th>
<th>PERCENTILE CUTOFF FOR ADMISSIONS (4)</th>
<th>MEAN RACE ACADEMIC GAP IN PERCENTILES (5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small race pref., using SES preferences with a race correlation of .45</td>
<td>a. .3</td>
<td>7.5%</td>
<td>14%</td>
<td>94</td>
<td>85</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>a. .35</td>
<td>10%</td>
<td>10%</td>
<td>93</td>
<td>82</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>p. .4</td>
<td>12%</td>
<td>20%</td>
<td>92</td>
<td>78</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>q. .45</td>
<td>15.5%</td>
<td>23%</td>
<td>90</td>
<td>74</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>r. .5</td>
<td>18%</td>
<td>27%</td>
<td>89</td>
<td>70</td>
<td>9</td>
</tr>
</tbody>
</table>

In these five simulations, we incorporate a racial preference that is about one-third as large as the SES preference. As we would expect, the direct use of race increases the minority presence, but, perhaps unexpectedly, the racial impact is relatively large (raising minority numbers some forty percent above their levels from an otherwise similar SES system). Despite this jump, the effect on the mean racial credential gap (column 6) is quite modest compared to a system of pure racial preferences.

Thus, for example, simulation (p) manages to balance several goals. The mean academic percentile is only slightly lower than that of a pure racial preference system; it is within the bounds of the tradeoffs selective colleges currently make between academic and non-academic admissions goals. The combined number of

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105. That is to say, few colleges today simply maximize the academic strength of their student body; most accept a loss that, in effect, lowers the “average percentile” of their students by 2 to 4 points in pursuing other admissions goals, including of course goals other than racial and SES diversity. See generally William G. Bowen & Derek Bok, The Shape of the River (1998).
minorities and low-to-moderate SES students is also comparable to that of a pure racial preference system, and it is more balanced between racial and SES goals. Notably, the weakest students in this regime (column 5) are significantly stronger than those in a pure racial preference system, and the racial preparation gap is far smaller. This follows directly from using multiple factors to achieve diversity rather than relying on one student characteristic and reaching as deeply as necessary into the applicant pool to meet that specific diversity goal.

E. What Happens if We Deepen the Pool?

As we noted earlier, low-SES students are far less likely than high-SES students to attend a four-year college, even when we hold the level of academic achievement constant.\textsuperscript{106} Recent research has demonstrated a related fact: vast numbers of very talented low- and moderate-SES students do not even make it into the applicant pool for selective colleges and universities. This is partly a failure of high school counseling, partly a reflection of the low priority many selective schools give to finding low-SES students, and partly just the greater difficulty of locating high-promise, low-SES students compared to the relative ease of identifying upper-middle-class minorities. Table 6 illustrates this problem, using a simple and arbitrary measure of “high-achieving students” (those scoring above 1200 on the old-scale SAT I) and an arbitrary set of elite schools to show the dramatic disparities in the rates at which low-SES and high-SES students apply to these schools.

\textsuperscript{106} See supra Part II.
TABLE 6:
RATES AT WHICH HIGH-ACHIEVING STUDENTS APPLY TO VERY ELITE COLLEGES BY RACE AND SOCIOECONOMIC STATUS, 1999

<table>
<thead>
<tr>
<th>SOCIOECONOMIC QUINTILE</th>
<th>RACE</th>
<th>ASIAN AMERICAN</th>
<th>LATINO</th>
<th>ANGLO</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>4</td>
<td>34</td>
<td>8</td>
<td>14</td>
</tr>
<tr>
<td>2</td>
<td>8</td>
<td>37</td>
<td>16</td>
<td>14</td>
</tr>
<tr>
<td>3</td>
<td>15</td>
<td>41</td>
<td>22</td>
<td>18</td>
</tr>
<tr>
<td>4</td>
<td>25</td>
<td>47</td>
<td>30</td>
<td>22</td>
</tr>
<tr>
<td>5</td>
<td>48</td>
<td>61</td>
<td>45</td>
<td>34</td>
</tr>
</tbody>
</table>

Note: The students analyzed here scored 1200 or higher on their combined SAT Math and Verbal tests in 1999; each cell describes the percentage of students in that cohort who applied to one of ten very elite colleges (the eight Ivy League colleges, plus Duke and Stanford). Calculations by Flori So for the authors, using 1999 College Board data.

These overlooked “diamonds in the rough” have gained greater visibility because of the powerful, influential work of Caroline Hoxby and Christopher Avery and because of a series of New York Times articles by David Leonhardt, the paper’s Pulitzer Prize-winning Washington bureau chief. Colleges have real potential to develop new mechanisms—ideally collective mechanisms, as discussed in Part IV—to do a better job of making their applicant pools look like the actual pool of academically successful students in American society. The simulations in Table 7 illustrate just how important is the ability to reach more deeply into the talent pool. We use the same model ingredients as in Tables 3 and 5, except that within each tier of academic credentials, we have adjusted the applicant pool to reflect the actual socioeconomic and racial distribution of high school seniors with those qualifications. For example, in our original applicant pool (based closely, as noted earlier, on the UCLA applicant pool for 2004-06), about 80% of the students whose credentials place them in the eighty-eighth to ninetieth percentile of all American seniors are from the top quartile of the SES distribution; only 10% are from the bottom half. When we adjust the pool to reflect actual academic achievement among high


school seniors, only 50% of the students are from the top quarter, and 25% are from the bottom half. This means that our SES preferences have many more students with which to work, and as a result the diversity effects of those preferences are far greater.

### Table 7:
Admission Simulations with a Representative Applicant Pool

<table>
<thead>
<tr>
<th>METHOD</th>
<th>WEIGHT (1)</th>
<th>MINORITY PRESENCE (2)</th>
<th>MODERATE SES PRESENCE (3)</th>
<th>MEAN ACADEMIC PERCENTILE (4)</th>
<th>PERCENTILE CUTOFF FOR ADMISSIONS (5)</th>
<th>MEAN RACE ACADEMIC GAP IN PERCENTILES (6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>s. Academic index only</td>
<td>n/a</td>
<td>5%</td>
<td>12%</td>
<td>95</td>
<td>91</td>
<td>3</td>
</tr>
<tr>
<td>t. Racial preferences</td>
<td>n/a</td>
<td>20%</td>
<td>15%</td>
<td>93</td>
<td>77</td>
<td>13</td>
</tr>
<tr>
<td>u. SES, (w/ race corr .45)</td>
<td>30%</td>
<td>10%</td>
<td>27%</td>
<td>92</td>
<td>83</td>
<td>5</td>
</tr>
<tr>
<td>v.</td>
<td>40%</td>
<td>17%</td>
<td>40%</td>
<td>89</td>
<td>77</td>
<td>6</td>
</tr>
<tr>
<td>w.</td>
<td>50%</td>
<td>21%</td>
<td>24%</td>
<td>87</td>
<td>69</td>
<td>9</td>
</tr>
<tr>
<td>x. SES (w/ race corr. 45), plus small racial pref.</td>
<td>30%</td>
<td>14%</td>
<td>26%</td>
<td>92</td>
<td>80</td>
<td>7</td>
</tr>
<tr>
<td>y.</td>
<td>35%</td>
<td>17%</td>
<td>34%</td>
<td>91</td>
<td>78</td>
<td>7</td>
</tr>
<tr>
<td>z.</td>
<td>40%</td>
<td>20%</td>
<td>39%</td>
<td>89</td>
<td>75</td>
<td>7</td>
</tr>
<tr>
<td>aa.</td>
<td>45%</td>
<td>25%</td>
<td>45%</td>
<td>87</td>
<td>72</td>
<td>8</td>
</tr>
<tr>
<td>bb.</td>
<td>50%</td>
<td>29%</td>
<td>50%</td>
<td>84</td>
<td>69</td>
<td>8</td>
</tr>
</tbody>
</table>

Source: Calculated by the authors; see text and notes accompanying Table 3 for details.

The specific simulations shown in Table 7 correspond to the most promising simulations (in achieving multiple goals) from Tables 3 and 5, but here use the deepened applicant pools. Models (u) through (w) all use an SES preference that has a .45 correlation with race, apply varying weights, and eschew any racial preference. The final five of these ((x) through (bb)) include the same small racial preference used in Table 5 (equal to about one-third of the SES preference). Compared with our earlier simulations, these models produce far more socioeconomic diversity and significantly more racial diversity—in both cases because the applicant pools better reflect the actual talent pool. This makes it possible to create more diverse student bodies at lower academic cost and with generally less potential for mismatch.

Consider, for example, simulations (v) and (y). These models produce substantial racial diversity approaching the levels of a conventional “race only” system but have dramatically lower levels of mismatch potential (the racial gap in credentials is less than half what it is in simulation (b)) and dramatically higher levels of socioeconomic diversity—higher even than the SES diversity in Table 3 models that gave SES far greater weight. Moreover, they admit classes that have average academic credentials only one or two points lower than conventional race-preference systems. These strike us as
sweet spots, models that would appeal to university leaders as academically plausible, with attractive diversity levels and much healthier climates for diversity students to flourish.

We emphasize that these simulations are exploratory. If we used the applicant pool from a different selective college as our starting point, we might well get significantly different results. There are multiple ways of assigning preferences and these alternative methods might also change the pattern of results here in meaningful ways. In particular, note that we have not specifically done simulations of “top x percent” plans, in which colleges achieve diversity by guaranteeing admission to students with top ranks in their high school classes. Our simulations attempted to do something similar, by taking into account data on the home neighborhood and high school characteristics of applicants. But it is possible that in some states, high school segregation is so high that the use of high school proxies might produce higher correlations with race than in any of our simulations.

Nonetheless, we believe this exercise yields one general lesson and several more specific ones.

The general lesson is that we need a literature of admissions simulations. That literature must be specific enough and transparent enough for both scholars and university officials to easily replicate results and make direct comparisons across simulated systems. Understanding the contours of applicant pools, the choices in designing preferences, and the tradeoffs involved in various designs is essential to progress in this field, and the simulation is the basic tool of the trade.

As to the specific lessons, we advance the following as hypotheses our data and simulations support:

—Measures of SES have widely differing associations with race. Those measures that are multi-dimensional and take account of such factors as family wealth, neighborhood poverty, and school quality are likely both to be richer measures of disadvantage and to yield higher racial dividends.

109. For example, the SES preference system inaugurated by UCLA in 1997, and used in some modified form for many years, awarded applicants preference points on the basis of seven distinct SES characteristics, only to those applicants who were at least one standard deviation below the applicant mean on that characteristic. See Sander, supra note 5, at 476–81.

110. The best known of these is the “top ten percent plan” used in Texas. An analysis of data from Texas that has some analogs to the analyses in this section is Marta Tienda and Angel Harris, Hispanics in Higher Education and the Texas Top 10% Plan, 4 Race & Soc. Problems 57 (2012).
—SES preferences, at least when applied universally as in these examples, tend to impose a greater downward pull on the average academic credentials of an admitted class than do racial preferences. But they also tend, ceterus paribus, to create smaller academic gaps within a class across racial or SES lines.

—The academic cost of achieving specific gains in either racial or SES diversity goes up at an increasing rate as the racial/SES targets go up.

—A combination of small racial preferences with moderate SES preferences is more effective than either type of preference in isolation in achieving the multiple goals of maximizing diversity while minimizing the academic cost of preferences and the danger of mismatch.

—The applicant pools of selective schools tend not to capture vast numbers of low- and moderate-SES students with strong academic records. Capturing these “diamonds in the rough” greatly increases the power of SES preferences to diversify a selective college class at modest academic cost. Smoothing the path for such students is also intrinsically important on social justice grounds.

F. The “Collective Action” Problem in Reforming Preferences

When the University of California began to implement race-neutral policies in the late 1990s, the effects on racial diversity varied enormously from one setting to another. At UC Berkeley Law School (the system’s most elite law school, hereinafter “UCBLS”), the number of enrolled blacks fell by ninety-five percent in the first year of race-neutrality and the number of Hispanics fell by half.\footnote{111 Memorandum from the Univ. of Cal. Office of the President on Admissions Statistics for Berkeley, Davis, UCLA, Hastings, Texas, and Washington (circa 2000) (on file with author).} At UC’s Irvine undergraduate campus, in contrast, the first year of race-neutrality brought a forty-five percent increase in black enrollment and a twenty-five percent increase in Hispanic enrollment.\footnote{112 See Univ. of Cal. Office of the President, Student Affairs, Admissions, University of California Application, Admissions, and Enrollment of California Resident Freshmen for Fall 1989 Through 2012 (Mar. 2013), available at http://www.ucop.edu/news/factsheets/2012/flowfrosh-ca-12.pdf.} It is true that Irvine had smaller racial preferences than UCBLS to begin with and was somewhat more proactive than UCBLS in developing strategies, such as SES preferences and improved outreach,
that would counterbalance the elimination of racial preferences.\textsuperscript{113} However, their peers’ behavior was the main driver behind the dramatic difference in outcomes between these institutions.

UCBLS is generally ranked as a top ten law school in the United States, and it competes on a national market with other top-ten schools—all of which were aggressively using racial preferences the year that UCBLS stopped. Minority students that eighth-ranked UCBLS might admit on race-neutral grounds would therefore be very likely to receive a preferential admission (and a recruitment scholarship to boot) from the “top three” law schools: Yale, Harvard, and Stanford. Indeed, UCBLS’s yield on African American admits when it shifted to race neutrality fell from twenty-six percent to six percent.\textsuperscript{114}

In contrast, UC Irvine drew the vast majority of its students from California.\textsuperscript{115} Its main competitors—for reasons of cost, geography, and selectivity—were other UC schools, such as UC San Diego and UCLA, which were also operating under the effect of a racial preference ban.\textsuperscript{116} Irvine consequently faced a much smaller threat of poaching by race-conscious competitors than UCBLS. Irvine’s yield from African American and Hispanic admits thus went \textit{up} sharply.\textsuperscript{117}

This highlights a final important lesson about shifts to race-neutral admissions. The simulations we just presented in Section II.D all focused on who was \textit{admitted}. But from the pool of admittees, who actually \textit{enrolls} will be heavily driven by the degree to which one’s competitors pursue similar or at least complementary policies. An institution that moves unilaterally from racial preferences to socioeconomic preferences will find its yield rate of racial minorities drops (because those students will receive, through racial preferences, better offers from more elite schools), and its yield rate from Anglos and Asians will rise (because SES-preferred Anglos and Asians are not receiving preferences from other schools). Thus, even a school’s socioeconomic diversity could be skewed away from underrepresented minorities. In short, selective institutions

\textsuperscript{113} Kate Antonovics and Ben Backes, \textit{The Effect of Banning Affirmative Action on College Admissions Policies and Student Quality}, 49 \textit{J. of Hum. Resources} (2014), discussed ways that UC Irvine’s policies changed after Prop 209.

\textsuperscript{114} See Memorandum from the Univ. of Cal. Office of the President, \textit{supra} note 111 (comparing UCBLS statistics for 1996 and 1997).

\textsuperscript{115} See Antonovics and Backes, \textit{supra} note 113.

\textsuperscript{116} Id.

\textsuperscript{117} See Univ. of Cal. Office of the President, Student Affairs, Admissions (comparing Irvine statistics for 1997 and 1998).
contemplating reforms of their preferences face an important collective-action problem.

In at least one important way, however, schools moderating their use of racial preferences may reap an admissions dividend. Research on admissions patterns at the University of California found very powerful evidence that the minority “uptake” rate at UC campuses rose sharply when race-neutral policies were formally implemented. That is, black and Hispanic students admitted to UC schools after Proposition 209 went into effect were more likely to decide to enroll, other things being equal, than they were when racial preferences were used. The effect was strongest on those campuses that had previously used the largest racial preferences.118 One can infer that the “chilling effect” of attending a campus with fewer minority students was, at least in this case, more than offset for black and Hispanic applicants by the “warming effect” of attending a campus without the stigma of being admitted via a racial preference.

In any case, the broader collective action problem remains. One conspicuous solution is for universities to cooperate in reforming their admissions policies. As Part I notes, there are significant policy barriers to intercollegiate cooperation on admissions matters. We will return in Part IV to this question and suggest ways that cooperation can be fostered rather than deterred.

III. Compliance with the Law

When reporters and scholars discuss measures to regulate the use of racial preferences, they assume (with surprising uniformity) that schools will obey these regulations.119 This seems odd, because the history of civil rights law is generally a history of first achieving formal decisions or laws that embrace reform and then undertaking the arduous process of actually enforcing them.120 No one assumed that the Supreme Court’s decision in Brown v. Board of Education


119. For example, see Richard Kahlenberg, THE CENTURY FOUNDATION, A BETTER AFFIRMATIVE ACTION (2012), which analyses the effects of affirmative action bans on university behavior and assumes university compliance throughout. This is in no way exceptional; I am aware of no discussion by reporters or higher education reports that questions the assumption that bans on the use of preferences will be more or less automatically followed.

120. See generally MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004) (providing an exemplary account of the interplay between formal legal change, particularly as determined in Supreme Court decisions, and on-the-ground practice).
meant that southern school districts would promptly begin to integrate their schools—and indeed, only after the Kennedy and Johnson Justice Departments launched large-scale compliance efforts did widespread desegregation occur in the South.\footnote{Id. at 344–442.}

Conversely, to consider another example, the passage of the federal Fair Housing Act in 1968 certainly had an impact on the behavior of housing market actors, but it took many years and the passage of stronger (and more expensive) enforcement mechanisms by Congress in 1988 before one could say that the vast majority of housing discrimination had been curtailed.\footnote{Federal fair housing audit studies show a long, gradual decline in housing discrimination rates from the 1970s through 2010. MARGERY AUSTIN TURNER ET AL., U.S. DEP’T OF HOUSING \& URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 xix (June 2013).}

It may initially seem farfetched to compare contemporary university administrators dealing with bans on racial preferences to southern school officials in the 1950s resisting Brown, but, in fact, the similarities are striking. In both cases, officials aggressively asserted their opposition to the elimination of discrimination, resented the restriction of their freedom of operation, probably considered the reforms immoral, and certainly faced intense political pressure to resist the new insistence on race neutrality.\footnote{See generally SANDER \& TAYLOR, supra note 15, at 131–142, 155–174.}

There is an important difference, of course. In the South, political pressure to resist desegregation came from the white citizenry.\footnote{KLARMAN, supra note 120, at 408–42 (discussing the nature of “massive resistance” in the South of the 1950s and the 1960s, and its eventual fall).} Their resistance was fundamentally reactionary, in defense of a system which had no defensible moral underpinning. Intellectuals were largely united in opposing the South’s resistance, and white public opinion in the North steadily solidified in opposition, too. The political forces facing university leaders today are more complicated. Public opinion is generally against racial preferences, but many university constituencies strongly favor it. Elites in government and industry also tend to favor the use of preferences or at least find support politically expedient. There are strong moral arguments on both sides, though the empirical argument against large preferences, as noted earlier, has gained considerable strength.\footnote{SANDER \& TAYLOR, supra note 15, at 185–90.}

This combination of pressures does not produce a single, predictable course of action among university leaders. Nearly all leaders express strong opposition to bans on racial preferences,
and most emphasize their continuing commitment to racial diversity in the face of bans. But open defiance is unusual; most leaders seem to work with faculty and admissions officers to explore work-arounds that nominally comply with the law but, in fact, produce results that are hard to distinguish from the outright consideration of race. In this section, we consider a few examples of this interplay and the evidence that racial preferences continue in fact, if not in name.

