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# Class-Based Affirmative Action: Creating a New Model of Diversity in Higher Education

Neil Goldsmith\*

## INTRODUCTION

The social policy known today as affirmative action dates back to the post-Civil War Reconstruction-era.<sup>1</sup> Under the guise of the Equal Protection Clause,<sup>2</sup> Congress created numerous programs that attempted to aid the assimilation of former slaves into society.<sup>3</sup> Although the phrase “affirmative action” was first used in an attempt to combat discrimination during the Civil Rights movement by supporting race-neutral laws and policies,<sup>4</sup> modern affirmative action emerged under President Lyndon Johnson, who redefined affirmative action to include result-oriented hiring plans that gave preferences to minorities.<sup>5</sup> President Johnson famously stated: “You do not take a

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\* J.D. (2010), Washington University School of Law; B.A. Political Science (2007), University of Wisconsin. I would like to thank my family and friends for their constant support, love, and encouragement, with a special thank you to my mom, dad, and wife, Elana. I would also like to thank the amazing editors of the *Washington University Journal of Law & Policy* for their hard work on this Note and overall dedication to the publication.

1. Affirmative action programs are based on the concepts of equality embedded in the Thirteenth, Fourteenth, and Fifteenth Amendments. See Kent Kostka, Commentary, *Higher Education, Hopwood, and Homogeneity: Preserving Affirmative Action and Diversity in a Scrutinizing Society*, 74 DENV. U.L. REV. 265, 268 (1996).

2. The Equal Protection Clause of the Fourteenth Amendment states: “No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

3. Kostka, *supra* note 1, at 268 n.22.

4. The phrase was first coined by President Kennedy in an Executive Order that called upon federal contractors to “promote and ensure equal opportunity for all qualified persons, without regard to race,” and to use “affirmative action” to do so. Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1961).

5. Kostka, *supra* note 1, at 268 n.24. The Supreme Court first upheld racial remedies for past discrimination in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15–31 (1971) (holding that courts have broad power to remedy past discrimination). After this

person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all others,' and still justly believe that you have been completely fair."<sup>6</sup>

President Johnson's basic rationale for affirmative action still rings true today: discrimination against minorities persists despite targeted efforts to eradicate it, and as a result of this past and present discrimination, minorities should be given preferential treatment in order to make up for the social inequalities that have accompanied such discrimination.<sup>7</sup>

Affirmative action policies are particularly relevant within the context of university admissions. Because universities are considered to be "major pathways to power and privilege" in society, admissions policies that embrace affirmative action are seen as viable ways minorities can achieve upward social mobility.<sup>8</sup> Education is also considered a mechanism to curb the effects of "intergenerational

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decision, it was widely believed that affirmative action policies would withstand judicial scrutiny. *See* Kostka, *supra* note 1, at 269.

6. Commencement Address at Howard University: "To Fulfill These Rights," 2 PUB. PAPERS 635, 636 (June 4, 1965). Johnson also addressed the socioeconomic disadvantages many blacks faced, stating:

[A]bility is not just the product of birth. Ability is stretched or stunted by the family that you live with and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.

*Id.*

7. Indeed, the Supreme Court recognized this in the recent *Grutter* and *Gratz* cases. *See* *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003). In her concurring opinion in *Grutter*, Justice Ginsburg stated that "conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals." *Grutter*, 539 U.S. at 345 (Ginsburg, J., concurring). In *Gratz*, Justice Ginsburg further noted: "The stain of generations of racial oppression is still visible in our society . . . and the determination to hasten its removal remains vital." *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting).

8. Jerome Karabel, Op-Ed., *The New College Try*, N.Y. TIMES, Sept. 24, 2007, at A23. Others see admission to an elite educational institution as "virtually ensuring those students wonderful opportunities for further education, economic security, professional rewards and personal freedom." Rod Paige, U.S. Sec'y of Educ., Back-to-School Address to National Press Club: Education in America: The Complacency Must End 2 (Sept. 24, 2003), available at <http://www.evic.ed.gov/PDFs/ED482942.pdf>.

economic disadvantage.”<sup>9</sup> Thus, universities commonly consider race when deciding which applicants to admit.<sup>10</sup> Exactly how this policy is implemented, however, varies by institution<sup>11</sup> and has prompted the Supreme Court to uphold certain policies,<sup>12</sup> while claiming others to be unconstitutional under the Equal Protection Clause.<sup>13</sup>

The main critique of affirmative action is that it can, and often does, provide advantages for minorities who have access to the same socioeconomic resources as privileged white applicants.<sup>14</sup> Additionally, some scholars argue that, by focusing solely on race, affirmative action ignores the problem of unequal access to higher education that many low-income white students face.<sup>15</sup> A solution to this problem is to use socioeconomic status as a factor in admissions decisions instead of race.

While a few schools have experimented with these policies with varied success,<sup>16</sup> no court has examined a challenge to class-based

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9. Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1881 (1996). Malamud also notes, however, that such intergenerational transmission of economic advantage (or disadvantage) is a “subtle and diffuse phenomenon.” *Id.* at 1880.

10. See generally WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* 1–20 (2006).

11. See *infra* Part I.

12. See, e.g., *Grutter*, 539 U.S. at 343 (holding that “the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admission decisions”).

13. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003).

14. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 49 (1998) (noting that 71 percent of blacks enrolled at selective colleges come from middle class backgrounds); see also Malamud, *supra* note 9, at 1861 (noting that sociologist William Julius Wilson has argued that “affirmative action programs tend to benefit those who have already risen out of the lower classes”); Richard Kahlenberg, *Invisible Men: Race Is No Longer The Unacknowledged Dividing Line In America. Class Is.*, WASH. MONTHLY, Mar. 1, 2007, at 61 (asking the question: “Why is it ‘progressive’ to support a college admissions program that favors the son of a wealthy black doctor over the child of a poor white waitress?”).

15. Additionally, Martin Luther King has commented on the plight of low-income whites, stating, “[I]t is a simple matter of justice that America, in dealing creatively with the task of raising the Negro from backwardness, should also be rescuing a large stratum of white poor.” MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 129 (Signet Classic 2000) (1964).

16. At the UCLA School of Law, an admissions scheme utilizing economic-based preferences increased Black, Hispanic, and Native American enrollment figures to five times what they would have been under a strictly academic scheme. Richard Kahlenberg, *Class-Based Affirmative Action*, BOSTON GLOBE, Jan. 19, 1999 at 11. However, in the University of California system, preferences for low-income students were heavily scaled back after they significantly increased enrollment only for Eastern European and Vietnamese students,

affirmative action plans, leaving universities to wonder if such initiatives would pass constitutional muster.<sup>17</sup> Although the legality of class-based affirmative action policies would likely be analyzed under intermediate scrutiny,<sup>18</sup> they should also be able to withstand strict scrutiny review.<sup>19</sup>

This Note proposes that class-based<sup>20</sup> affirmative action policies should be further implemented in university admissions. While the benefits of class-based policies are clear, most institutions have been hesitant to implement such initiatives for fear of subsequently reducing minority enrollment.<sup>21</sup> Although class-based plans have the potential to limit minorities' participation in higher education, if the proper variables are taken into account by admissions offices, these plans would provide a much needed boost to both minorities and

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seemingly "not the sort of 'diversity' the university had in mind." Heather MacDonald, *How UC is Rigging the Admissions Process*, L.A. TIMES, Sept. 7, 2008, at 34.

17. It should be noted that only admissions policies at public universities may be challenged as unconstitutional under the Equal Protection Clause, as private universities are not state actors that fall under the mandate of the Fourteenth Amendment. *See, e.g.,* *Berrios v. Inter Am. Univ.*, 535 F.2d 1330, 1332 (1st Cir. 1976).

18. *See* Genevieve Campbell, Note, *Is Classism the New Racism? Avoiding Strict Scrutiny's Fatal in Fact Consequences By Diversifying Student Bodies on the Basis of Socioeconomic Status*, 34 N. KY. L. REV. 679, 694–700 (arguing that class-based affirmative action policies would be subject only to intermediate scrutiny because they are facially neutral and merely have a disparate impact on certain racial groups). *But see Gratz*, 539 U.S. at 304–05 (Ginsburg, J., dissenting) (frowning upon universities that "may resort to camouflage" in order to maintain racial enrollment figures without specifically identifying applicants based on race, charging that such institutions would try to do this through "winks, nods, and disguises"). Due to the disproportionate number of poor minorities in this country, race and class are so intertwined that such policies could not be deemed race-neutral. Justice Ginsburg's statements show an inherent suspicion of the Court that class-based affirmative action plans are really just racial affirmative action plans by another name because they purport to achieve specific race-based goals.

19. *See infra* Part II.A.

20. While this model is referred to as "class-based," this definition is not only limited to class as commonly defined as lower, middle, and upper sections in the United States. As discussed further in this Note, the definition of "class" is complex, and it is that very definition that dictates exactly which individuals should receive preferences, and whether certain admissions policies will live up to judges' scrutiny. This Note defines class largely in terms of socioeconomic status, which consists of numerous variables discussed at length in Parts II and III.