A. University of California at Berkeley Law School

As we have noted, California’s 1996 ban on racial preferences severely affected its leading public law school. UCBLS’s sister institution, UCLA School of Law, responded to the race-preferences ban by adopting an aggressive system of socioeconomic preferences which greatly cushioned the racial effect of the new regime. But in the first year under the ban, UCBLS simply dropped its racial preferences. Because of the dynamic discussed in Part II—that is, the fact that UCBLS was virtually alone among its peer national law schools in not using large race preferences—the effects were very dramatic: UCBLS enrolled only one African American freshman in 1997, compared with ten at UCLA and increases in black enrollment at many UC schools. The dramatic shift at UCBLS prompted national media coverage and humiliated the school’s leaders. The deans and faculty determined that this experience would not be repeated. UCBS announced that henceforth it would consider personal disadvantage in the admissions process, and it created faculty committees to review applications and assess the special characteristics and contributions of individual applicants. UCBLS’s minority numbers immediately rose sharply—not to pre-ban levels, but to respectable levels—and have remained there ever since.

126. See id. at 132–35,155–57.
127. See Yagan, supra note 13, at 13 and 48 fig. III (comparing admission rates at Berkeley and at non-UC elite (top 15) law schools); Sander, supra note 15, at 416 (showing that the large academic gap between black and white students exists at all tiers of legal education).
128. See Univ. of Cal. Office of the President, supra note 135.
129. Cf. Robert Cole et al., Report of an Ad Hoc Task Force on Diversity in Admissions (Oct. 1997). We have an extensive cache of accompanying documents, none of which explain what UCBLS actually did but which show the intense focus of UCBLS on coming up with a new policy in 1997–98.
UCBLS is not transparent in its admissions. It strenuously opposed the efforts of scholars (including one of us) to study California Bar data, plausibly because that data would have revealed too much about both the operation of UCBLS’s admissions and the mismatch consequences of its large *sub rosa* preferences.\(^{131}\) UCBLS has also defied for the past two years our public records request for admissions data. But it did make some data available a decade ago, and that information shows a clear pattern of racial discrimination.\(^{132}\) Table 8 shows one way of analyzing this data; it divides 2002 applicants to UCBLS into quintiles, based on their academic credentials, and reports the admissions rate of three racial groups within each quintile.

**Table 8:** UCBLS Admission Rates, 2002, by Quintile of Applicant Academic Indices

<table>
<thead>
<tr>
<th>Quintile</th>
<th>Black</th>
<th>Hispanic</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>1.000</td>
<td>0.812</td>
<td>0.448</td>
</tr>
<tr>
<td>4</td>
<td>0.769</td>
<td>0.368</td>
<td>0.082</td>
</tr>
<tr>
<td>3</td>
<td>0.560</td>
<td>0.282</td>
<td>0.013</td>
</tr>
<tr>
<td>2</td>
<td>0.233</td>
<td>0.103</td>
<td>0.005</td>
</tr>
<tr>
<td>1</td>
<td>0.005</td>
<td>0.022</td>
<td>0.002</td>
</tr>
</tbody>
</table>

*Source: Authors’ analysis of data provided by UCBLS School of Law*

As we can see, black applicants in the third quintile of the applicant pool had a 56% chance of being admitted to UCBLS; comparable white applicants had only a 1.3% chance of admission. The forty-fold advantage blacks enjoyed cannot be attributed to indirect measures, such as socioeconomic disadvantage. As we have seen, SES measures can virtually never exceed a race correlation of more than .45, and the UCBLS figures, if they are to be explained by a “race-neutral” measure, imply a correlation between “black” and that measure of over .95. Moreover, most race-neutral measures of disadvantage correlate more highly with Hispanic applicants than black ones, but UCBLS’s numbers obviously show blacks being admitted at a much higher rate than academically comparable Hispanics.

\(^{131}\) UCBLS did not do so openly, but UCBLS administrators drafted a confidential letter to the State Bar which UCLA’s Dean, Michael Schill, showed to Sander in early 2007.

\(^{132}\) In response to a request from Sander, UCBLS released in late 2003 an anonymized database showing the race, ethnicity, LSAT score, undergraduate GPA, UCBLS academic index, and admissions outcome for every applicant to the school in the 2001–02 and 2002–03 admissions cycles.
Another approach to evaluating UCBLS admissions is by using a logistic regression analysis to predict which applicants to the school are admitted. Table 9 shows such an analysis for the 2002 admissions cycle.

### Table 9:
**Logistic Regression of 2002 Admissions, UC Berkeley Law School**
**Predicted Outcome: Admission**

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Odds Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>LSAT</td>
<td>1.32**</td>
</tr>
<tr>
<td>Undergraduate GPA</td>
<td>2905.7**</td>
</tr>
<tr>
<td>Resident</td>
<td>2.8**</td>
</tr>
<tr>
<td>Black</td>
<td>121.6**</td>
</tr>
<tr>
<td>Asian</td>
<td>1.6*</td>
</tr>
<tr>
<td>Hispanic</td>
<td>18.2**</td>
</tr>
<tr>
<td>Other nonwhite, non-reported</td>
<td>2.4**</td>
</tr>
<tr>
<td>Observations</td>
<td>6,568</td>
</tr>
<tr>
<td>Somers’ D</td>
<td>.853</td>
</tr>
</tbody>
</table>

*p<.01 **p<.001

Logistic regressions are useful for explaining the factors that predict binary outcomes (such as admissions, which are either “admit” or “deny”). The Somers’ D (in this case .853) measures how well the independent variables can predict the admissions outcome. In this case, UCBLS admitted about 12% of its applicants, so if one had no other information, one would guess that a given applicant had a 12% chance of admission and an 88% chance of rejection. The Somers’ D improves our guessing ability by 85.3%, so that we could predict rejected cases with something like 98% accuracy.

All of the independent variables included in Table 9 prove to be highly statistically significant; that is, they all reliably help predict admissions outcomes. The “odds ratio” can be intuitively interpreted in this way: the square root of the odds ratio tells us by roughly what factor a one-point increase will increase one’s chances of admissions. Thus, for the LSAT score, the odds ratio is 1.32. The square root of 1.32 is about 1.15, so on average, a one-point improvement in an applicant’s LSAT score (e.g., from 160 to 161) is associated with a roughly 15% improvement in admissions chances. For undergraduate grades, the odds ratio is 2905, whose square root is about 54. This means that, on average, a one point
improvement in an applicant’s UGPA (e.g., from 2.8 to 3.8) is associated with a 54-fold improvement in admissions chances. Although the UGPA coefficient is much larger than the LSAT coefficient, it turns out that this is merely because they operate on such different scales; a one-point improvement in UGPA is vast, while a one-point improvement in LSAT score is comparatively minor.

With this context, let us return to question of racial discrimination. The coefficient on “black” is just over 121; this means that, on average, a black applicant has eleven times the admissions chances of a white candidate with other identical observed characteristics (LSAT, UGPA, and residency in California). Comparing that ratio with the relative admission chances shown for blacks and whites in Table 8 demonstrates how these two measures compare. They are telling very similar stories, and the odds ratio creates an overall average of the differing odds at different points in the credential distribution of applicants. The very high odds ratio tells us that it is not plausible for non-racial factors to produce these outcomes, and the high Somers’ D tells us that these few factors can account for the vast majority of admissions outcomes.

Another economist’s research, which draws on detailed national law school applications from an elite college and which also found continuing use of racial preferences at UCBL, corroborates our findings. Additionally, current and former faculty at the law school have told us, confidentially, that a key mechanism for the cheating is the use of subjective “black-box” assessments by carefully chosen faculty members.

B. UCLA Undergraduate Admissions

A second, more complicated example of this manipulation has occurred at UCLA and developed far more gradually. As we noted in Part II, the effects of the racial preferences ban were far milder at the University of California’s undergraduate campuses than at its graduate professional programs, because the eight undergraduate campuses provided much of one another’s competition. Many minorities remained within the UC system but cascaded to less elite campuses where their credentials were more similar to their majority classmates. In the UC system as a whole, black freshman enrollment fell only modestly in the first year of “race-neutrality”

133. See generally Yagan, supra note 13.
134. This information was provided confidentially in personal communications with the authors.
and, with the introduction of much larger outreach programs and socioeconomic preferences, black enrollment reached record highs by the early 2000s.\footnote{For a look at the UC-wide figures in the University of California Office of the President, see University of California Application, Admissions, and Enrollment of California Resident Freshmen for Fall 1989 through 2013, available at http://www.ucop.edu/news/factsheets/2012/flow-frosh-ca-12.pdf. Enrollment of black admits in the freshman class was 917 in 1997, the last year of racial preferences; it fell to 739 in 1998 but had rebounded to 832 in 2000 and rose to an average of 1250 from 2007 through 2010.}\footnote{Sander & Taylor, supra note 15, at 131–54.} Importantly, the better matching that came with the elimination of large racial preferences also substantially improved minority outcomes, so the numbers of black and Hispanic graduates rose rapidly as preferences were first reduced and then formally eliminated.\footnote{Sander & Taylor, supra note 15, at 155–174.}

Still, the most elite UC campuses chafed under the race-neutrality requirement. As the most selective schools, they had used the largest racial preferences before the ban arrived,\footnote{Antonovics, supra note 118, at 292; see generally Bakke, supra note 2, at 319-21.} and they experienced the most significant drops in minority enrollment. Student groups regularly protested the declines and, perhaps to convey their solidarity, campus leaders consistently emphasized the drop in freshman minority numbers, while utterly ignoring the improvements in minority grades, graduation rates, and incoming transfers from other UC schools.\footnote{Kate Antonovics, Marc Luppino, and Peter Arcidiacono are all labor economists who have written about the impact of Proposition 209 and have all expressed this view in communication with the authors.}

As far as one can tell from statistical data, it appears that race continued to factor into the decisions of many UC campuses, especially the most elite ones. That, at least, is the conclusion of economists who have examined the data closely.\footnote{Sander & Taylor, supra note 15, at 161.} Since there is no doubt that admissions offices formally took a variety of steps to comply with the law, these early violations appear to have occurred subtly and at the margins.

Something much more systematic began at UCLA in the ninth year of formal race-neutrality. In 2006, largely for random reasons, the number of black freshmen entering UCLA dipped below one hundred (about two percent of the class). This was an important symbolic threshold.\footnote{One reason we believe this was random was that the number of black transfer students to UCLA rose the same year, so the total number of blacks arriving on campus was quite similar year-over-year.} A series of campus protests followed, accompanied by sympathetic media coverage and strong complaints from minority alumni. UCLA’s acting Chancellor Norman Abrams met with the school’s admissions policy committee and instructed them...
on the importance of improving black representation at the school.\textsuperscript{141} He urged the committee to adopt a new “holistic” admissions procedure under which specially trained readers would subjectively take into account dozens of factors and reduce an applicant’s entire file to a single number, on which admissions decisions would be made. A majority of the committee supported the change and blocked a dissenting member’s effort to allow faculty committee members to monitor the change statistically to ensure that the new system did not reintroduce race to admissions.\textsuperscript{142}

UCLA’s holistic system went into effect in 2007 and did indeed produce a dramatic doubling of black freshmen.\textsuperscript{143} According to its proponents, this happened because the “holistic score” did a better job of capturing overall candidate experiences and potential. But analysis of the available data shows otherwise. Table 10, below, reports logistic regression analyses of admissions decisions before and after the 2006–07 changes in the process. Under the earlier “pre-holistic” system, readers assigned students three scores based on academic achievement, extra-curricular achievement, and personal disadvantage. In principle, those scores should have determined virtually all admissions outcomes, but in practice a variety of other applicant characteristics still predicted admission, including race. Quite incriminating is the fact that, even during the pre-holistic period, participating in one of the university’s high school outreach programs was not associated with a greater likelihood of admission, but being black or Hispanic and participating in those programs (indicated by the “*” interaction terms in the Table 10 regression) \textit{was} associated with a greater chance of admission. The odds ratios associated with race are, however, relatively modest.

\textsuperscript{141} Id. at 161–67.


\textsuperscript{143} The number most observers focused on—black freshmen from California high schools—exactly doubled, from 95 in 2006 to 190 in 2007. See data from the University of California, supra note 130.
As advertised, the holistic system introduced in 2006–07 merely replaced the academic, personal achievement, and life challenges scores with a single overall (“holistic”) score. But, as Table 10 shows, a sharp increase in the “odds ratio” for African Americans accompanied the new system: black applicants were now more than twice as likely to be admitted to UCLA as white applicants with the same holistic score! It was noteworthy that while this increase occurred, there was no comparable increase in the Hispanic odds ratio, which remained essentially unchanged (there had been no comparable pressure on the university to increase Hispanic admissions, which had been gradually rising for years). The 2007–09 analysis also showed a statistically significant discrimination against Asian-Americans.

Closer analysis of the holistic system reveals how this change occurred. The readers who assigned holistic scores to applicants actually appeared to do their work in a very race-neutral way. Had UCLA simply relied on its new holistic system to make admissions decisions, the outcomes from that system would have been almost

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Academic Rank</td>
<td>.07***</td>
<td></td>
</tr>
<tr>
<td>Personal Achievement</td>
<td>.16***</td>
<td></td>
</tr>
<tr>
<td>Life Challenges</td>
<td>.13***</td>
<td></td>
</tr>
<tr>
<td>Holistic Score</td>
<td>.013***</td>
<td></td>
</tr>
<tr>
<td>Adjusted GPA</td>
<td>1.35*</td>
<td>.94</td>
</tr>
<tr>
<td>SAT 1</td>
<td>1.002***</td>
<td>1.005***</td>
</tr>
<tr>
<td>African American</td>
<td>2.55***</td>
<td>5.15***</td>
</tr>
<tr>
<td>Hispanic</td>
<td>2.04***</td>
<td>1.92***</td>
</tr>
<tr>
<td>North Asian</td>
<td>1.05</td>
<td>.85***</td>
</tr>
<tr>
<td>Outreach</td>
<td>.95</td>
<td>1.03</td>
</tr>
<tr>
<td>African American *</td>
<td>1.97**</td>
<td>1.53**</td>
</tr>
<tr>
<td>Outreach</td>
<td>1.71***</td>
<td>1.49***</td>
</tr>
<tr>
<td>North Asian * Outreach</td>
<td>1.14</td>
<td>1.08*</td>
</tr>
<tr>
<td>Summary Characteristics of Model</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Observations</td>
<td>96,824</td>
<td>117,851</td>
</tr>
<tr>
<td>Somers’ D</td>
<td>.95</td>
<td>.93</td>
</tr>
</tbody>
</table>
identical to those of the pre-holistic system. However, the admissions office created a process-within-the-process known as “Supplemental Review.” Senior administrators could refer applicants whose holistic scores were too low for admission to Supplemental Review at their discretion, where applicants were invited to submit additional information for their files. The original holistic scores, as well as traditional measures of academic achievement, became secondary and almost irrelevant factors. Table 11 reports logistic regressions, predicting admission to UCLA through the Supplemental Review process (for all applicants on the left, and for applicants with below-average academic credentials on the right). In the Supplemental Review process, the odds-advantage of being black increases sharply, as does the odds-disadvantage of being Asian-American.

145. Id.
Table 11:
UCLA’s “Supplemental Review” Within the Holistic Admissions System

Outcome: Admission through Supplemental Review
Universe: Applicants not admitted through other admissions processes

<table>
<thead>
<tr>
<th>INDEPENDENT VARIABLE</th>
<th>ALL APPLICANTS</th>
<th>APPLICANTS WITH ACADEMIC INDEX UNDER 700</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjusted HSGPA</td>
<td>16.9***</td>
<td>6.3***</td>
</tr>
<tr>
<td>SAT I</td>
<td>1.002***</td>
<td>1.0002</td>
</tr>
<tr>
<td>African American</td>
<td>7.2***</td>
<td>17.5***</td>
</tr>
<tr>
<td>Hispanic</td>
<td>3.15***</td>
<td>7.4***</td>
</tr>
<tr>
<td>North Asian</td>
<td>63***</td>
<td>.62*</td>
</tr>
<tr>
<td>VF</td>
<td>1.36</td>
<td>1.84</td>
</tr>
<tr>
<td>International</td>
<td>1.46*</td>
<td>1.02</td>
</tr>
<tr>
<td>Other</td>
<td>1.12</td>
<td>1.92</td>
</tr>
<tr>
<td>Outreach</td>
<td>1.51***</td>
<td>1.65*</td>
</tr>
<tr>
<td>African American * Outreach</td>
<td>1.68**</td>
<td>1.87*</td>
</tr>
<tr>
<td>Hispanic * Outreach</td>
<td>1.35*</td>
<td>1.35</td>
</tr>
<tr>
<td>North Asian * Outreach</td>
<td>1.30</td>
<td>1.60</td>
</tr>
<tr>
<td>VF * Outreach</td>
<td>1.39</td>
<td>2.39*</td>
</tr>
<tr>
<td>Other * Outreach</td>
<td>1.12</td>
<td>2.23</td>
</tr>
<tr>
<td>Family income over $100k</td>
<td>.26***</td>
<td>.22***</td>
</tr>
<tr>
<td>Family income $80-99</td>
<td>.31***</td>
<td>.32**</td>
</tr>
<tr>
<td>Family income $60-79</td>
<td>.39***</td>
<td>.40**</td>
</tr>
<tr>
<td>Family income $40-59</td>
<td>.59***</td>
<td>.80</td>
</tr>
<tr>
<td>Family income $20-39k</td>
<td>~1.0</td>
<td>~1.0</td>
</tr>
<tr>
<td>Fam education – grad degree</td>
<td>.39***</td>
<td>.23***</td>
</tr>
<tr>
<td>Fam education – B.A.</td>
<td>.41***</td>
<td>.43***</td>
</tr>
<tr>
<td>Fam education – some college</td>
<td>.63***</td>
<td>.55***</td>
</tr>
<tr>
<td>Fam education = H.S. or less</td>
<td>~1.0</td>
<td>~1.0</td>
</tr>
<tr>
<td>API 10</td>
<td>.20***</td>
<td>.13***</td>
</tr>
<tr>
<td>API 7 to 9</td>
<td>.23***</td>
<td>.21***</td>
</tr>
<tr>
<td>API 5 to 6</td>
<td>.34***</td>
<td>.35***</td>
</tr>
<tr>
<td>API 3 to 4</td>
<td>.57***</td>
<td>.55***</td>
</tr>
<tr>
<td>API 2</td>
<td>.88</td>
<td>.89</td>
</tr>
<tr>
<td>Observations</td>
<td>91,010</td>
<td>88,691</td>
</tr>
<tr>
<td>Somers’ D</td>
<td>.66</td>
<td>.79</td>
</tr>
</tbody>
</table>

Note: “Income under $20k,” “Parental education non high school,” and “API 1” are omitted
*p < .1 **p < .01 ***p < .001

So far as we can tell, UCLA’s admissions system has not notably changed since 2007–09. After a faculty member of the admissions committee resigned in protest over the apparent illegal consideration of race and the University’s unwillingness to make its data and procedures transparent, the University agreed to retain a distinguished sociologist to evaluate the holistic system.146 Professor Robert Mare’s report found essentially the same patterns described

here, though he did not attempt to draw any legal inferences from his findings.\textsuperscript{147}

C. The University of Michigan Undergraduate Admissions

Our third example of legal evasion is the undergraduate program at the University of Michigan (UM). UM’s system of racial preferences became famous in the United States when Jennifer Gratz sued the university in 1997. Discovery revealed that the college used a 150-point system in which one hundred points generally assured admission and which assigned students an automatic twenty points if they indicated they were African American or Hispanic on their application.\textsuperscript{148} In \textit{Gratz v. Bollinger}, the Supreme Court held that UM’s system was unconstitutional.\textsuperscript{149} The college eliminated its point system, but data from its 2005–06 admissions cycle suggested that functionally the college’s preferences were even larger and, in some ways, just as mechanical as before the Court’s decision.\textsuperscript{150} Opponents of racial preferences put on the November 2006 initiative, modeled on California’s Proposition 209, to ban the use of race in state programs (including state university admissions). This Proposition 2 passed by a 58%/42% margin\textsuperscript{151} and for practical purposes went into effect at the University of Michigan during the 2007-08 admissions cycle.

UM’s president, Mary Sue Coleman, is a staunch advocate of racial preferences and actively opposed Proposition 2. The morning after its passage, she gave a defiant speech promising that the university would not waver in its commitment to student diversity.\textsuperscript{152} University officials mentioned one particular strategy for doing this: a new College Board service called “Descriptor Plus.”\textsuperscript{153} Borrowing a technique sophisticated marketing companies used for decades, the College Board “clustered” students into categories with similar

\begin{itemize}
\item \textsuperscript{147} Mare, supra note 144.
\item \textsuperscript{148} Gratz v. Bollinger, 539 U.S. 244, 255–57 (2003).
\item \textsuperscript{149} Id. at 270–76.
\item \textsuperscript{152} See Laurel Thomas Gnagey, Coleman on Prop. 2: ‘We will not be deterred’, U. Record Online, Nov. 8, 2006, http://www.ur.umich.edu/0607/Nov06_06/23.shtml; see also id.
\end{itemize}
demographic profiles. The Descriptor Plus system assigned students to one of thirty “Neighborhood” profiles and one of thirty “School” profiles.\textsuperscript{154} One criterion for the profiles was racial composition. By giving significant weight to applicants from neighborhoods or schools with heavily minority “ratings,” the college could secure an unusually high racial dividend.

The Descriptor Plus strategy raised interesting legal issues,\textsuperscript{155} and the Washington-based Center for Individual Rights (CIR), a conservative legal group that was heavily involved in past efforts to curtail UM’s racial preferences, made public information requests that eventually obtained data from UM’s undergraduate admissions cycle for 2007–08. This included data the University had obtained on its applicants’ Descriptor Plus characteristics. CIR provided a copy of that data to us, and our analysis produced the surprising result captured by Table 12.

\textbf{Table 12: Undergraduate Admissions at the University of Michigan Before and After Proposition 2}

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>2006 Admissions Cycle Odds Ratio</th>
<th>2008 Admissions Cycle Odds Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>SAT I</td>
<td>1.004***</td>
<td>1.002***</td>
</tr>
<tr>
<td>High school GPA</td>
<td>78.6***</td>
<td>27.8***</td>
</tr>
<tr>
<td>African American</td>
<td>35.1***</td>
<td>6.4***</td>
</tr>
<tr>
<td>Hispanic</td>
<td>34.0***</td>
<td>5.4***</td>
</tr>
<tr>
<td>Asian</td>
<td>.99</td>
<td>.83**</td>
</tr>
<tr>
<td>In-state resident</td>
<td>.58***</td>
<td>.94</td>
</tr>
<tr>
<td>Alumni relative</td>
<td>2.8***</td>
<td>2.8***</td>
</tr>
<tr>
<td>Somers’ D</td>
<td>.87</td>
<td>.83</td>
</tr>
<tr>
<td>Observations</td>
<td>21,624</td>
<td>25,693</td>
</tr>
</tbody>
</table>

\textit{**p < .01 *** p<.0001}

\textsuperscript{154} Id.

\textsuperscript{155} For reasons of space, we have not examined in this article the question of whether socioeconomic preferences, if deliberately calibrated to produce particular racial results (as seemed to be the initial premise of the Descriptor Plus approach), would be legally vulnerable as a disguised form of racial discrimination. As the reader can infer, our view is that racial (or socioeconomic) admissions goals themselves should be permissible, so long as (a) the preferences used to achieve them are largely socioeconomic (b) the performance of discrete groups at college is reasonably close to performance levels of the rest of the class; and (c) there is transparency in both admissions and outcomes.
Only a few key variables from our admissions models are shown in Table 12, simply because the number of socioeconomic variables available was so large. There are thirty Descriptor Plus school categories and thirty Descriptor Plus neighborhood types. UM also gathered SES data including the number of parents in the applicants home, their education levels, and their income. Our models thus had roughly one hundred variables. We included dummy variables for missing values and imputed some values to avoid losing sample size. Strikingly, almost none of the SES variables had explanatory power in our full model. This might well be because there was a lot of multicollinearity with such a large number of overlapping SES variables; for example, a measure of neighborhood affluence and a measure of family affluence might both lose significance because they correlate so closely with one another. We therefore used stepwise regression to identify the SES variables with the most explanatory power, but even then only a few variables were significant.

Table 12, however, strongly suggests that race continued to play a major role in UM’s admissions decisions. Although the odds-ratios for blacks and Hispanics declined sharply from 2006 to 2008, it remained quite large—larger, indeed, than the overall odds-ratios for the same groups in the UCLA holistic system. In 2008, the odds-ratio for Asians fell below one and became statistically significant, indicating that the University of Michigan was discriminating against Asians vis-à-vis white applicants.

Our analysis suggests that Descriptor Plus was not a substitute for race, but rather a cover story to mask continuing reliance on race. UM probably did increase its use of socioeconomic factors after Proposition 2, and it appears to have reduced the size (or at least the consistency) of racial preferences. But, clearly, it did not adopt racial neutrality.

Either way, the University of Michigan experienced almost no change in black enrollment during the first year under Proposition 2. The University’s Senior Vice Provost, Lester Monts, maintained this happened because of improved and targeted “outreach.” However, changes in the composition of the applicant pools cannot account for the admissions outcomes we observed. UM may well have improved outreach and it may have benefited from the same

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156. Robin Erb, *U-M African-American Enrollment Increases in Wake of Prop 2*, DETROIT FREE PRESS (Oct. 20, 2008, 12:49 PM), http://www.freep.com/article/20081020/NEWS06/8102072/U-M-African-American-enrollment-increases-wake-Prop-2. Of course, if the provost’s statement was correct and the University of Michigan could maintain racial diversity simply through improved outreach, then its defense of preferences in *Grutter* would have been in extremely bad faith.
kind of “warming effect” as the University of California, which lead
to higher minority uptake rates after Proposition 2. But the Univer-
sity of Michigan did not discover a silver bullet for achieving racial
diversity through purely non-racial means.

CONCLUSION

The lesson from these three examples is straightforward and
harkens back to a central point of Part I. University leaders face
strong pressures to preserve racial diversity on their campuses, and
constraint can override the law when the two collide. A formal ban
on racial preferences does not end racial preferences.

IV. POLICIES AND REFORMS

The basic structure of affirmative action at selective colleges and
universities has barely changed since large preferences were insti-
tuted some forty years ago. Today, however, the pressure for
change is increasing and now comes from multiple directions. Ris-
ing economic inequality and growing awareness of privilege at
selective schools has increased pressure for elite colleges to increase
SES diversity from both the public and intellectuals.157 The roll call
of states that have adopted preference bans has steadily length-
ened.158 Mismatch research has grown in influence and underminded
many of the core rationales for universities’ existing
programs.159 Meanwhile, the Supreme Court laid out in Fisher basic
tests for racial preferences that nearly all selective schools would
flunk.160

Yet, actual change in university practices has been incremental at
best.161 Even in jurisdictions that have banned racial preferences,
many institutions cling to the form of the old system. We have advanced here an explanation for this conservatism: universities do not see a viable path for reform. As discussed in Part I, university leaders have felt constrained by the powerful pressures that seem to limit their options and the problems that they see flowing from a move to socioeconomic preferences. Since the first-mover costs to any pioneering institution are particularly large, no one moves, and inertia and silence consume higher education.

Our analysis suggests seven reforms that together can shape a new path for university leaders:

A. More specific court doctrine. Supreme Court regulation of racial preferences in higher education has been vague and ineffective. It rejects current practices without providing enough specific guidance for either lower courts or colleges themselves to reform.\(^{162}\) Our analysis suggests several examples of standards that would make the Court’s doctrine clearer. First, the Court should not permit universities to give greater weight to race than to socioeconomic disadvantage. For example, a regression predicting admissions outcomes should not show a larger coefficient for any race than it does for an index of SES factors used by the school. Second, the Court should not permit universities to admit any identifiable subset of students that have an average performance level below, say, the thirtieth percentile of their classmates.\(^{163}\) This would be provide a powerful incentive for colleges to broaden the types of preferences they use (reducing credential gaps, as we saw in Part II), and an even stronger incentive to invest in the success of the students they do admit. Third, colleges that use racial preferences should provide sufficient transparency in their admissions process so that the first and second principles can be easily monitored.

B. Facilitating, rather than hindering, college cooperation. A flourishing system of cooperation among elite colleges to establish need-blind admissions ran aground as a result of federal antitrust policy in the early 1990s.\(^{164}\) While we agree that price-

\(^{162}\) See Sander, supra note 5.

\(^{163}\) The current preferences at many law schools are so large that the median black student has grades at the fifth percentile of white classmates. See Sander, supra note 16 at 372–73.

fixing is a bad thing, the first-mover problem in college admissions reform makes it important, and probably essential, that universities be able to cooperate on some aspects of admissions. The federal government can play a constructive role in overseeing and encouraging this type of cooperation, as it has recently shown signs of doing in areas other than higher education. Two types of collective effort are particularly important: (a) broad plans to shift from traditional large racial preferences to more diversified and smaller preferences, in a series of gradual steps; and (b) cooperative efforts that encourage colleges to scale back their ruinous competition in merit-based aid and focus financial resources on need-based aid instead.

C. Building diversity in the applicant pool. If we can build more inclusive applicant pools, social mobility in America will improve and reduce the size of preferences universities use. Universities should follow the example of UC schools in the wake of Proposition 209. But the challenge of reaching high-achieving but low-SES students is beyond the reach of any one school. Here, again, cooperative systems built by universities and government agencies can do what a single school cannot. Outreach officers working for the consortium use available data to provide training and liaisons to counselors at every high school and make direct contact with promising students identified by a variety of factors.  


166. See Heller & Marin, supra note 38, at 114–15.

167. One of us has outlined a strategy for building cooperation while respecting antitrust goals in Richard Sander, A Collective Path Upward, in THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER Fisher V. UNIVERSITY OF TEXAS (Richard Kahlenberg ed., forthcoming 2014); Hoxby & Avery, supra note 107 at 28.

168. Id. for an outline of a strategy for building cooperative search and recruitment mechanisms.

D. Broadening the meaning of diversity. Several of the changes proposed here require a revised university mindset that de-emphasizes the competition of each school in maximizing its special “inputs” and instead tries to ensure that universities collectively serve important social interests. This shift could also be achieved by a move away from the current notion that every school should seek a particular type of diversity—one that revolves around a racial head-count of freshmen—to a definition that not only pursues a richer set of diversity values in each institution (e.g., pursuing SES as well as racial diversity) but also encourages individual schools to pursue distinct types of diversity. Some colleges could emphasize international students; others could emphasize political diversity. Some colleges could eschew any use of preferences so that students know they have been judged primarily on academic grounds. Importantly, the ability of selective schools to vary their diversity makeups can greatly ease the negative-sum competition for scarce minority students, making it easier for other selective colleges to create highly-racially diverse student bodies with relatively smaller preferences.

E. Fostering simulation research. A key conclusion we drew from Part II was the need for education leaders and scholars alike to foster and engage in simulation research that will make it easier to understand the nature of applicant pools, methods of selecting for diversity, and the tradeoffs different systems make between class diversity, racial diversity, academic strength, and academic gaps. Beyond this, however, is a need to build software systems that make it easy for admissions officers to understand these options and systems and for them to compare their actual student body characteristics with the talent pool that meets their admissions criteria.

F. Creating enforcement mechanisms. An important lesson from both the Supreme Court’s affirmative action decisions and voter initiatives on the use of preferences is that policies in this field are anything but self-executing. Evasion is both widespread and ultimately destructive. Schools that are evading legal restrictions encourage secrecy and dissimulation, obscure the effects of policy for outsiders and foster feelings of betrayal.

170. See Arcidiacono, Khan, Vigdor supra note 44, at 12-13; see also Sander & Taylor supra note 15, at 15–32 (discussing the effects of competition).
171. Sander, supra note 150, at 283-85.
and cynicism among minority and majority students alike. Enforcement mechanisms that deter, rather than wink at, noncompliance are essential.

G. Building a regime of transparency. All of the goals we have described are enhanced and reinforced when educational institutions record and release comprehensive, anonymous data on their applicants, their students, and their students’ outcomes. Transparency should be recognized as a fundamental value and goal of the system.

Our conversations with higher education leaders—as well as affirmative action critics—suggests that elements like the ones outlined here could form the basis of a grand compromise and reform on the long-contentious issue of affirmative action. If we are creative and collaborative, we can replace gridlock with win-win solutions that improve university climates, social mobility, and student choice all at once.
THE “COMPELLING GOVERNMENT INTEREST” IN
SCHOOL DIVERSITY: REBUILDING THE CASE FOR AN
AFFIRMATIVE GOVERNMENT ROLE

Philip Tegeler*

INTRODUCTION

The strong endorsement of the “compelling government interest” in school integration by five members of the Supreme Court in
Parents Involved in Community Schools1 stands in surprising contrast to
the Obama Administration’s tepid support for affirmative measures
to expand school diversity initiatives. Although the Department of
Education formally endorsed the Supreme Court plurality’s position
on school integration in a 2011 guidance to local districts,2 its
funding programs have not followed suit. Since 2009, spending on
magnet schools, the only Department of Education funding pro-
gram that supports school integration, has declined relative to
other departmental programs, while funding for charter schools,
which are generally even more segregated than regular public
schools, has expanded.3

* Executive Director, Poverty & Race Research Action Council, Washington, DC.
Thanks to my colleagues Olati Johnson, Rachel Godsil, Michelle Adams, Elise Boddie, and
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Hilton, and the resources of the National Coalition on School Diversity (www.school-diversity
.org).

(2007) (Kennedy, J., concurring); id. at 803 (Breyer, J., dissenting).
2. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF
RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY
3. NAT’L COAL. ON SCH. DIVERSITY, FEDERAL SUPPORT FOR SCHOOL INTEGRATION—A STA-
TUS REPORT 8–9 (June 2012, updated April 2014), available at www.school-diversity.org/pdf/
DiversityIssueBriefNo4.pdf. See also infra note 120. A new Department of Education guidance
letter on the obligations of charter schools to comply with federal civil rights laws emphasizes
the benefits of school diversity and outlines steps charter school operators can take to in-
crease diversity. “Dear Colleague” Letter from Catherine E. Lhamon, Assistant Sec’y for Civil
Rights, U.S. Dep’t of Educ. (May 14, 2014), available at www2.ed.gov/about/offices/list/ocr/
letters/colleague-201405-charter.pdf. The language on diversity in the new guidance is not
mandatory, however, and the guidance letter does not offer any new funding incentives.

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At the same time, the Department’s largest competitive grant programs, “Race to the Top” and “Investing in Innovation,” have eschewed any mention of school integration as a goal or priority. The Office for Civil Rights’ (OCR) 2012 annual report illustrates the Department of Education’s reluctance to affirmatively promote school integration: “The choice as to whether to pursue diversity and reduce racial isolation lies with educational and civic leaders. OCR is ready to help educational leaders who make this choice.” The Department essentially takes the position that it will not intervene to help severely segregated districts except upon request. Yet, the Department generously funds segregated districts and regions, as well as the states that support them, without providing any encouragement or incentive to address these harmful local conditions. This Article will explore the gap between the “compelling government interest” in school integration announced in Parents Involved and the Obama Administration’s education policies. I will argue that the federal government has both the legal authority and the obligation to take a more proactive stance in promoting racial and economic integration in schools.


In striking down voluntary school integration plans in Seattle and Louisville, the Parents Involved decision significantly narrowed the use of individual racial classifications to achieve voluntary K-12 integration. Simultaneously, a different majority of the Court announced for the first time that school diversity and reduction of racial isolation are “compelling government interests” that justify the use of non-discriminatory measures to achieve racial integration. Although the Court had previously opined on the importance

4. NAT’L COAL. ON SCH. DIVERSITY, infra note 3, at 3–5. See also infra Part III. This Article uses the terms “school diversity,” “reduction of racial isolation,” and “school integration” interchangeably, though the Court in Parents Involved chose the two former terms in its recitation of the importance of integration. See, e.g., Parents Involved, 551 U.S. at 783, 797–98. While some potential definitional differences among these three terms exist, they are not germane to this Article.


7. The 5-4 opinion of the Court in Parents Involved struck down the individualized use of race as a factor in assigning students to schools in non-court ordered integration plans in two school districts (Louisville and Seattle). Parents Involved, 551 U.S. at 711. However, a separate 5–4 majority, led by Justice Kennedy’s concurring opinion and supported by Justice
of school integration, this was the first time the Court had assessed a state or local government’s efforts to voluntarily promote school diversity in K-12 education in the absence of a desegregation liability finding.  

Consistent with the Court’s decision in Parents Involved, the Secretary of Education and the Attorney General issued a high-level “guidance” document in December 2011 reinforcing the Supreme Court majority’s view. The joint Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools summarized the compelling government interest found by the Court and explained that, ”[p]roviding students with diverse, inclusive educational opportunities from an early age is crucial to achieving the nation’s educational and civic goals. . . . Racially diverse schools provide incalculable educational and civic benefits by promoting cross-racial understanding, breaking down racial and other stereotypes, and eliminating bias and prejudice.”