21. *See, e.g.,* Ben Gose, *The Chorus Grows Louder for Class-Based Affirmative Action*, CHRON. HIGHER EDUC., Feb. 25, 2005, (Special Supp.) at B5 (quoting scholar William Bowen's book, *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION*, as noting that "replacing racial preferences with income-based ones alone would cut minority enrollment at selective colleges nearly in half").

disadvantaged white applicants, creating greater socioeconomic diversity while maintaining racial diversity. Thus, this Note concludes that the implementation of class-based policies would not represent the end of race-based affirmative action. Rather, these policies would represent an important modification of race-based policies to achieve the same basic diversity goals while not sacrificing opportunities for well-qualified white students.<sup>22</sup>

Part I of this Note will discuss the history of both race-based affirmative action and class-based affirmative action, with a focus on the seminal case law and current public policy debate.<sup>23</sup> Part II will examine the legality of class-based affirmative action policies, and explain why such policies offer a significant advantage over strictly racial policies.<sup>24</sup> Finally, in Part III, this Note will identify the characteristics of an effective class-based affirmative action policy, and propose specific factors and metrics universities should consider when designing an appropriate plan.<sup>25</sup>

## I. HISTORY

Although no case has examined the legality of a class-based affirmative action policy in university admissions, the Supreme Court ruled on the constitutionality of racial preferences in admissions in three landmark cases: *Regents of the University of California v. Bakke*,<sup>26</sup> *Gratz v. Bollinger*,<sup>27</sup> and *Grutter v. Bollinger*.<sup>28</sup> Drawing on the principles set forth in these cases, as well as various lower court decisions, affirmative action scholars have outlined the legally-based and policy-based rationales both for and against class-based measures.

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22. See *infra* Part III.

23. See *infra* Part I.

24. See *infra* Part II.

25. See *infra* Part III.

26. 438 U.S. 265 (1978).

27. 539 U.S. 244 (2003).

28. 539 U.S. 306 (2003).

### A. Regents of the University of California v. Bakke

In 1972, the University of California-Davis School of Medicine (UC-Davis) adopted a “special admissions program” to increase minority enrollment.<sup>29</sup> Students who indentified themselves as racial minorities<sup>30</sup> were referred to the special program, which operated independently from the general admissions program.<sup>31</sup> UC-Davis specifically reserved sixteen percent of its incoming class seats for minorities participating in the program.<sup>32</sup> Allan Bakke, a white male who had been denied admission to UC-Davis in 1973 and 1974, brought suit, claiming that the program violated the Equal Protection Clause.<sup>33</sup>

In an opinion issued by Justice Powell, the Court first rejected the school’s argument that equal protection only applies to a “discrete and insular minority.”<sup>34</sup> Applying strict scrutiny, the Court initially noted that “the interest of diversity is compelling in the context of a university’s admissions program.”<sup>35</sup> However, the Court invalidated

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29. This was done largely in response to the enrollment figures of the first incoming class in 1968, which included three Asians, no Blacks, no Mexican Americans, and no American Indians out of fifty students. *Bakke*, 438 U.S. at 272.

30. UC-Davis viewed only “‘Blacks,’ ‘Chicanos,’ ‘Asians,’ and ‘American Indians’” as targeted minorities. *Id.* at 274.

31. *Id.* at 274–75. Besides not being compared to the general admission applicant pool, students in the special program did not have to meet the 2.5 GPA cutoff applied to all other applicants. *Id.* at 275.

32. *Id.*

33. *Id.* at 276–78. Bakke’s academic qualifications, as defined by undergraduate grades and MCAT scores, were far superior to the average applicant admitted under the special program. His GPA in science courses was 3.44, compared to 2.62 (1973 class) and 2.42 (1974); his overall GPA was 3.46, compared to 2.88 (1973) and 2.62 (1974); his MCAT Verbal, Quantitative Science, and General Information percentile scores were ninety-six, ninety-four, ninety-seven, and seventy-two, respectively, compared to forty-six, twenty-four, thirty-five, and thirty-three (1973) and thirty-four, thirty, thirty-seven, and eighteen (1974). *Id.* at 277 n.7.

34. *Id.* at 290. The Court also famously stated that “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.” *Id.* at 289–90.