Regarding the government’s responsibility to reduce racial isolation, the joint K-12 Guidance states:

Conversely, where schools lack a diverse student body or are racially isolated (i.e., are composed overwhelmingly of students of one race), they may fail to provide the full panoply of benefits that K-12 schools can offer. The academic achievement of students at racially isolated schools often lags behind

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10. Id. at 1.
that of their peers at more diverse schools. Racially isolated schools often have fewer effective teachers, higher teacher turnover rates, less rigorous curricular resources (e.g., college preparatory courses), and inferior facilities and other educational resources. Reducing racial isolation in schools is also important because students who are not exposed to racial diversity in school often lack other opportunities to interact with students from different racial backgrounds.  

These affirmative statements express the Executive Branch’s policy judgment, but they are presented without much legal citation apart from Parents Involved and Grutter v. Bollinger. Justice Kennedy’s key legal conclusion in Parents Involved is likewise devoid of citations other than to earlier Court opinions:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.

Justice Breyer’s dissent in Parents Involved is a more detailed exploration of the compelling government interest in school integration,

11. Id. The Joint Guidance’s summary of the harms of segregation is consistent with decades of social science research, most recently summarized in Gary Orfield et al., E Pluribus: Separation: Deepening Double Segregation for More Students 7–8, available at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e pluribus. . separation-deepening-double-segregation-for-more-students:

The consensus of nearly sixty years of social science research on the harms of school segregation is clear: separate remains extremely unequal. Schools of concentrated poverty and segregated minority schools are strongly related to an array of factors that limit educational opportunities and outcomes. These include less experienced and less qualified teachers, high levels of teacher turnover, less successful peer groups and inadequate facilities and learning materials. There is also a mounting body of evidence indicating that desegregated schools are linked to important benefits for all children, including prejudice reduction, heightened civic engagement, more complex thinking and better learning outcomes in general.

See also Derek W. Black, Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access, 53 B.C. L. Rev. 373, 404–09 (2012) (summarizing research on harms of racial and poverty isolation).

12. Though, as noted in the discussion in Part III, below, the Executive Branch has yet to implement this policy.


relying not only on prior court opinions\textsuperscript{15} but also on social science literature expounding the benefits of integration.\textsuperscript{16}

How far does Justice Kennedy’s “moral and ethical obligation” to avoid racial isolation extend? Does the obligation flow primarily from Supreme Court case law, does it derive from an evolving consensus in the social sciences,\textsuperscript{17} or does it also have a statutory basis in Title VI and other federal law? In addition to its value as a justification for non-individualized, race-conscious remedial efforts by state and local governments, does the compelling interest identified in \textit{Parents Involved} also suggest an affirmative duty on the part of the federal government? And if so, how far does this affirmative duty extend, and how might it be enforced?

This Article will attempt to answer these questions by exploring the potential legal sources of the federal government’s powers and duties with respect to avoiding racial isolation in the public schools and to the government’s affirmative obligation to promote integration. Part I will explore sources of legal authority for affirmative school diversity policies at the federal executive level. Part II will propose a new, more proactive approach to assessing state and local segregation impacts that the Department of Education could adopt within its existing Title VI authority. Part III will identify non-prescriptive funding incentives that the Department could include in its competitive grant programs to support school diversity. Finally, Part IV will suggest data metrics the Department could include in its data reporting programs to incentivize performance by state governments and local districts. In sum, the federal government has multiple tools at its disposal to advance the promise of \textit{Brown} and \textit{Parents Involved}. Its continuing failure to assert these inherent powers will inexorably result in increasing segregation at the local level.

\textsuperscript{15} Justice Breyer finds the compelling interest in school integration grounded, in part, on “a well-established legal view of the Fourteenth Amendment . . . as forbidding practices that lead to racial exclusion.” \textit{Id.} at 829 (Breyer, J., dissenting).

\textsuperscript{16} Citing multiple recent articles and treatises, Justice Breyer identifies three “essential elements” to the interest in school integration: the “historical and remedial element,” the “educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools,” and the “democratic element: an interest in producing an educational environment that reflects the ‘pluralistic society’ in which our children will live.” \textit{Id.} at 838–40.

\textsuperscript{17} Lia Epperson has explored some of the ramifications of this approach in \textit{The Promise and Pitfalls Of Empiricism In Educational Equality Jurisprudence}, 48 \textit{Wake Forest L. Rev.} 489 (2013).
I. Sources of Authority for Affirmative School Integration Policies at the Federal Agency Level

As illustrated by the citations underlying the plurality opinions in Parents Involved, the most direct source of legal authority for school integration has come from federal enforcement against school districts engaged in de jure or intentional segregation practices.18 This historical focus on enforcement is also reflected in the policies of the Department of Education, where school integration efforts are still largely siloed in its civil rights enforcement division. For example, the Department of Education’s only mention of school diversity in its proposed Strategic Plan for 2014–2018 is in the section of the plan covering civil rights enforcement.19

While federal enforcement continues to be important, especially in monitoring longstanding school integration plans in historically segregated southern school districts,20 it has diminishing value as a basis for addressing deepening interdistrict school segregation in the 21st Century.21 To promote the government’s “compelling interest” in the reduction of racial isolation, the Department of Education must move beyond the limited frame of enforcement and acknowledge that meaningful school integration efforts do not necessarily stop at the school district boundary line.

In this Section, I will suggest that the federal government has at least four potential sources of legal authority to promote school integration on the state and local level, without requiring any

18. School desegregation claims have historically been brought under both the 14th Amendment and Title VI of the Civil Rights Act of 1964. While these cases have most often been brought by schoolchildren and their parents, the federal government has also exerted its authority under Title VI to investigate and bring enforcement claims against state and local governments. See Chinh Q. Le, Racially Integrated Education and the Role of the Federal Government, 88 N.C. L. Rev. 725, 764–68 (2010); Lia Epperson, Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence, 10 Berkeley J. Afr-Am. L. & Pol’y 146 (2008).


20. Indeed, hundreds of old court orders and consent decrees remain in effect around the country and serve as the foundation for ongoing enforcement efforts by the Department of Justice and the Department of Education’s Office for Civil Rights. See Le, supra note 18; Epperson, supra note 18. For a review of extant court orders, see Sean F. Reardon et al, Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools, 31 J. Pol’y Analysis & Mgmt. 876 (2012), and accompanying database at http://cepa.stanford.edu/data/district-court-order-data.

additional legislative authority. These sources include Title VI of the Civil Rights Act of 1964; the Elementary and Secondary Education Act; the Department of Education’s founding legislation; and the Convention on the Elimination of All Forms of Racial Discrimination, an international treaty ratified by the Senate in 1994.

A. Title VI

Title VI of the Civil Rights Act of 1964 gave the federal government new power to address segregation at the state and local level. Title VI prohibits recipients of federal funding from discriminating on the basis of race, color, or national origin. It is enforceable by private parties or directly by the federal government, both in court and through administrative complaints filed with the appropriate federal funding agency. The Title VI Coordinating Regulations require each federal department to create regulations barring discrimination by grantees, including an administrative mechanism to investigate and adjudicate complaints. Title VI prohibits both intentional discrimination and policies or practices that have a discriminatory impact; however, since 2001, private claims of disparate impact under Title VI may no longer be brought in court but must be filed in an administrative complaint through the appropriate agency.

Although the original context for Title VI was the continuing existence of "de jure" Jim Crow segregation ten years after the 1954

22. It should be noted here that Congress is also fully empowered to pass legislation promoting school integration. For a fuller discussion see Lia Epperson, Legislating Inclusion, 6 Harv. L. & Pol’y Rev. 91 (2012). However, this Article focuses on the existing powers the Department of Education has been reluctant to fully exercise.
24. Section 601 of the Act provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 742, (codified at 42 U.S.C. § 2000d (2006)).
26. 28 C.F.R. §§ 42.401–42.415
27. 28 CFR § 42.408(a)
Brown decision. Title VI expressly reached beyond “de jure” policies in the South. As President Kennedy noted in his June 1963 speech previewing the introduction of Title VI in Congress, “This is not a sectional issue. Difficulties over segregation and discrimination exist in every city, in every State of the Union, producing in many cities a rising tide of discontent that threatens the public safety.” Indeed, the distinction between “de jure” and “de facto” racial segregation was not as clear in 1964 as it has since become. As Justice Marshall noted in Guardians Association v. Civil Services Commission of New York City, “when the agencies first interpreted [Title VI] in 1964, 12 years before Washington v. Davis, . . . the Equal Protection standard could easily have been viewed as one of discriminatory impact.”

More specifically, amendments in 1970 to Title VI and the Elementary and Secondary Education Amendments made it clear that de facto school segregation was as much of a concern for Title VI enforcement as formal de jure segregation:

> It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

Although Congress cut back on Title VI enforcement in the mid-1970s, these later amendments were limited to restrictions on

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30. See generally Robert D. Loevy, To End All Segregation: The Politics of the Passage of The Civil Rights Act of 1964 (1990). Although school segregation and educational inequity was a major original focus of Title VI, it was also intended to address segregation in hospitals and other institutions. See David Barton Smith, Racial and Ethnic Health Disparities and the Unfinished Agenda of the Civil Rights Era, 24 Health Affairs 317 (2005).


“forced busing” as a remedy to a Title VI violation—they did not undermine the substantive scope of the statute.

Title IV of the 1964 Civil Rights Act, which created regional Equity Assistance Centers (EACs) to assist in the implementation of Title VI, provides further evidence of Title VI’s broad reach and Congress’s expectation that the Department of Education would take an affirmative, proactive role. Funded by the Department of Education, EACs provide services to states, school districts, and schools on desegregation-related issues. Consistent with Title VI’s general intent to address discriminatory effects of segregation, regardless of legal origin, most of the Centers were located outside regions with de jure school segregation.

The legislative history of Title VI is replete with references to segregation policies and practices, which are usually subsumed under the term “discrimination” in the Congressional Record. It was understood that the new statute would eliminate perennial disputes over segregation in every federal program that came up for reauthorization or annual funding.

Importantly, Section 102 of Title VI also “authorizes and directs” the Department of Education to advance Title VI’s non-discrimination goals in a manner consistent with the goals of its education

34. See Le, supra note 18, at 739–42 (discussing the history of the federal commitment to school integration). The Equal Opportunities Act of 1974 is still codified at 17 U.S.C. § 1713, and reads:

No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.


38. Horwich, supra note 37. For example, one Congressman stated that “Title VI enables the Congress to consider the overall issue of racial discrimination separately from the issue of the desirability of particular Federal assistance programs. Its enactment would avoid for the future the occasion for further legislative maneuvers like the so-called Powell amendment.” 110 CONG. REC. 2468 (1964). The “Powell Amendment” was an anti-segregation rider placed separately on each spending bill by Congressman Adam Clayton Powell prior to the enactment of Title VI, forcing repeated votes on the issue.
programs. As discussed below, this provision is not just the basis for adoption of administrative enforcement regulations; it also authorizes and directs the agency to engage in more far-reaching efforts to address the segregated educational conditions that were a catalyst for the original statute.

B. The Elementary and Secondary Education Act

The Elementary and Secondary Education Act of 1965 (ESEA) also provides support for the federal government’s interest in and its authority to promote school integration. The ESEA, like Title VI, was designed to address unequal educational conditions and funding needs. Title I of the Act provides supplemental funding to schools with substantial numbers of poor children.

Consistent with the mandate to assist low income children concentrated in poor schools, the ESEA also recognized the importance of school integration, and the original statute directly tied funding to compliance with Title VI desegregation requirements.

In addition to tying Title I funding to desegregation compliance, the ESEA has also included affirmative support for magnet schools and interdistrict school integration programs. In the section authorizing the Magnet Schools Assistance Program (MSAP), Congress declared that “[d]esegregation efforts through magnet school programs are a significant part of our Nation’s effort to achieve voluntary desegregation in schools and help to ensure equal educational opportunities for all students” and that “[i]t is in the best interests of the United States” to “ensure that all students have equitable access to a high quality education that will prepare all students to function well in a technologically oriented and a highly competitive economy comprised of people from many different racial and ethnic backgrounds.” The ESEA also expressly

40. See infra Part II.
42. 20 U.S.C. § 6314(a)(1).
43. 42 U.S.C. § 2000d-5. This section, which was added to Title VI by the ESEA Amendments Act in 1966, includes hearing procedures for school districts that have had Title I funding suspended for non-compliance with Title VI. Id.
44. See 20 U.S.C. § 7231 (magnet schools); 20 U.S.C. § 7225 (voluntary public school choice); see also 34 C.F.R. §§ 280.1–280.41 (magnet schools).
45. 20 U.S.C. § 7231(a)(1)(a) (2006). In the most recent reauthorization of this section, Congress reiterated that “Magnet schools are a significant part of the Nation’s effort to achieve voluntary desegregation in our Nation’s schools.” Id. at § 7231(a)(1) (emphasis added).
The “Compelling Government Interest”

states that the MSAP’s purpose includes “the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students.”

The 2002 amendments to the ESEA (titled “No Child Left Behind”) included a school transfer option for students in persistently failing schools. While this provision does not expressly mention school integration, it addresses the severe resource and opportunity disparities that are associated with economic and racial segregation and adopts a classic desegregation remedy: voluntary transfer to a higher-performing school.

More broadly, a central goal of the entire ESEA is alleviating the impacts of school-based poverty concentration. For example, the section of Title I authorizing targeted grants to high poverty schools notes that “[s]tudies have found that the poverty of a child’s family is much more likely to be associated with educational disadvantage if the family lives in an area with large concentrations of poor families.” Similarly, the ESEA’s “Voluntary Public School Choice” program does not expressly mention racial or economic diversity, but it prioritizes proposals aimed at reducing racial isolation.

C. The Department of Education Organization Act

The Department of Education became an independent, cabinet-level department with the Department of Education Organization Act in October 1979. According to the Act, a key purpose of the


48. See William L. Taylor, Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity, 81 N.C. L. REV 1751, 1755–62 (2003). The voluntary transfer provisions of NCLB also recognize that some urban districts may have no schools eligible for transfer and permit transfers across school district lines, though it is unclear how many families have actually taken advantage of this option. 20 U.S.C. § 6316(b)(11).


In awarding grants under this subpart, the Secretary shall give priority to an eligible entity— (1) whose program would provide the widest variety of choices to all students in participating schools; (2) whose program would, through various choice options, have the most impact in allowing students in low-performing schools to attend higher-performing schools; and (3) that is a partnership that seeks to implement an interdistrict approach to carrying out a program.

Department is “to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual.”\(^{52}\) At the time of the Department’s founding, this commitment to equal educational opportunity was widely understood to encompass school desegregation. The Senate Report accompanying the Bill reflects this focus:

The purpose[s] outlined in the bill highlight the view of the Committee with respect to its intent in establishing the Department: . . .

(2) To continue and strengthen the Federal commitment to ensuring access by every individual to equal educational opportunities. Equal educational opportunity has been and must remain a major education goal of the Federal government. The Federal government has acted to ensure equality of educational opportunity for every American regardless of race, sex, age, ethnic heritage, economic disadvantage, or handicapped condition:

Racial minorities – Through compliance efforts, technical assistance, and financial assistance the Federal government has promoted racial desegregation.\(^{53}\)

Similarly, the Federal Interagency Committee on Education for the Committee on Governmental Affairs\(^{54}\) described how the Bill’s equal-opportunity education goals were linked to desegregation and promotion of racially integrated school attendance:

To assure equality of educational opportunity for each individual . . . the Federal government has pursued three basic strategies. The first is the compliance effort relating to both

\(^{52}\) 20 U.S.C. § 3402(1).


\(^{54}\) The function of this Committee is:

to study and make recommendations for assuring effective coordination of Federal programs, policies, and administrative practices affecting education. The membership includes the Secretary of Education, or his designee, who chairs the Committee, and senior policy making officials from those Federal agencies, commissions, and boards that the President may find appropriate. OMB, the Council of Economic Advisors, the Office of Science and Technology policy and the Domestic Policy Staff designate a staff member to attend the Committee’s meetings. The Secretary recommends member agencies to the President.

educational access and employment. Second, technical assistance is provided to school systems and institutions undergoing desegregation. Finally, financial assistance is available under certain programs to ease problems resulting from desegregation and to strengthen historically minority institutions.55

Today’s Department of Education appears to recognize that school integration was an integral part of the Department’s founding “equal educational opportunity” mandate, although as discussed below, it has been slow to provide financial support for integration.56 Examples of the Department’s acceptance of the integration goal include the 2011 School Diversity Guidance, as well as the Department’s announcement of a 2010 competitive funding priority that permits (but does not require) a preference in discretionary grants programs for “[p]rojects that are designed to promote student diversity, including racial and ethnic diversity, or avoid racial isolation.”57 The Department notes that “[t]he intent of this priority . . . is to focus on the racial and ethnic diversity of students in order to promote cross-racial understanding, break down racial stereotypes, and prepare students for an increasingly diverse workforce and society.”58

D. The International Convention on the Elimination of All Forms of Racial Discrimination

In 1966, President Johnson signed the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD treaty”);59 Congress ratified the treaty in 1994.60 The CERD treaty

56. See infra Part III.
58. Id. at 78500.
applies to federal, state, and local governments. The treaty embodies an obligation, both within government programs and in society at large, not only to avoid policies with a discriminatory impact but also to affirmatively take action to address racial disparities in outcomes for people of color. The CERD treaty expressly commits state parties to "particularly condemn racial segregation" and "undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." The treaty also requires parties to monitor and take affirmative steps to address general societal discrimination and segregation, including the continuing legacy of historical discrimination.

The Geneva-based Committee on the Elimination of Racial Discrimination (the "CERD Committee") is a "body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties." It is located within the Office of the U.N. High Commissioner on Human Rights. State Parties to the Convention are required to submit periodic reports to the CERD Committee, which then reviews treaty compliance and issues findings and recommendations. The CERD Committee also issues periodic interpretations of the CERD treaty in the form of "General Recommendations."

In 1995, the CERD Committee issued a General Recommendation emphasizing that the duty to eradicate segregation includes

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61. CERD, supra note 59, at Art. 2(1)(a), Art. 2(1)(c), Art. 3.
62. "[T]he obligation to eradicate all practices of this nature includes the obligation to eradicate the consequences of such practices undertaken or tolerated by previous Governments in the State or imposed by forces outside the State." Comm. on the Elimination of Racial Discrimination, General Recommendation XIX on Art. 3 of the Convention: The Prevention, Prohibition, and Eradication of Racial Segregation and Apartheid, 47th Sess., U.N. Doc. A/50/18 (1995).
63. CERD, supra note 59, at Art. 2(1)(c).
66. CERD, supra note 59, at Art. 8, Art. 9.
67. Id.
taking affirmative steps to address the impacts of past discrimination and segregation, whether caused by government or private actions.\textsuperscript{68}

In its most recent review of U.S. compliance with the treaty,\textsuperscript{69} the CERD Committee specifically expressed concern over the lack of U.S. progress in addressing de facto school segregation:

¶ 17: The Committee remains concerned about the persistence of de facto racial segregation in public schools. In this regard, the Committee notes with particular concern that the recent U.S. Supreme Court decisions in Parents Involved in Community Schools v. Seattle School District No. 1 (2007) and Meredith v. Jefferson County Board of Education (2007) have rolled back the progress made since the U.S. Supreme Court’s landmark decision in Brown v. Board of Education (1954), and limited the ability of public school districts to address de facto segregation by prohibiting the use of race-conscious measures as a tool to promote integration. (Articles 2 (2), 3 and 5 (e) (v)).\textsuperscript{70}

The CERD Committee also urged the United States to “take all appropriate measures—including the enactment of legislation—to restore the possibility for school districts to voluntarily promote school integration. . . .”\textsuperscript{71}


[While conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds. . . . The Committee therefore affirms that a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities. It invites States parties to monitor all trends which can give rise to racial segregation, to work for the eradication of any negative consequences that ensue, and to describe any such action in their periodic reports.


\textsuperscript{70} Id. An accompanying paragraph criticized the United States' failure to make progress on housing segregation. See id. at ¶ 16.

\textsuperscript{71} Id. at ¶ 17.
In June 2013, the United States submitted its fourth periodic report to the CERD Committee, and its response to the Committee’s critique of U.S. school segregation illustrates the weakness of the Administration’s current efforts:

With regard to paragraphs 16 and 17 of the Committee’s Concluding Observations, the causes and effects of *de facto* segregation and racial and ethnic disparities in housing and education, as well as in other aspects of American life, are issues of active study and concern. . . .

The United States also actively addresses *de facto* segregation in education—an issue not unrelated to residential segregation. Despite the promise of the *Brown v. Board of Education* decision, far too many students still attend segregated schools with segregated faculties or unequal facilities. . . .

To ensure equal educational opportunities for all children, DOJ and ED enforce laws, such as Titles IV and VI of the Civil Rights Act of 1964 . . .

DOJ/CRT monitors and seeks further relief, as necessary, in approximately 200 school districts that had a history of segregation and remain under court supervision. . . .

The United States also assists school districts in voluntarily ending *de facto* segregation and avoiding racial isolation and in promoting diversity by 1) providing technical assistance . . . and 2) providing financial incentives to school districts for programs like magnet schools . . .

Unlike Title VI and the ESEA, which authorize but arguably do not require federal support for school integration, the CERD treaty requires affirmative government intervention to address *de facto* school segregation and its resulting harms. Unfortunately, the treaty is not enforceable by private parties against the United

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73. *Id.* at 25–28.
States, but as the “supreme law of the land” it provides ample authority for a more forceful federal stance.

The joint 2011 Guidance on K-12 school diversity acknowledges the federal government’s responsibility to promote school diversity and reduce racial isolation in public schools. And as summarized above, Title VI, the ESEA, the Department of Education Organization Act, and United States treaty commitments all provide ample legal foundation for a more assertive federal role. The next three Sections will introduce several approaches that the Department of Education can use to actively promote school integration using its existing regulatory and funding authority.

II. Implementing the “Compelling Interest” in School Diversity Through Proactive Title VI Equity Assessments

When Title VI was initially implemented, its regulations established a basic administrative complaint process within each federal agency and generally permitted disparate impact claims pursuant to the regulation-making authority set out in Section 602 of Title VI. This model was essentially passive: in response to the filing of an individual’s complaint, each agency’s Office of Civil Rights would conduct an investigation, make a probable cause determination, engage in conciliation efforts, and possibly hold a hearing if a settlement could not be reached.


75. U.S. Const., art VI.

76. The government’s treaty obligations to address school segregation also derive from the International Covenant on Civil and Political Rights (Dec. 16, 1966, United Nations General Assembly Resolution 2200A), a separate treaty also ratified by the United States. The government’s failure to address de facto school segregation, and the harms that flow from its inaction, were recently addressed in a “shadow report” submitted to the U.N. Human Rights Committee by the Leadership Conference, PRRAC, and other groups. Leadership Conference Educ. Fund, Still Segregated: How Race and Poverty SYnde the Right to Education (2013), available at http://civilrightsdocs.info/pdf/reports/Still_Segregated_Education_Fund.pdf.

77. U.S. Dep’t of Justice & U.S. Dep’t of Educ., supra note 2.


79. See U.S. Dep’t of Justice, Civil Rights Div., supra note 25. A less formal “compliance review” process also provides agencies a way to assess concerns about local Title VI compliance, in the absence of a formal complaint, but like the formal complaint process, these reviews generally occur after funding has been awarded, and are often triggered by problems identified by local advocates. See id.; 28 CFR § 42.407(c).
Until recently, this complaint-driven approach to Title VI was the norm, and the federal government’s obligation to affirmatively address disparate impact discrimination and racial disparities under Title VI remained inchoate. But in the last decade, several federal agencies have taken a more proactive approach and have required state and local governments to assess the racial impacts of their policies and practices before adopting them. These federal “equality directives” place “proactive and affirmative duties on federally funded actors,” including the duty to conduct racial impact analyses and to assess less discriminatory alternatives prior to major planned agency actions. Title VI regulations and guidance at the Federal Transit Administration, the Environmental Protection Agency, and the Department of Agriculture exemplify this new approach.

The Department of Education, however, has not yet implemented the full range of its Title VI obligations and powers. The Department’s Office of Civil Rights has an active enforcement program to address discrimination allegations but lacks the assessment tools that would assist state governments and local school districts in anticipating and avoiding actions that increase racial isolation and school poverty concentration. The absence of such an equity assessment procedure to review the effects of key decisions on segregation is particularly incongruous in light of the strong emphasis on school desegregation at the heart of Title VI. The Department should make the development of such a regulation or guidance a priority.

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81. Johnson, supra note 80, at 1363.

These directives take a different approach to achieving racial and other forms of inclusion than do the standard public and private enforcement models. Their essential attributes are that (1) they are regulatory in their approach; (2) they are affirmative and not just prohibitory; and (3) they impose a set of pervasive duties for federal-state programs.

Id. at 1366.

82. The Title VI Coordinating Regulations also provide a basis for a more formalized Title VI pre-decision assessment, 28 CFR § 42.407(b) (“Prior to approval of federal financial assistance, the federal agency shall make written determination as to whether the applicant is in compliance with Title VI . . . . The basis for such a determination under “the agency’s own investigation” provision . . . shall be submission of an assurance of compliance and a review of the data submitted by the applicant. Where a determination cannot be made from this data, the agency shall require the submission of necessary additional information and shall take other steps necessary for making the determination. . . .”)

83. See infra notes 84, 94, 95.
To consider what a proactive Title VI regulation might look like at the Department of Education, this Part will first look at the Federal Transit Administration, where the requirement of a prospective racial equity analysis as a precursor to major state and local action is particularly well-developed. In its 2012 Title VI guidance, the FTA set out equity guidelines that require state and local transit agencies to review racial impacts of siting decisions, service changes including new routes, and other major policy or spending decisions. These assessments are encompassed in each grantee’s “Title VI Program,” which varies with the size and type of the grantee. For example, large “Fixed Route Transit Providers” must undertake the following:

- Extensive data reporting on ridership demographics and resident needs in the service area region, and on detailed service indicators by area;
- A Title VI “equity analysis” for the siting of new facilities and any proposed fare changes, requiring detailed comparisons of impacts on persons in protected classes compared to impacts on persons not in protected classes;
- Development of a general “Disparate Impact Analysis;”
- Monitoring subrecipients; and
- An ongoing monitoring plan.

Additionally, if the transit provider forecasts a potential disparate impact associated with a proposed action, it must “determine whether alternatives exist that would serve the same legitimate objectives but with less of a disparate effect on the basis of race, color or national origin” in advance. If alternatives exist, “the
transit provider must revisit the service changes and make adjustments that will eliminate unnecessary disparate effects . . . .”

The Department of Transportation’s 2012 guidance on Environmental Justice, the Department of Agriculture’s Civil Rights Impact Analysis, and the Department of Housing and Urban Development’s “Affirmatively Furthering Fair Housing” mandate include similar requirements.

What would such a proactive Title VI assessment look like as applied to conditions of racial isolation and poverty concentration in public schools? With consistent national research linking attendance in racially isolated schools to a wide range of negative educational outcomes, including lower student achievement results, higher dropout rates, lower college completion rates, less qualified teachers, high rates of teacher turnover, less challenging curriculum, and higher rates of student discipline, and additional

93. Id.
94. See Updated Environmental Justice Order 5610.2(a), 77 Fed. Reg. 27534-02 (May 10, 2012). The environmental justice guidance was adopted pursuant to both Title VI and the President’s Executive Order on Environmental Justice (which was also grounded in Title VI). The guidance requires all DOT funded programs to identify in advance potential “disproportionately high and adverse effects on minority populations and low-income populations” and to propose “measures to avoid, minimize and/or mitigate” these impacts. Id. at 27536.
96. At the Department of Housing and Urban Development (HUD), a special section of the Fair Housing Act, 42 U.S.C. § 3608, creates a duty on the part of the federal government (and its grantees) “affirmatively to further the policies of this subchapter” (that is, fair housing). The Housing and Community Development Act, 42 U.S.C. § 5304 repeats this admonition and courts have interpreted this to encompass both a duty to avoid actions that perpetuate segregation, and to take affirmative steps to promote racial integration. See NAACP, Boston Chapter v. Sec’y of Hous. & Urban Dev., 817 F.2d 149, 154 (1st Cir. 1987); Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1133-34 (2d Cir. 1973); Thompson v. HUD, 348 F. Supp. 2d 398 (D. Md. 1973); Thompson v. HUD, 348 F. Supp. 2d 398 (D. Md. 2005); U.S. ex rel. Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County 495 F.Supp.2d 375 (S.D.N.Y. 2007); U.S. ex rel. Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County, N.Y., 668 F.Supp.2d 548 (S.D.N.Y. 2009). HUD recently issued a proposed rule to enhance state and local compliance with this obligation. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 (July 19, 2013). However, HUD’s mandate to its grantees to consider and avoid actions that perpetuate or increase segregation is not limited to Title VIII; it also flows also from Title VI, as reflected in HUD’s Title VI regulations. See 24 C.F.R. § 1.4. HUD has also invoked its Title VI review process to affirmatively address housing segregation through investigation and enforcement; these reviews are often done concurrently with Title VIII reviews. See Lawyers Comm. for Civil Rights, Nat’l Fair Hous. Alliance & Poverty & Race Research Action Council, Affirmatively Furthering Fair Housing at HUD: A First Term Report Card: Part II: HUD Enforcement of the Affirmatively Furthering Fair Housing Requirement (2013). See also Office of Fair Hous. & Equal Opportunity, Dep’t of Hous. & Urban Dev., HUD Handbook 8040.1 Compliance and Enforcement Procedures for Title VI.
97. See Orfield et al., supra note 11, at 6-9.
research documenting impacts of concentrated poverty, the Department would be justified in demanding that its grantees account for the predictable impacts their policies and planning decisions have on local segregation patterns.

A Title VI “school diversity assessment” analogous to the Department of Transportation’s procedures would require a prospective state and local racial impact assessment of school construction spending decisions (by the state and local districts), school siting (by local districts, often with state approval), and school districting and boundary decisions (usually at the local level).

As noted earlier, the Department has been reluctant to use its Title VI authority to affirmatively promote school integration outside the enforcement context. However, the Department’s reluctance to take on existing “non-intentional” segregated conditions in local districts is sharply distinguishable from its failure to use its inherent authority under Title VI (as the Department of Transportation has done) to require states and districts to proactively assess the discriminatory impacts of new policy and funding decisions affecting education. Such decisions are more analogous to the siting of new transit stations, fare increases, or changes in transit service to a particular neighborhood.

Using the other agencies’ Title VI guidelines as a framework, the following types of questions are appropriate for a new Department of Education Title VI school diversity assessment guidance:

1) Is the planned state or local government action likely to increase or perpetuate racial isolation or exclusion of students in any racial or ethnic group? Examples include: new school construction (or substantial rehabilitation/reinvestment in an existing school location), school boundary zone changes, school district consolidation or secession, new state charter school funding, state bonding decisions, and changes in the state school construction grant formula.

2) Will the proposed policy or action increase the exposure of children in any racial or ethnic group to concentrated poverty conditions within schools? Will the projected increase in segregation have a significant impact on white children?

98. See Derek W. Black, Middle-Income Peers As Educational Resources and the Constitutional Right to Equal Access, 53 B.C. L. Rev. 573, 404–09 (2012) (summarizing research on harms of racial and poverty isolation). Note that “reduction of poverty concentration” does not have its own independent doctrinal support per se, but that impact is cognizable under Title VI to the extent that conditions of poverty concentration have a disparate racial impact.
by preventing the opportunity to benefit from inter-racial contact.  

3) Are there feasible alternatives available that mitigate the harmful effects projected by the proposal? This is the crucial step that would require the state or local agency to think beyond the local status quo and consider what changes to the proposed action might enhance racial and economic diversity and exposure for students. In the absence of available alternatives to the planned action and where no clear “alternative” exists, this step would also require state and local agencies to consider what remedial steps are available to alleviate the harmful impacts of the resulting segregation.

An example of how such an equity analysis might be conducted was recently provided by local advocates and researchers in Richmond, Virginia, in response to a proposed school closing and rezoning plan. Their policy memo, “Increasing Diversity in the City Schools: Unexplored Paths of Opportunity,” projected the segregative impacts of the Richmond School Board’s decision to close three elementary schools and rezone fourteen others, and set out a series of alternative proposals that would limit resegregation and promote diversity. Similar analyses have been performed recently in New York City and Boston. The methodology is not difficult and could be easily replicated by states and local school districts, perhaps in conjunction with a data tool provided by the Department of Education.

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103. Compare the new data tools included in HUD’s proposed “Affirmatively Furthering Fair Housing” rule, designed to assist local jurisdictions in analyzing patterns of segregation and “racially and ethnically concentrated areas of poverty.” Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 (July 19, 2013).
A proactive Department of Education school diversity planning tool could have a powerful impact on state and local decision making. Coupled with a strong community engagement component, the assessment would require grantees to evaluate the expected impacts of their actions and consider less discriminatory, segregative alternatives. Such an assessment procedure would fit squarely within the agency’s authority under Title VI.

### III. Implementing the “Compelling Interest” in School Diversity Through Government Funding Incentives

Positive incentives embedded in federal non-entitlement grant programs are an increasingly popular government tool for encouraging policy reform at the state and local level. The Department of Education has recently used the competitive grant process to achieve significant policy changes. For example, the Race to the Top grant program has disbursed grants totaling more than $4 billion, and the Investing in Innovation program has disbursed more than $900 million through 2012, with an estimated $134.5 million made available in 2013. These and other competitive grant programs advantage states and districts that adopt policy changes the Department favors. For example, the threshold criteria for the first two phases of the Race to the Top competition required states to adopt policies “establishing pre-K-to college and career data systems that track progress and foster continuous improvement.”

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105. See supra Part I.


107. NAT’L COAL. ON SCH. DIVERSITY, supra note 3.

the Top also encouraged states to raise their caps on the total number of charter schools. Secretary Duncan stated in an early press release that “[s]tates that do not have public charter laws or put artificial caps on the growth of charter schools will jeopardize their applications under the Race to the Top Fund.” In response to such funding incentives, over twenty-five states have made significant legislative changes, even though only eighteen states and the District of Columbia ultimately received funded.

This experience demonstrates how top-down competitive funding can create surprising political motivation at the state level for reforms that would otherwise take many years of political organizing or burdensome litigation to achieve.

School diversity advocates were initially encouraged by the Department’s late 2010 announcement of permissible funding preferences in discretionary grants programs. Those preferences included a potential preference for “projects that are designed to promote student diversity, including racial and ethnic diversity, or avoid racial isolation,” in order to “promote cross-racial understanding, break down racial stereotypes, and prepare students for an increasingly diverse workforce and society.” If such a preference had been incorporated into subsequent Race to the Top and Investing in Innovation funding rounds, the results could have been profound. However, for reasons that remain unclear, the Department’s newly authorized “diversity preference” has only been listed in the federal charter school grants program, and its impact there has been minimal.

In a 2012 Issue Brief, the National Coalition on School Diversity detailed the Department of Education’s reluctance to support school diversity across a number of programs, including Race to the Top and Investing in Innovation. Instead of including even mild

112. See Nat’l Coal. on Sch. Diversity, supra note 3 at 1.
113. Notice of Final Supplemental Priorities and Definitions for Discretionary Grant Programs, 75 Fed. Reg. 78,486, 78,500 (Dec. 15, 2010). The diversity preference was one of sixteen competitive funding priorities the Department authorized.
114. As noted below, the diversity preference for charter schools was too weak, when compared with other priorities, to have any meaningful impact.
115. See Nat’l Coal. on Sch. Diversity, supra note 3.
integration incentives, funds from these programs have flowed to states and districts administering highly segregated systems. The Department is spending the vast majority of its discretionary resources to ameliorate the disparities that racial and economic segregation create and perpetuate, rather than addressing their causes.

The exclusion of school diversity incentives from the Department’s marquee education reform initiatives is also inconsistent with the Department’s implicit recognition, in the 2011 school diversity guidance, that school integration furthers many of the educational “reforms” that the Department champions.

The Administration continues to support funding for the Magnet Schools Assistance Program and has strengthened some of the program’s diversity language. It has not, however, sought to increase magnet school funds; instead, it opts to support the much larger charter school funding program, which contributes to highly segregated schools. And while a diversity incentive is included in the charter school funding guidelines, a charter school with a very high percentage of children in poverty is likely to score higher in the point system than a diverse school that (by definition) includes a large number of non-poor children.

Perhaps the greatest lost opportunity for the Administration to promote school diversity is the system of “waivers” that permits

116. See Orfield et al., supra note 11.
117. See U.S. Dep’t of Justice & U.S. Dep’t of Educ., supra note 2.
118. As the guidance affirms, “[r]acially isolated schools often have fewer effective teachers, higher teacher turnover rates, less rigorous curricular resources (e.g., college preparatory courses), and inferior facilities and other educational resources,” and “[p]roviding students with diverse, inclusive educational opportunities from an early age is crucial to achieving the nation’s educational and civic goals.” Id. at 1.
121. The preference incentives for integrated charter schools have increased in recent funding notices, but they are still outweighed by points for charters with high poverty rates, which effectively eliminates any federal incentive to diversify local charters. See Nat’l Coal. on Sch. Diversity, supra note 3.
states to apply for relief from the strictest accountability penalties the Elementary and Secondary Education Act imposed on “schools in need of improvement.” In both the first and second rounds of the waiver process, Department of Education guidelines require a long list of programmatic assurances, none of which mention diversity. Even though it is widely acknowledged that the lowest performing schools in most states are also the same schools that are extremely poor and often racially isolated, there is nothing in the new waiver process that even acknowledges this as a potential problem. The Department essentially turns a blind eye to the underlying causes of achievement disparities in these lowest performing schools, while relieving states of most of their accountability requirements and permitting Title I funds to continue flowing.