35. *Id.* at 314. The Court based its conclusion on the principles of academic freedom, allowing a university “to determine for itself on academic grounds . . . who may be admitted to study.” *Id.* at 312. (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). The Court also discussed UC-Davis’ right to select students who “contribute the most to the ‘robust exchange of ideas,’” and noted the benefits of studying in a diverse environment to prepare students to deal with the “heterogeneous population” they will ultimately serve as physicians. *Id.* at 313–14 (internal quotations omitted).

the program because it was not narrowly tailored to achieve that interest and represented a “disregard of individual rights as guaranteed by the Fourteenth Amendment.”<sup>36</sup> In making this determination, the Court took issue with the specified number of seats reserved for certain ethnic and racial minorities because non-minority applicants, “[n]o matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity,” would never be given a chance to compete for those seats.<sup>37</sup> The Court found it acceptable for diversity to constitute a “plus factor,” but held that it should not act as a tool to separate an applicant from competition against other applicants.<sup>38</sup>

### B. Hopwood v. Texas

In 1996, the Fifth Circuit decided *Hopwood v. Texas*,<sup>39</sup> which involved a constitutional challenge to the admissions policies at the University of Texas School of Law (“UT”). Under the UT scheme, all applicants were assigned a Texas Index (“TI”) score, which was a composite of each applicant’s GPA and LSAT score.<sup>40</sup> Based on an applicant’s TI score, she would be categorized as either a “presumptive admit,”<sup>41</sup> “presumptive deny,”<sup>42</sup> or placed in a middle

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36. *Id.* at 320.

37. *Id.* at 319. In making this determination, Justice Powell did not conclude that any admissions policy that takes race into consideration is per se unconstitutional. *Id.* at 315–18. To the contrary, he praised the efforts of Harvard and Princeton for having admissions policies that take race into consideration but do not reserve specified numbers of seats for minority applicants. *Id.* at 321–24. He heavily endorsed the Harvard program, which was “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.” *Id.* at 317.

38. *Id.* at 315–19.

39. 78 F.3d 932 (5th Cir. 1996).

40. *Id.* at 935. For students with three-digit LSAT scores, the formula was:  $LSAT + 10*(GPA)$ . For students with two-digit LSAT scores, the formula was:  $(1.25)*LSAT + 10*(GPA)$ . *Id.* at 935 n.1.

41. Most applicants in this category were offered admission “with little review.” *Id.* at 935–36. Only 5 to 10 percent of candidates in this category were downgraded to the discretionary zone, typically for “weaknesses in their applications.” *Id.* at 936. Examples of weaknesses included “a non-competitive major or a weak undergraduate education.” *Id.*

42. All applicants in this category were to be rejected, unless one of the reviewing professors “believed that the TI score did not adequately reflect potential to compete at the law



“discretionary zone.”<sup>43</sup> In 1992, for Texas non-preferred minority residents, the presumptive admit TI score was 199 and above and the presumptive deny TI score was 192 and below.<sup>44</sup> However, for Texas minorities,<sup>45</sup> the presumptive admit TI score was 189 and above and the presumptive deny TI score was 179 and below.<sup>46</sup> Cheryl Hopwood, a white, female Texas resident who was denied admission to UT in 1992, along with three other white Texas residents denied admission, brought suit under the Equal Protection Clause.<sup>47</sup>

As in *Bakke*, the Fifth Circuit examined the admissions policy using strict scrutiny.<sup>48</sup> However, it disagreed with Justice Powell’s conclusion that diversity constitutes a compelling government interest.<sup>49</sup> The court held that the use of race in admissions decisions “contradicts, rather than furthers, the aims of equal protection” by treating minority applicants as merely part of easily defined groups instead of individuals.<sup>50</sup> Although the court acknowledged a

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school.” *Id.*

43. Applicants with scores in this category were typically distributed to an admissions subcommittee, consisting of three members, in stacks of thirty. Each member could then vote for roughly ten candidates. If an applicant received two or three votes, she was admitted; if she received one vote, she was waitlisted; if she received no votes, she was rejected. *Id.*

44. *Id.*

45. UT viewed only blacks and Mexican-Americans (not all Hispanics) as targeted minorities. *Id.* at 936 n.4.

46. *Id.* To illustrate the impact of this disparity, it should be noted that out of the applicant pool of residents whose TI scores fell between 189–192 (the difference between a presumptive minority admit and presumptive non-minority deny), 100 percent of blacks were admitted, 90 percent of Mexican-Americans were admitted, and only 6 percent of whites were admitted. *Id.* at 937.