The next test for the Administration will be its ambitious Early Learning initiative. If Congress funds this proposal, will the Administration simply expand separate pre-school programs for low-income children of color? Or will there be some effort to bring children from diverse economic and racial backgrounds together in the same learning space? Early indications are not encouraging. As with all other programs funded by the Department of Education, the decision not to promote integration through funding incentives is not a neutral act—it supports and maintains an existing system of educational separation for low-income children of color.

The Department of Education should focus on incentives at the state level to promote integration across school district lines to maximize the effect of its integration efforts. As Goodwin Liu and Bill Taylor have observed, “[f]or poor and minority students in urban areas, the principal means of obtaining a desegregated public education is to cross an urban district boundary into a suburban school.”

123. Schools in need of improvement are defined in the most recent reauthorization of ESEA. The No Child Left Behind Act of 2001, Pub. L. No. 107–10, 115 Stat. 1425 (2002). The waiver process was precipitated in part by the large number of schools that failed to reach improvement goals after five years.


125. See ORFIELD ET AL., supra note 11.

126. The $250 million “Competition to Build and Develop and Expand High-quality Pre-school Programs,” pursuant to the Consolidated Appropriations Act of 2014, Pub. L. No. 113–76, was recently announced by the Department of Education, with regulations or funding guidance to follow. See Public Comment Sought for New Competition to Build, Develop and Expand High-Quality Preschool Programs, HOMEROOM (Feb. 26, 2014), http://www.ed.gov/blog/public-comment-sought-for-new-competition-to-build-develop-and-expand-high-quality-preschool-programs.

127. See NAT’L. COAL. ON SCH. DIVERSITY, supra note 3.
This is easier said than done.\textsuperscript{128} To achieve desegregation, the Department of Education must first overcome its exaggerated deference to school district boundary lines.\textsuperscript{129}

The Obama Administration’s most recent proposal to reauthorize the ESEA\textsuperscript{130} explicitly recognizes the key role played by interdistrict programs in promoting diversity. The Administration’s proposal includes the creation of “Promoting Public School Choice Grants,” a new program that would make competitive grants to high-need districts and give “priority for grants to applicants that propose to implement or expand an interdistrict choice program and to applicants that propose to implement or expand a program that will increase diversity.”\textsuperscript{131} Unfortunately, this proposed new section of the ESEA is not funded in the President’s 2015 budget.\textsuperscript{132}

But the Department need not wait for Congress to act—it already has ample authority to promote diversity in its existing grant programs. The Department also has a number of models to draw on from regions with successful interdistrict transfer and regional magnet school programs, demonstrating that voluntary school integration is possible if the right incentives are in place.\textsuperscript{133}


\textsuperscript{132} The President’s proposed 2015 Budget also includes a funding proposal for a new “Race to the Top: Equity and Opportunity” competition that is focused on improving the academic achievement of students in high poverty schools. The initial description of this proposed funding program includes a reference to strategies that help “break up and mitigate” the effects of concentrated poverty—suggesting that one of the goals of this program could include school integration. However, as this Article goes to press it is too early to know the fate of this funding proposal or the specific language that Congress will adopt. See DEP’T OF EDUC., supra note 131 at H-28.

IV. USES OF DATA REPORTING TO ENCOURAGE PROGRESS TOWARD INTEGRATION

The federal government collects a vast amount of demographic data from local education agencies (LEAs) and schools, primarily through the biennial Civil Rights Data Collection (CRDC). Surprisingly, in spite of robust information on student race and ethnicity, as well as regular proposals for new information collection, the CRDC does not provide information on either the degree of racial and economic segregation in schools or districts, or how these rates have changed over time. Schools already collect information on student race, ethnicity, and free or reduced price lunch participation each year. This proposed additional dimension would require minimal effort, but would provide benchmarks for district and school progress over time. For example, a Connecticut statute requires local districts to report biennially on “programs and activities undertaken . . . to reduce racial, ethnic and economic isolation” and “evidence of the progress over time in the reduction of racial, ethnic and economic isolation.”

Statewide progress in addressing racial segregation across school districts could also be measured, but this is not yet part of federally required state level reporting requirements.

Improved access to racial and economic segregation data over time would not only help empower advocates, but would also create an expectation of progress at the state and local levels, especially if accompanied by specific benchmarks or goals.


138. CONN. GEN. STAT. § 10-226h(b) (2013). The statute, adopted in response to a state-based school desegregation decision, *Sheff v. O’Neill*, 238 Conn. 1 (1996), has a parallel reporting requirement for the state to provide “an analysis of the success of such programs and activities in reducing racial, ethnic and economic isolation.” *Id.* at § 10-226h(c).
V. Conclusion: The Cost of Neutrality

In a 2010 speech at the historic Edmund Pettus Bridge in Selma, Alabama, Education Secretary Duncan asked, rhetorically, “How can we better integrate our schools, promote a healthy diversity, and reduce racial isolation?”139 But he gave no answers. Instead, Secretary Duncan listed actions that the Department of Education hoped would address the consequences of segregation and racial isolation, including disparities in achievement, school discipline, and dropout rates for low-income children of color. Surely these disparities must be addressed, but the Department’s avoidance of school integration as a policy priority will only lead to more segregation, and greater disparities in the future.

The Department of Education already has the policy levers it needs to engage more forcefully with states and local districts to promote school diversity and reduce racial and economic isolation in public schools. The Department can exercise its unused Title VI authority to require states and districts, as a basic condition of Title I funding, to undertake proactive equity assessments that include an analysis of the discriminatory and segregative impacts of major policy and funding decisions, and to take steps to ameliorate these impacts. It can use its competitive grant programs to encourage innovative efforts to reduce racial and economic isolation of students at the state and local level, and it can require regular data reporting that will demonstrate whether a state or district is moving toward greater segregation or integration. The Department’s existing statutory framework authorizes and even encourages all of these actions. The Department of Education’s ongoing refusal to act within its existing authority to encourage integration is a denial of the “moral and ethical obligation” that Justice Kennedy described in Parents Involved.

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RESTRUCTURING LOCAL SCHOOL WELLNESS POLICIES: AMENDING THE KIDS ACT TO FIGHT CHILDHOOD OBESITY

Rebecca Edwalds*

Childhood obesity is a major problem plaguing the United States. Over one-third of children are overweight, and there is little indication that this trend will reverse in the near future. The federal government has attempted to combat childhood obesity through the National School Lunch Act, which regulates the quality of foods federally subsidized schools may serve to children, and provides broad goals for physical activity. These basic goals leave extensive room for states to implement different standards, and they are not sufficient to effectively confront the childhood obesity problem. This Note proposes amendments to the National School Lunch Act that increase the requirements for physical activity for schools participating in the National School Lunch Program. By raising the standards and forcing schools to increase actual physical activity among children, the United States can begin to take strides in the right direction to combat childhood obesity.

INTRODUCTION

Childhood obesity is a growing and omnipresent health issue in the United States. As of 2008, over one-third of all U.S. children and adolescents were overweight, and currently, seventeen percent of overweight children and adolescents are obese. These numbers continue to grow. Children are now at risk for health issues that historically only plagued adults—issues so severe that the average life expectancy in the United States is decreasing.

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2. Id.; see Childhood Obesity Facts, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/healthyyouth/obesity/facts.htm (last updated Feb. 27, 2014) [hereinafter Childhood Obesity Facts].
Most state and federal policies attempting to combat childhood obesity focus on which foods are served in lunchrooms. While the type of food served in schools is important in the battle against childhood obesity, statutes enacted to date have been insufficient and may contribute to the obesity problem. Children need to exercise and learn how to make healthy choices while they are young so that they can make better decisions as adults.

The most recent federal law on point, the Healthy, Hunger-Free Kids Act of 2010 (Kids Act), is a promising step toward fighting childhood obesity. The Kids Act is a significant improvement over the original 1946 school wellness program, codified in the National School Lunch Program. However, the Kids Act has not gone far enough. This Note proposes an amendment to the Kids Act that combines more stringent physical activity requirements with increased physical and nutritional education, all within the existing Local School Wellness Policy framework established by the Kids Act.

Part I of this Note examines the history and current structure of federal legislation surrounding childhood obesity. Part II discusses how the current statutory framework addresses childhood obesity and considers its shortcomings. This Part also explores the guidelines at the center of the Kids Act and argues why such guidelines are inadequate. Finally, Part III proposes an amendment to the Kids Act that will make the Act more effective in teaching children the importance of exercise and healthy eating. Additionally, Part III combats possible criticisms of the proposed amendment by arguing that such criticisms do not override the need for greater action against childhood obesity.

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5. Although it is clear that childhood obesity is multi-faceted and cannot simply be fixed by the implementation of more exercise in schools, this Note argues that strengthening physical education and nutritional education programs in schools could go a long way towards fighting obesity. Other reforms are undoubtedly important, but they are beyond the scope of this Note.


8. As will be discussed in more detail below, the Local School Wellness Policy is the portion of the Kids Act that gives guidelines to participating schools for physical activity and education. This Note proposes to build on those guidelines.
I. EXISTING FEDERAL PROGRAMS

The federal government’s first foray into childhood nutrition and health legislation came about not because children in America were obese, but because many were starving. Accordingly, the first federal program to deal with the issue, the National School Lunch Program, focused on feeding children. Although there are still hungry children in the United States, childhood obesity has become an increasingly pressing issue. As a result, attention of some legislative and regulatory bodies, such as the Centers for Disease Control and Prevention, has shifted from feeding hungry children to helping obese children become healthy.

The introduction of physical activity and nutrition education into federal legislation has been a slow and inadequate process, in part because of the historical focus on feeding children, and also partially due to the foods served in schools’ contingency on federal funding. This Part summarizes existing federal law regulating child health and nutrition to demonstrate why reform is needed.

Although federal regulations have attempted to incorporate physical activity and nutrition education elements, they have failed to effectively combat childhood obesity.


13. All of the statutes discussed are still in full force in schools today.
Established in the aftermath of the Great Depression, the National School Lunch Program (NSLP) was created through the Richard B. Russell National School Lunch Act to address malnutrition and poverty among children. At the time, there was an agricultural surplus, where farmers were unable to find buyers for their crops, and malnutrition problems, particularly amongst children. The NSLP granted cash subsidies from the United States Department of Agriculture (USDA) for every meal served at schools in compliance with federal regulations promulgated under the NSLP. The NSLP thus provided a solution to both problems. Farmers found a buyer for excess crops and children received at least one full meal each school day at an affordable price to the schools. This subsidy arrangement, which still exists today, was not mandatory, but provided a monetary incentive for schools to participate. Though the program received little funding and was poorly administered when it first began, it has much more structure and funding today.

The NSLP’s federal regulations, although originally focused on preventing starvation and malnutrition, also include a minimum standard of nutrition and require each meal to be provided to children for free or at a reduced price. The minimum nutritional standards attempt to ensure that each meal served at the free or reduced price is nutritionally balanced. In addition, the regulations prohibit the sale of Foods of Minimum Nutritional Value.
(FMNV). Failure by a school to comply with these regulations can result in a loss of federal funding.

Because schools serve more food than can be covered by cash subsidies, the regulations also created a program whereby the USDA can purchase “entitlement foods” in stock from agricultural surplus and resell those foods to schools. Entitlement foods are not FMNV, although their nutritional value may be questionable. Schools tend to heavily rely on entitlement foods, most of which are “canned, frozen, or dried, and disproportionately favor meats, eggs, and cheese.”

These foods tend to be the basis for unhealthy foods often served in schools such as “cooked sausage patties and links, pizza topping, pork bar-b-que, beef parties/crumbles/meat balls, fruit pops, turnovers, chicken nuggets/patties/roasted pieces, breaded chicken . . . and pizza.”

Even vegetables that are available as entitlement foods are not particularly healthy. They typically consist of “various beans, processed tomato products, potatoes, and corn,” most of which are starches. Although starches provide important nutrients, they tend to be higher in calories and carbohydrates—items some nutritionists believe should be eaten in moderation. In addition, school lunch portions typically exceed recommended caloric intake.

When the purpose of the Act was to feed malnourished children, larger portion sizes and reliance on entitlement foods were less of a concern. However, obesity is a more prevalent issue today than malnutrition, so the need to reduce unhealthy calories is of great importance.

22. Victoria L. Brescoll et al., Assessing the Feasibility and Impact of Federal Childhood Obesity Policies, 615 ANNALS AM. ACAD. POL’L & SOC. SCI. 178, 181 (2008). The foods of minimum nutritional value (FMNV) are foods prescribed by the USDA that may not be sold in the food service areas during lunch periods. FMNV include: “soda water, water ices, chewing gum, hard candy, jellies, and gums, marshmallow candy, fondant, licorice, spun candy, and candy coated popcorn.” Pomeranz & Gostin, supra note 16, at 68.


25. See id.

26. Id. at 1704–05.

27. Id. at 1705.

28. Id.


30. See Plemmons, supra note 23, at 192 (“[S]ome have attributed the alarmingly escalating rates of child obesity of student participants to the historical paranoia of childhood malnutrition, which has been overcompensated by over consumption.”).

31. See Mortazavi, supra note 24, at 1706.
surplus and feeding malnourished children makes it difficult to provide meals that are truly nutritionally balanced.32

The NSLP has an additional problem, however. It only prohibits the sale of FMNV in school cafeterias during lunch hours, so children still have access to these foods from vending machines, snack bars, or the cafeteria before and after lunch.33 Moreover, the items prohibited as FMNV only include “sodas, non-juice based water ices, chewing gum, and certain kinds of candy and candy coated items,”34 leaving room for other unhealthy foods such as French fries, ice cream, and potato chips to be served at lunch.35

Furthermore, the National School Lunch Program does not fully prevent schools from selling or making available “competitive foods”—foods sold in direct competition with NSLP foods in schools, but not endorsed by NSLP. Competitive foods tend to be higher in fat and calories and lower in nutritional value than NSLP foods.36 The ease with which children can access these high-fat, low-nutrient foods prevents moderately healthy foods provided by the government from being the sole source of calories for children.37

While the NSLP has helped to solve the problems it was originally enacted to face, it has outlived its usefulness. It now provides school lunches to children struggling with obesity that offer insufficient nutritional quality and portion control, while doing nothing to encourage increased physical activity. In short, instead of combatting childhood obesity, the current food regime established in the NSLP significantly contributes to the problem.

32. Cf. id. (“The USDA’s duty to two masters—public health on the one hand and the economic viability of the agricultural sector on the other—has always been an uneasy balancing act.”).
33. Brescoll, supra note 22, at 181.
34. Mortazavi, supra note 24, at 1720.
35. See Brescoll, supra note 22, at 181.
36. See Pomeranz & Gostin, supra note 17, at 68. Competitive foods are statutorily defined as any foods that are in competition with foods provided by the National School Lunch Program. 7 C.F.R. § 210.11(a)(1). More specifically, they are the foods provided to schools through private vendors, which act as another source of income for schools. See Plemmons, supra note 23, at 193.
Established for purposes similar to the National School Lunch Act, the Child Nutrition Act of 1966 created the National School Breakfast Program to supplement the school lunch program. Although the 1950s and 60s were periods of steady growth and prosperity in the United States, poverty, particularly amongst children, was still a concern. Accordingly, funding for school meal programs greatly increased. Like its counterpart, the NSLP, the Child Nutrition Act does not force schools to participate. Instead, the National School Breakfast Program provides a monetary benefit to schools that adopt its program. This infrastructure was put in place to target schools with students from low-income families. Because schools are typically funded by local property taxes, schools in low-income areas, which often have minimal or no property taxes, are frequently underfunded, and thus more likely to take advantage of the monetary benefits provided by the Child Nutrition Act. To take part in the National School Breakfast Program, individual school districts must apply to their state’s educational agency, which then applies to the federal government for food and monetary aid. This structure, enacted in 1966, still exists today.

There are two principal issues with the Child Nutrition Act. First, like the NSLP, the Child Nutrition Act does not prevent schools from selling or making available “competitive foods.” In addition—similar to the NSLP—the original Child Nutrition Act did not include health education or physical exercise components. Because schools need the money that comes from the sale of competitive foods, it is difficult for the National School Lunch Program or the Child Nutrition Act to promote the health of children, especially

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39. See Mortazavi, supra note 24, at 1707–08 (“The purpose of [the Child Nutrition Act of 1966] was also binary: To feed school children adequate calories and to encourage consumption of surplus agricultural commodities.”).
40. See Lesley Lueke, Comment, Devouring Childhood Obesity by Helping Children Help Themselves, 32 J. LEGAL MED. 205, 210 (2011).
41. See Kramer, supra note 9, at § 3(c).
42. Lueke, supra note 40.
43. See id.
44. See Plemmons, supra note 23 at 186–87.
45. See Interview with Eduardo Sindaco, Principal, Rusk Middle and Elementary School, in Houston, Tex. (Oct. 10, 2012).
48. Child Nutrition Act of 1966 (amended 2004); see Fabros, supra note 4, at 450.
since both programs lack physical exercise and health education components.

C. Child Nutrition & WIC Reauthorization Act of 2004

In 2004, when Congress reauthorized the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966, it also created the Child Nutrition Act of 2004. Like its predecessors, the Child Nutrition Act of 2004 focused on regulating the types of foods served in school cafeterias. However, the 2004 Act also made several amendments to help reduce childhood obesity. One of its most important additions was a directive to the Secretary of Agriculture to promulgate new standards regarding nutrition and food consumption. Inspired by legislation in Arkansas, the 2004 Act also added health education and physical activity components. For example, the 2004 Act amended the Child and Adult Care Food Program. This program was established with the 1946 National School Lunch Act in order to provide food to qualifying families, and amended in the 2004 Act to offer additional funding to entities that created health education programs for limited English speakers, including children and their families.

50. See id.
51. Id.; see Fabros, supra note 4, at 450–52.
52. See Mortazavi, supra note 24, at 1707.
53. In 2003, Arkansas became one of the first states to take aggressive steps to combating childhood obesity by passing Arkansas Act 1220 of 2003. Child Health Advisory Committee, 2005 Arkansas Laws Act 1220 (H.B. 1583) (codified as A.C.A. § 20–7–133–35 (2007)). The Act established a state Child Health Advisory Committee whose job it was to create standards for nutritional and physical education throughout the state. Fabros, supra note 4, at 449. The Act also prohibited the sale of unhealthy foods from vending machines for elementary school students. A.C.A. § 20–7–135(c)(1) (2007); see Fabros, supra note 4, at 449. The most aggressive measure required schools to distribute annual body mass index (BMI) results to parents, given in the context of the child’s age group, along with a notification of the possible health effects of a high BMI, nutrition, and physical activity. See Fabros, supra note 4, at 450. Because of parent outrage at the possible traumatic effects BMI categorization had, the Arkansas General Assembly changed this BMI assessment requirement. See James M. Raczynski et al., Arkansas Act 1220 of 2003 to Reduce Childhood Obesity: Its Implementation and Impact on Child and Adolescent Body Mass Index, 30 J. PUB. HEALTH POL’Y 1, S124, S129 (2009), available at http://www.palgrave-journals.com/jphp/journal/v30/nS1/pdf/jphp200854a.pdf. The BMI assessment is now a requirement for even numbered grades Kindergarten through 10 and is administered every other year, although parents may choose to opt out of the program. See id. at S130.
The 2004 Act, however, consisted of vague standards regarding what physical activity and nutrition education was required and lacked clear enforcement mechanisms. The 2004 Act required each local educational agency to establish wellness policies that, \textit{inter alia}, “[include] goals for nutrition education, [and] physical activity.”\textsuperscript{56} Additionally, the 2004 Act authorized such agencies to seek general advice from the Secretary of Agriculture regarding how to meet local school wellness policy standards.\textsuperscript{57} One guideline promulgated by the Secretary of Agriculture suggests, but does not mandate, that schools provide all children with at least sixty minutes of exercise per day.\textsuperscript{58} However, the 2004 Act contains no enforcement mechanism for these guidelines, meaning that local educational agencies are essentially free to create whatever wellness policies they see fit, even if they do not live up to the guidelines.\textsuperscript{59}

In addition to requiring local school wellness policies, the 2004 Act also created the Team Nutrition Network and Team Nutrition.\textsuperscript{60} The Team Nutrition Network is a program that allows the Secretary of Agriculture and the Secretary of Education to provide grants to states that create programs promoting healthy eating and physical activity.\textsuperscript{61} Team Nutrition is an organization established under the USDA’s Food and Nutrition Service\textsuperscript{62} that seeks to “improve children’s lifelong eating and physical activity habits” through comprehensive plans promoting a healthy lifestyle, but these plans are not backed by any enforcement mechanisms.\textsuperscript{63} Team Nutrition recruits schools to become “Team Nutrition Schools” that commit to promoting healthy lifestyles in children.\textsuperscript{64}

\textsuperscript{56} Id. at § 204(a)(1).
\textsuperscript{57} Id. at § 204(b).
\textsuperscript{59} See Loeb, \textit{supra} note 15, at 322; see also Pomeranz & Gostin, \textit{supra} note 17, at 68 (stating that the local wellness policy in the 2004 Act needed to be strengthened and have increased monitoring and enforcement).
\textsuperscript{60} See Fabros, \textit{supra} note 4, at 451.
\textsuperscript{61} 42 U.S.C.A. § 1788(c)(1) (2012).
\textsuperscript{64} See id. at 7.
Team Nutrition relies heavily on the Food and Nutrition Service, state agencies, school districts, and individual schools to distribute Team Nutrition materials and promote its messages.65

The 2004 Act placed the burden of creating policies squarely on individual school districts, in conformity with principles of federalism.66 Yet, leaving these decisions to individual districts has proved insufficient, and childhood obesity remains a rampant problem.67

D. Healthy, Hunger-Free Kids Act of 201068

The Healthy, Hunger-Free Kids Act of 2010, also called the Child Nutrition Reauthorization Bill, is the most recent federal legislation dealing with childhood health and obesity.69 Like the previous federal legislation, the Kids Act focuses on the types of foods available in schools. However, the Kids Act imposes tougher restrictions on the types of food products allowed on school grounds and encourages more physical and nutritional education.70 The Kids Act authorizes the USDA to regulate competitive foods and requires more stringent nutritional standards for meals served in schools.71 The Kids Act requires the USDA’s nutritional guidelines to be scientifically founded and in compliance with the published Dietary Guidelines for Americans.72 This is an important and necessary step toward combating childhood obesity because it increases the nutritional value of foods available at schools while lowering calorie consumption.73

The Kids Act improves the process through which schools receive entitlement foods.74 Originally, entitlement foods were limited to whatever surplus items American farmers produced. Although the purchase of entitlement foods by the USDA still partially depends on which commodities are in surplus, the USDA may now decide

65. See id. at 6.
67. See Data and Statistics, supra note 3.
69. See id.; Kaplin, supra note 1, at 351–52.
70. Kaplin, supra note 1, at 373.
71. Lisa Craig, Comment, Childhood Obesity, the Unhealthy School Lunch and School Liability Under 42 U.S.C. § 1983, 21 SAN JOAQUIN AGRIC. L. REV. 73, 79–80 (2012); Mortazavi, supra note 24, at 1713. Although the USDA has this new power to regulate competitive foods, it is unclear that they are utilizing this power. See Mortazavi, supra note 24, at 1718.
72. Mortazavi, supra note 24, at 1716.
73. Id.
74. See Craig, supra note 71, at 81.
which foods to buy, allowing for healthier choices than under the NSLP.\textsuperscript{75} State distribution agencies can then decide which foods to purchase from the USDA to distribute to local school districts.\textsuperscript{76} However, the Kids Act does not require states to buy entitlement foods of any kind or amount.\textsuperscript{77} Therefore, although this system allows states to select healthier foods for their school districts, there is no guarantee that states will actually choose to receive healthier foods from the USDA.

The Kids Act also takes the physical and nutritional education components of the Child Nutrition and WIC Reauthorization Act of 2004 further by requiring the Secretary of Agriculture to provide goals and guidelines for local educational agencies, thereby aiding those agencies in creating meaningful local wellness policies.\textsuperscript{78} This is an improvement over the Team Nutrition Network, which, as noted above, only facilitates these goals and guidelines, leaving tremendous discretion to individual school districts to promulgate inadequate local wellness policies.\textsuperscript{79} By becoming the first piece of legislation to impose a federal nutritional education requirement, the Kids Act is a big step in the right direction.\textsuperscript{80}

\section*{II. Shortcomings of the Kids Act}

The Kids Act is certainly an improvement over previous child wellness laws, particularly in the physical activity and nutritional education realm. However, it is not strong enough to combat the problem of childhood obesity. This Part explores the current policies and practices under the Kids Act. Section II.A describes the requirements of the local wellness policies under the Kids Act. In doing so, it highlights the lack of support systems for local school districts and presents the guidelines created to aid local school districts in forming local wellness policies. This Section concludes that school districts fail to fulfill these guidelines due to budgetary constraints and lack of enforcement. Sections II.B and II.C give

\begin{itemize}
\item \textsuperscript{75} See id.
\item \textsuperscript{76} See id.
\item \textsuperscript{77} See id.
\item \textsuperscript{79} See Policy Statement, supra note 63, at 1; Section II, infra.
\item \textsuperscript{80} Kaplin, supra note 1, at 371–72. In the 1920s, some government and other community groups pushed for nutritional health through campaigns advocating for personal hygiene and healthy foods. Id. at 371.
examples of local wellness policies in Texas and Illinois, respectively. These states represent the two extremes of the local wellness policy spectrum. By looking at both the weakest and strongest implementations of local school wellness policies, it is evident that few states make meaningful contributions towards the fight against childhood obesity via local wellness policies.

A. Local School Wellness Policy Requirements

Although the provisions of the Kids Act strengthen the local school wellness policy mandate originally created by the Child Nutrition Act of 2004, they do not go far enough.81 The new provisions were inspired by the lack of reporting requirements under the 2004 Act regarding compliance and implementation of the local wellness policies.82 The most significant improvements in the Kids Act include the addition of a nutritional education requirement, inclusion of additional parties in the formulation of local school wellness policies, programs to improve transparency to the community about the wellness policies and their progress, and the designation of an official at each educational agency to enforce local school wellness policies.83

Another key change involves the Secretary of Agriculture’s increased role in the creation and enforcement of school guidelines. Where the Child Nutrition Act of 2004 only required the Secretary of Agriculture to assist educational agencies upon request, the Kids Act requires the Secretary of Agriculture to proactively create guidelines for local wellness policies.84 More specifically, the Kids Act requires the Secretary of Agriculture to create guidelines and goals in the following areas: (1) nutrition and physical education; (2) nutrition guidelines for foods that are made available on school campuses; (3) requiring others outside of the local educational agency to participate in the creation, implementation, and review of the policies; (4) requiring that the education agency keep the

83. Id.
public updated on changes and implementation status of the policies; and (5) measurement of compliance with the local school wellness policy by the local educational agency.\(^\text{85}\)

Additionally, the statute also requires the Secretary of Agriculture to seek input from the U.S. Department of Education and the U.S. Department of Health and Human Services, acting through the Centers for Disease Control and Prevention, when promulgating the guidelines.\(^\text{86}\) In response to this mandate, these agencies formed an Interagency Workgroup and created a 5-Year Technical Assistance and Guidance Plan.\(^\text{87}\) The Guidance Plan, which was produced after conducting surveys and interviews with school administrators, nutritionists, and staff members, lays out goals and objectives for the years 2010 to 2014 for the types of assistance and guidance available to local educational agencies. For example, one of the Workgroup’s conclusions was that there ought to be clearer guidance and more resources “to help school districts assess, implement, and measure the implementation of their LWPs.”\(^\text{88}\)

The Guidance Plan’s goals and objectives, as well as its underlying survey data, highlight the shortcomings of the Kids Act. For example, the Workgroup reported a lack of support for local wellness policies from school administrators, nutritionists, and staff members. A more critical look shows that the policies likely lack support because their creation is essentially an unfunded mandate.\(^\text{89}\) Compounding the lack of independent funding is the fact that because schools must achieve certain academic standards under No Child Left Behind, physical education is one of the first programs cut due to budget restraints.\(^\text{90}\) In order to comply with the local wellness policy mandate, schools will often count recess as a form of physical activity.\(^\text{91}\) Recess, however, is not necessarily equivalent to exercise, as there is no guarantee that children will actually engage in physical activities.\(^\text{92}\) The use of recess in lieu of

\(^{85}\) 42 U.S.C.A. § 1758b(h).


\(^{88}\) Id. at 10.


\(^{90}\) See Fabros, supra note 4, at 455.

\(^{91}\) Interview with Eduardo Sindaco, supra note 45.

\(^{92}\) See Leviton, supra note 89, at 47 (“Children are more active generally at school when there is equipment such as basketball hoops . . . and supervision to organize active games.”).
formal physical education undermines the physical activity requirements in the Kids Act.\footnote{95} Moreover, even when there are physical activity classes, studies have shown that in some school districts, only nine percent of that class time is spent performing moderate to vigorous physical activity.\footnote{94}

Furthermore, even if schools were required under local wellness policies to provide physical education to students, budgetary constraints pit academic programs directly against wellness policies, and academic programs usually win. The strategy of dropping physical education programs when budgets are tight sends the wrong message to children: Physical activity is not as important as academics.\footnote{95} This mindset works directly against the Kids Act’s goal of encouraging children to form life-long healthy habits.

The Workgroup also found that school nutritionists believed the benefits of physical education were not sufficiently publicized.\footnote{96} Research has shown that physical activity is linked with stronger academic performance, better behavior, and improved cognitive skills.\footnote{97} Decision-makers’ knowledge of these benefits might improve the credibility of local school wellness policies. However, the Kids Act contains little to ameliorate this problem.

The Guidance Plan produced by the Workgroup provides evidence that the government is at least aware of the types of changes that need to occur to reduce childhood obesity. However, the guidelines, while well intentioned, are too broad to sufficiently prepare local education agencies to adequately address the issue of childhood obesity.

In a separate publication, the Centers for Disease Control (CDC), providing advice per the Kids Act, created its own guidelines that espouse a holistic and comprehensive approach to healthy eating, physical education, and health education.\footnote{98} Although compliance with the CDC guidelines “is neither mandatory nor tracked by CDC,” they show that the CDC is aware of the types

\footnote{95. Admittedly, even where there is a physical education program, there is no guarantee that children will actually engage in meaningful physical activity during said program. See Karen E. Peterson & Mary Kay Fox, \textit{Addressing the Epidemic of Childhood Obesity Through School-Based Interventions: What Has Been Done and Where Do We Go From Here?}, 35 J.L. MED. \& ETHICS 113, 118 (2007).}

\footnote{94. \textit{Id.} (citing P.R. Nader, \textit{Frequency and Intensity of Activity of Third-Grade Children in Physical Education}, 157 PEDiATRIC \& ADOLESCENT MED. 2, 183–90 (2005); B.G. Simons-Morton et al., \textit{Observed Levels of Elementary and Middle-School Children’s Physical Activity during Physical Education Classes}, 23 PREVENTIVE MED. 437 (1994)).}

\footnote{96. \textit{Id.} at 208.}

\footnote{97. \textit{Id.} at 2.}

\footnote{98. \textit{See CDC Guidelines, supra note 10, at 1–2.}}
of programs that must be implemented in order to effectively combat childhood obesity.

The CDC provides nine general guidelines, as follows:

1. Use a coordinated approach to develop, implement, and evaluate healthy eating and physical activity policies and practices.\textsuperscript{100}
2. Establish school environments that support healthy eating and physical activity.\textsuperscript{101}
3. Provide a quality school meal program and ensure that students have only appealing, healthy food and beverage choices offered outside of the school meal program.\textsuperscript{102}
4. Implement a comprehensive physical activity program with quality physical education as the cornerstone.\textsuperscript{103}
5. Implement health education that provides students with the knowledge, attitudes, skills, and experiences needed for healthy eating and physical activity.\textsuperscript{104}
6. Provide students with health, mental health, and social services to address healthy eating, physical activity, and related chronic disease prevention.\textsuperscript{105}
7. Partner with families and community members in the development and implementation of healthy eating and physical activity policies, practices, and programs.\textsuperscript{106}
8. Provide a school employee wellness program that includes healthy eating and physical activity services for all school staff members.\textsuperscript{107}
9. Employ qualified persons, and provide professional development opportunities for physical education, health education, nutrition services, and health, mental health, and social services with staff members, as well as staff members who supervise recess, cafeteria time, and out-of-school-time programs.\textsuperscript{108}

\textsuperscript{100} Id. at 13.
\textsuperscript{101} Id. at 18.
\textsuperscript{102} Id. at 21.
\textsuperscript{103} Id. at 28.
\textsuperscript{104} Id. at 33.
\textsuperscript{105} Id. at 37.
\textsuperscript{106} Id. at 41.
\textsuperscript{107} Id. at 45.
\textsuperscript{108} Id. at 47.
Although all nine guidelines are important for creating a healthy school environment, this Note suggests that Guidelines Four and Five—increased physical education and nutrition education—are most needed. Guideline Four recommends daily physical education for grades K-12, specified as 150 minutes of exercise per week for elementary school children, and 225 minutes of exercise per week for secondary school children. Guideline Four also suggests having daily recess and opportunities available for extracurricular sports, but does not allow recess or participation in sports to take the place of physical education. Guideline Five urges schools to provide health education from pre-kindergarten through twelfth grade. These recommendations demonstrate the importance of health education in the fight against childhood obesity, yet health education is woefully underemphasized in schools.

Like the Guidance Plan, the CDC’s guidelines demonstrate that the government is aware of what is necessary to produce an ideal school environment that encourages physical activity and nutrition education. Unfortunately, these guidelines have not been enough to incentivize the implementation of effective programs. As mentioned in Part I, local school wellness policies were first required by the Child Nutrition Act of 2004. At that time, the Secretary of Agriculture’s guidelines recommended local school wellness policies provide children with at least sixty minutes of physical activity per day. Yet, by 2006, only four percent of elementary schools, eight percent of middle schools, and two percent of high schools provided daily physical education. The vagueness of these guidelines and lack of mechanisms to enforce them has resulted in a

109. See Section III.A, infra.
110. CDC Guidelines, supra note 10, at 28. The recommended weekly physical activity requirements increase with age because physical activity naturally decreases as children get older. See Adolescents and Young Adults, Ctrs. for Disease Control & Prevention, http://www.cdc.gov/nccdphp/sgr/adoles.htm (last visited Mar. 23, 2014).
111. CDC Guidelines, supra note 11, at 31–32.
112. Id. at 33.
113. See id. at 33–34 (stating that in 2006, the median number of hours required for nutrition education was 3.4 hours for elementary school, and 5.9 hours for high school).
114. See Part I.C, supra.
116. See CDC Guidelines, supra note 11, at 28. These statistics are also, unfortunately, the most recent data collected on the issue. See Michelle Obama Understates Percentage of High Schools with Physical Education, Politifact.com (May 30, 2012), http://www.politifact.com/truth-o-meter/statements/2012/may/30/michelle-obama/michelle-obama-understates-percent-high-schools-ph/.
wide range of physical activity and nutritional education programs. At one end of the spectrum is Texas, with little to no physical and nutritional education. At the other end is Illinois, which provides some of the best programs in the country. Both states are discussed below.

B. Texas

Texas’s state policies facially comply with Kids Act requirements, but nonetheless fail to significantly contribute to the battle against childhood obesity. Currently, the Texas State Education Code requires physical education instruction for grades K-12.117 Today, the phrase “physical education,” which historically did not include physical activity, means at least thirty minutes of moderate to vigorous physical activity each day for grades K-5, or if this is impracticable, 135 minutes of moderate to vigorous physical activity each week.118 The requirement for physical activity may be fulfilled through recess, which is frequently the case in low-income schools.119

As children get older, however, the requirements grow more lenient. For grades 6-8, the Code requires just thirty minutes of moderate to vigorous physical activity each day for at least four of the six semesters.120 High school students must only take one credit of physical education to graduate.121 This credit can be completed through online coursework, which does not include actual physical activity.122 In addition, middle and high school students may be exempted from physical education if they participate in a school sport, or any other activity that has moderate to vigorous activity levels.123


118. Id. at 1.

119. See Nat’l Ass’n of State Bds. of Educ., State School Healthy Policy Database: Texas, http://www.nasbe.org/healthy_schools/hs/state.php?state=Texas (last updated Aug. 22, 2013) [hereinafter State School Healthy Policy Database: Texas]; Interview with Eduardo Sindaco, supra note 45 (describing his school’s physical education program as having one physical education class per week, and thirty minutes of recess each day).


121. State School Healthy Policy Database: Texas, supra note 119.


123. State School Healthy Policy Database: Texas, supra note 119.
Texas provides significant leeway for school districts to create their own physical education curricula. The base requirement is that the curriculum be sequential and developmentally appropriate for the age range, while advancing several other statutory goals, such as “promot[ing] student participation in physical activity outside of school.” Additionally, at least fifty percent of the physical education must involve physical activity. Under the Code, however, recess meets this fifty percent requirement, despite the fact that many students do not actually engage in moderate to vigorous physical activity during recess.

Texas additionally demonstrates its inadequate approach to childhood obesity by its apparent lack of concern for children’s health. As a form of data collection, the Texas Education Agency requires a fitness assessment of all students from third to twelfth grade. The results are confidential and are not provided to parents as a way of informing them or their child about the child’s current fitness level. Providing this information to parents could at least put parents on notice of their children’s health and give parents the opportunity to effectuate change in their children’s lives that might otherwise go unnoticed.

Like Texas’s physical education requirements, the health education requirements are more stringent for grades below the high school level. Health education must be available for grades K-12, though there are no specific hourly requirements. Grades K-8 must spend “sufficient time” on health education each year, while high school students must earn a half credit in health education over four years to graduate. The state leaves the decision of minimum hourly requirements to each district’s local school health advisory council.

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125. Id. at § 28.002(d)(10).
126. Id. at § 28.002(d)(3).
127. See Peterson & Fox, supra note 93, at 118.
129. See State School Healthy Policy Database: Texas, supra note 119.
130. See id.
As a result of these vague guidelines, Texas technically complies with the Kids Act’s local school wellness policies. The implementation of local school wellness policies, however, fails to significantly contribute to the battle against childhood obesity.

C. Illinois

At the opposite end of the spectrum, Illinois is one of the few states to require daily physical education from kindergarten through twelfth grade in public schools. Neither recess nor extracurricular sports are required. However, schools may count recess toward their daily physical education requirement, as long as a certified teacher is supervising. In addition, schools may exempt students in eleventh or twelfth grade who participate in interscholastic sports, are members of ROTC, who must take other classes to graduate, or take classes required to apply to an institution of higher learning. Illinois allows school districts to apply to the state legislature for a waiver from the physical education requirement for a two-year period, which may be renewed, but only for a total of six years.

Illinois also requires health education, though to a much lesser extent than physical education. Middle and high school students must complete health education, though it is also encouraged in elementary school. Middle and high school students must complete the equivalent of one semester of health education before each graduation, but the weeks may be split up over several years.

Although the legal requirements in Illinois do not meet CDC Guidelines, Illinois has its own model wellness policies that much
more closely follow the CDC Guidelines. The model policies call for daily physical education, daily recess, daily health education, availability of sports or other physical activity in programs before and after school, and a prohibition against using physical activity as a punishment. However, like many of the federal level guidelines, these model policies are only recommendations and Illinois state law does not contain any mechanisms to ensure their adoption in schools.

Despite the lack of enforcement mechanisms, the Illinois Department of Public Health, in conjunction with the Illinois State Board of Education and the Illinois Public Health Institute, is actively working to raise Illinois’ standards. They recently produced a three-year plan calling for all Illinois K-12 students to participate in daily, high-quality physical education. The plan eliminates the physical education waiver program, and mandates that children engage in moderate to vigorous activity for at least fifty percent of physical education time. In addition, the group successfully lobbied the Illinois Legislature to revise the Illinois physical education curriculum. In 2012, Illinois Public Act 97-1102 created the Enhanced P.E. Task Force to make recommendations to the Governor on what curriculum changes need to be made.

This strong state mandate is surely a step in the right direction, but it still lacks effective means of implementation. Schools do not always fulfill the state mandate for daily physical education. Furthermore, childhood obesity is a nation-wide problem, and a state-by-state approach is not an adequate solution. As Texas’s state...
requirements show, it is quite easy for a school district to comply with the local wellness policy without seriously impacting a child’s physical activity or health education. This approach is insufficient to address the issue of childhood obesity. The nation as a whole should mimic Illinois’ bold efforts to combat childhood obesity by requiring higher standards for physical activity and health education. Because it is unlikely that the states will follow Illinois’ example on their own initiative given the current state of affairs, this would require stronger federal intervention.

III. A Stronger Federal Government Role is Needed

With just four changes, the existing Kids Act could be turned into a significantly more effective statute that might actually stand a chance at combating childhood obesity in the United States. This Part details each of these four changes and explains why greater federal intervention is desirable in this area. It then addresses potential criticisms of the reform and, finally, proposes mechanisms for implementing these changes.

A. Proposed Amendment to the Kids Act

One reason why the Kids Act has failed to substantially decrease childhood obesity is due to overly vague guidelines. Studies have shown that policies targeting direct behaviors are more likely to be effective than ones setting broad goals. Accordingly, this Note proposes an amendment that articulates four overarching goals centered around concrete standards for physical activity and nutrition education. The overarching goals include the following: (1) to increase moderate and vigorous physical activity; (2) to reduce sedentary activity (i.e. watching TV and playing video games); (3) to decrease consumption of high-fat foods; and (4) to increase consumption of fruits and vegetables. This Note proposes adding the following amendment to Section (b) of the Kids Act to provide more concrete guidelines that target these goals:


149. See Peterson & Fox, supra note 93, at 117.
(b) The Secretary of Agriculture shall promulgate regulations that provide the framework and guidelines for local education agencies to establish local school wellness policies. Using this provision and the Secretary’s guidelines, each local educational agency shall establish local school wellness policies for grades K through twelve including, at a minimum:

(1) thirty minutes of daily physical exercise, with a physical education class held three days each week, in which students spend seventy-five percent of the class maintaining moderate to vigorous physical activity;

(2) opportunities for students to participate in physical activity in before or after school programs;

(3) fifty hours of interdisciplinary nutrition education per year, showing how food choices and physical activity are tied to personal behavior, individual health, and the environment;\footnote{150}

(4) Failure to comply with these requirements will result in a loss of federal funding [remainder of existing statute omitted].\footnote{151}

B. Concrete Guidelines are Essential

The Secretary of Agriculture and the CDC intentionally promulgated broad guidelines under the Kids Act. These guidelines are intentionally broad because “every guideline might not be appropriate or feasible for every school to implement, [so] individual schools should determine which guidelines have the highest priority based on the needs of the school and available resources.”\footnote{152} However, the vagueness of the guidelines is one reason why the Kids Act has been so ineffective. With such open-ended guidelines, schools feel no obligation to set high standards for physical activity and nutrition education, because they can write it off as infeasible, economically or otherwise.\footnote{153}

The proposed amendment seeks to strike a balance between the need for more concrete guidelines and the nuances of different
school districts. However, this proposal does not strip school districts of all discretion. Instead, the proposed amendment sets a realistic minimum requirement of thirty minutes of daily physical exercise with three physical education classes per week.154 This requirement is far below the 150 minutes of physical activity each week for elementary students, the 225 minutes each week for high school students recommended by the CDC guidelines,155 or the sixty minutes per day recommended for all children by the Secretary of Agriculture.156 However, the proposed amendment will provide a higher minimum physical activity level than currently exists in many states, while leaving school districts discretion to meet the CDC recommendations.

C. Stronger Federal Intervention is Necessary

Opponents of any government intervention in the obesity battle have two principal objections. The first is that the federal government is too invasive of the personal choices of individuals. The second is that federal regulation will hurt corporate profits by driving people away from entities associated with the restaurant industry.157 Opponents argue that “paternalism is not properly the province of government, especially when it results in the expenditure of taxpayer dollars.”158 However, under the doctrine of parens patriae, greater intervention by the government is justified in the battle against childhood obesity. “Parens patriae . . . refers to the government’s role as guardian for persons legally unable to act for themselves, such as juveniles.”159 Over one-third of all children and adolescents in the United States are overweight or obese.160 The government has a responsibility to help these children become healthy.161

More specifically, opponents of federal intervention argue that education and health care are typically the province of states, and

154. Id.
155. CDC Guidelines, supra note 11, at 28.
156. See Position Statement supra note 58, at 1.
158. Id.
159. Kaplin, supra note 1, at 377.
160. Id. at 353.
161. See infra Part III.D.
the federal government has no business interfering.\textsuperscript{162} However, “the federal government . . . has more resources and expertise in many areas and can address issues that cross state lines.”\textsuperscript{163} Moreover, under the Constitution, the government must provide for the general welfare,\textsuperscript{164} which unequivocally includes public health.\textsuperscript{165}

Because childhood obesity is a national epidemic, the federal government should step in to guide the states more effectively than the Kids Act has done.\textsuperscript{166} Childhood obesity is also a national problem, because the burden of health complications that arise from childhood obesity fall on the wallets of all American taxpayers. Childhood obesity rates are much higher in poorer populations—populations that tend to rely on Medicaid and other public assistance programs. The high rate of obesity amongst those receiving social assistance increases the cost of these programs for all Americans.\textsuperscript{167}

\textbf{D. Constitutional Criticisms}

A favored argument amongst opponents to this Note’s proposed federal intervention is that such intervention violates the Constitution because it reaches beyond Congress’s enumerated powers.\textsuperscript{168} Their argument, however, is without merit. The proposed amendment does not require participation, but merely offers subsidies in exchange for participation—a clear constitutional use of the Spending Clause.\textsuperscript{169} In \textit{United States v. Butler}, the Supreme Court held that Congress has broad power to spend for the general welfare, as long as the general welfare is one of national concern, and the program does not violate other constitutional provisions.\textsuperscript{170} As previously stated, with almost one-third of the nation’s children

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\textsuperscript{162} See \textit{United States v. Onslow Cnty. Bd. of Educ.}, 728 F.2d 628, 638 (4th Cir. 1984) (“Education is certainly an important state function, and apparently is a ‘traditional’ one for purposes of Tenth Amendment analysis.”).
\textsuperscript{163} Loeb, \textit{supra} note 15, at 303.
\textsuperscript{164} U.S. \textsc{Const.} art I, § 8, cl. 1.
\textsuperscript{165} See \textsc{Lawrence O. Gostin, Public Health Law, Power, Duty, Restraint} 6 (2008).
\textsuperscript{166} See Loeb, \textit{supra} note 15, at 318 (“Federal legislation setting nationwide standards would ensure that schools work to address the obesity epidemic.”).
\textsuperscript{168} See generally U.S. \textsc{Const.} art I, § 8.
\textsuperscript{169} See \textsc{Gostin, supra} note 161, at 46; Loeb, \textit{supra} note 14, at 303, 318.
\textsuperscript{170} United States v. Butler, 297 U.S. 1, 65, 67 (1936) (interpreting U.S. \textsc{Const.} art I, § 8).
\end{flushleft}
dealing with weight issues, childhood obesity has clearly risen to a level of national concern.\textsuperscript{171}

The National School Lunch Program is a conditional grant to state governments. The Supreme Court has repeatedly held that conditions may be placed on grants, as long as the conditions are expressly stated and have some relationship to the purpose of the spending program.\textsuperscript{172} For example, the Supreme Court upheld a law requiring states to adopt a twenty-one-year-old drinking age or lose federal highway funding because the Court found that the purpose of federal highway funding created a sufficient nexus between the drinking age and safe interstate travel.\textsuperscript{173} The conditions in the amendment proposed by this Note are clearly stated and align with the program’s purpose: creating healthy children. It is unlikely a court would find this nexus lacking.

The Supreme Court has stated that Congress cannot compel states to adopt laws or regulations through monetary incentives in which states have no discretion in their decisions to comply with the federal regulation.\textsuperscript{174} However, Congress may create standards with which state and local governments must comply in order to receive funding, but participation is fully voluntary.\textsuperscript{175} The vague and broad goals in the Kids Act are likely an attempt to easily maintain compliance with this holding, since it makes it easy for states to comply without placing a heavy burden on each state. The amendment proposed here, however, does not change the fact that the federal government is setting standards. The standards are higher and more clearly defined, but the states and school districts still have discretion in determining the full extent of their local school wellness policies.

Critics may also argue that requiring states to provide more physical education and nutrition education violates the Tenth Amendment.\textsuperscript{176} Again, this argument fails. There are three concepts of federalism that are most often cited for Tenth Amendment concerns: avoiding federal tyranny, promoting democratic rule by providing government that is closer to the people, and allowing

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\textsuperscript{171.} See Kaplin, \textit{supra} note 1, at 353.
\textsuperscript{172.} See, \textit{e.g.}, South Dakota \textit{v.} Dole, 483 U.S. 203, 212 (1987); Oklahoma \textit{v.} Civil Serv. Comm’n, 330 U.S. 127, 143 (1947).
\textsuperscript{173.} See \textit{Dole}, 483 U.S. at 208.
\textsuperscript{174.} New York \textit{v.} United States, 505 U.S. 144, 188 (1992). In \textit{New York \textit{v.} United States}, the Supreme Court held that a federal law giving monetary incentives to states to dispose of radioactive waste in a specific manner, or otherwise have to take ownership of the waste violated the Tenth Amendment and was therefore unconstitutional. \textit{Id.} at 173.
\textsuperscript{175.} \textit{Id.} at 166–67.
\textsuperscript{176.} See \textit{Onslow}, 728 F.2d at 638.
states to be laboratories for new ideas. The idea that the proposed amendment to the Kids Act promotes federal tyranny cannot be maintained, as the amendment leaves considerable discretion to local and state governments. Moreover, in a world of expansive federal regulation, this fear is even less convincing. The same can be said for the second concern, because the proposed statute leaves room for a government closer to the people to design specific programs.

The desire to maintain states as laboratories for new ideas is a compelling, but not dispositive argument against the proposed amendment. While it is true that the proposed amendment limits state experimentation, it does not completely confine that experimentation. State and local educational agencies still have discretion to define the exact terms of the local wellness policy. Accordingly, states and local education agencies have room to experiment with different policies to combat childhood obesity beyond the amendment’s minimum standards. Moreover, state and local educational agencies have been creating local wellness policies largely unguided since 2004 when the first local wellness policies requirements were introduced. They have had ample time to experiment, yet the locally-designed programs have proven ineffective. It is now time for the federal government to step in for the sake of the general welfare. While the debates about the meaning of the Tenth Amendment within the context of the Spending Power will continue, neither affects the proposed amendment.

E. Implementing the Amendment

The success of the proposed amendment depends significantly on its implementation. The amendment focuses on increasing physical activity and nutritional education in schools because schools are the natural environment for a project of this nature. Many children do not live close to parks or other facilities where they can easily exercise. Most children spend the majority of their day at

178. Id. at 321.
179. Id. at 322.
180. See supra Part I.C.
181. Id. at 323.
school and form many habits there that carry over into adulthood. Moreover, most schools already have various sports equipment and field space, making it easier for children to become physically active. Access to exercise facilities in school is especially important in low-income neighborhoods, whose residents are most plagued by obesity.

However, the amendment places a heavier burden on schools to provide students with more physical activity and health education. Educators focused on ensuring that kids reach certain academic benchmarks to comply with No Child Left Behind might see this as problematic. Accordingly, educators often view academics as in competition with, or rather more important than, teaching children the importance of healthy choices and exercise. Policymakers and educators alike should see these realms of education in harmony with one another, especially because being overweight can damage school performance, either through medical related school absences or social stigmas that cause anxiety or depression. Moreover, evidence has shown that increased physical activity during the school day may improve academic performance.

To reduce the friction between academics and physical and nutritional education, schools should incorporate lessons on nutrition and physical activity within existing classrooms and curriculums. Physical and nutritional education courses do not necessarily require separate teachers, as current teachers can teach both classes. In fact, a model local school wellness policy for Illinois already encourages this idea as a legitimate way to achieve the fifty-hour

183. See Kaplin, supra note 1, at 356.
185. Kaplin, supra note 1, at 356.
186. See id. at 355.
188. See Peterson & Fox, supra note 93, at 116.
189. See Fabros, supra note 4, at 447; Story et al., supra note 187, at 110. I recognize the possibility that the best solution to the child obesity epidemic is to reform No Child Left Behind. That solution, however, would require a complete societal change on which values in schools are important. There are advocates that believe the current school atmospheres stifle creativity and the development of children to learn certain skills that are not the skills everyone needs in life. See Sir Ken Robinson, Ken Robinson Says Schools Kill Creativity, Ted Talk (2006), http://www.ted.com/talks/ken_robinson_says_schools_kill_creativity.html.
190. Story et al., supra note 187, at 111.
nutrition education requirement.\textsuperscript{191} A pilot program in Massachusetts provides a similar model for both physical and nutrition education.\textsuperscript{192} This integration is important because it enables children to truly buy into health and physical education information when the entire environment around them supports those ideas.\textsuperscript{193}

The success of the proposed amendment also depends on funding. One significant reason why the Kids Act has been ineffective is that in practice, it requires districts to create and implement local wellness policies without any significant funding from the federal government.\textsuperscript{194} The more stringent requirements included in the proposed amendment will merely exacerbate the problem. Additional funding is needed. One way to provide this funding is to create a new targeted tax.\textsuperscript{195} This new tax could be placed on certain foods to discourage their consumption, hopefully having a similar effect to increased taxes on cigarettes.\textsuperscript{196} Not only would this tax hopefully discourage unhealthy eating, but it could also create revenue specifically for obesity prevention efforts, such as local school wellness policies.

\textbf{Conclusion}

Although the federal government and local educational agencies have been working towards preventing childhood obesity, the efforts to date have not been enough. The government has amended the standards for food served in schools under the National School Lunch Program in an attempt to promote school health. Yet under these same regulations, kids still have access to unhealthy competitive foods. In addition, there is a lack of institutional support for programs geared towards health and exercise throughout the

\textsuperscript{191} See \textit{School District Model}, supra note 137, at 3 ("To maximize classroom time . . . nutrition education shall be integrated into the standards-based lesson plans of other school subjects.").

\textsuperscript{192} One example is Planet Health, which was a two-year program implemented in ten Massachusetts schools where nutrition and physical activity messages were incorporated into the existing school curriculum. See Peterson & Fox, supra note 91, at 116; Kaplin, supra note 1, at 358.

\textsuperscript{193} See Peterson & Fox, supra note 93, at 117.

\textsuperscript{194} Currently the federal government only grants $3 million for the implementation of local wellness policies. See 42 U.S.C.A. § 1758b(d)(3)(D) (2012). See also Interview with Eduardo Sindaco, supra note 45.

\textsuperscript{195} Other policymakers have called for more tax dollars to be used to pay for the implementation of local wellness policies, or for new taxes to be created. See Cawley, supra note 167, at 79.

school administration. This makes it more difficult to build an environment emphasizing exercise and healthy living. Finally, even though the Kids Act requires the Secretary of Agriculture to provide guidelines to support local wellness policies, as evidenced by the current policies in Texas and Illinois, the guidelines are insufficient to create solid local wellness policies.

Children must receive education about the importance of healthy choices and exercise, just as they are educated about other core academic subjects. The best solution to this problem is amending the Kids Act to require increased activity and physical education classes, more opportunities before and after school for exercise, and health education requirements. In placing importance on health education and physical activity, children may grow up to make independent healthy choices, and prevent themselves from becoming part of the obesity epidemic that plagues the nation.