47. *Id.* at 938. Hopwood’s TI score was a 199, which placed her in the presumptive admit category. *Id.* However, because a UT official believed “her educational background overstated the strength of her GPA,” she was reviewed as a discretionary candidate, and ultimately rejected. *Id.* The three other plaintiffs—Douglas Carvell, Kenneth Elliot, and David Rodgers—had TI scores of 197. *Id.* Still, their applications were reviewed in the discretionary category and they were not offered admission. *Id.*

48. *Id.* at 940. The court endorsed this standard because it “ensure[d] that ‘courts will consistently give racial classifications . . . detailed examination both as to ends and as to means.’” *Id.* at 940–41 (quoting *Adarand Constructors v. Peña*, 15 U.S. 200, 236 (1995)).

49. *Id.* at 944. The court also determined that Justice Powell’s opinion in *Bakke* was not binding precedent because “no other Justice joined in that part of the opinion discussing the diversity rationale.” *Id.* It further noted that *Bakke* did not contain the word “diversity” other than in Justice Powell’s single-Justice opinion, and that “[n]o case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis.” *Id.*; see also *infra* note 65.

50. *Id.* at 945.

“remedial purpose” in ameliorating the past effects of racism, it saw as equally important the need to refrain from promoting “improper racial stereotypes” that fuel racial hostility.<sup>51</sup> It also hinted at the appropriate use of class-based affirmative action policies, noting that schools “may consider factors such as whether an applicant’s parents attended college or the applicant’s economic or social background.”<sup>52</sup> Finally, the court dismissed UT’s argument that racial preferences constituted a compelling interest to remedy the effects of past racism,<sup>53</sup> and held its admissions policy unconstitutional.<sup>54</sup>

### C. *Johnson v. Board of Regents of the University of Georgia*

Five years later, in 2001, the Eleventh Circuit decided *Johnson v. Board of Regents of the University of Georgia*.<sup>55</sup> At issue was the freshman admissions policy at the University of Georgia (“UGA”) in effect from 1996–99.<sup>56</sup> Similar to UT, UGA generated an Academic

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51. *Id.* Elaborating on this, the court pointed out that the use of race in admissions merely assembles a student body that looks different, hinting that the broad diversity so enthusiastically endorsed by Justice Powell in *Bakke* is not guaranteed even under a race-based policy. *Id.* at 945–46. The court further held that “[t]o believe that a person’s race controls his point of view is to stereotype him.” *Id.* at 946. Furthermore, the court warned of using race “as a proxy for other characteristics that institutions of higher education value but that do not raise similar constitutional concerns.” *Id.*

52. *Id.* at 946 (footnote omitted).

53. In its analysis, the court found that this use of a remedy seemingly had “no viable limiting principle.” *Id.* at 950. It determined that a “broad program that sweeps in all minorities with a remedy that is in no way related to past harms” is not constitutional. *Id.* at 951. From a functional standpoint, the court also did not believe that, if past discrimination existed in the history of Texas education, a law school admissions policy would represent the proper method to remedy such discrimination. *Id.* at 953–54.

54. *Id.* at 962. Because the court found no compelling state interest in using racial preferences in admissions decisions, it declined to rule on whether UT’s policy was narrowly tailored to achieve that interest. *Id.* at 955. The court also weighed plaintiff’s contention that UT should be enjoined from using race in admissions decisions, which was denied at trial. *Id.* at 938. Justice Wiener stated: “If an injunction should be needed in the future, the district court . . . can consider its parameters without our assistance. Accordingly, we leave intact that court’s refusal to enter an injunction.” *Id.* at 958–59. On remand, the district court issued an injunction, but this was later reversed in another appellate proceeding. *Hopwood v. Texas (Hopwood III)*, 236 F.3d 256, 276 (5th Cir. 2000) (holding that the district court’s failure to provide written findings of fact and conclusions of law and conduct a hearing to determine whether an injunction “was needed in the future” warranted reversal).

55. *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

56. *Id.* at 1240. Between 1990 and 1995, UGA also used an inherently suspect admissions policy. During those years, UGA set minimum standards for black applicants lower than non-

Index (“AI”)<sup>57</sup> number for each applicant, and based on that score, automatically admitted, rejected, or held candidates for further review.<sup>58</sup> For applicants requiring further review, another numerical index was created: the Total Student Index (“TSI”), which consisted of a combination of “weighted academic, extracurricular, demographic, and other factors.”<sup>59</sup> Race was one of the factors considered, and minority<sup>60</sup> applicants were automatically awarded 0.5 points, roughly ten percent of the points necessary to gain admission at this stage.<sup>61</sup> Jennifer Johnson, a white female who was denied admission for the 1999–2000 school year, along with two other white females denied admission, brought suit.<sup>62</sup>

The Eleventh Circuit invoked the Equal Protection Clause and applied strict scrutiny.<sup>63</sup> At the outset, the court refused to examine whether UGA’s interest in student body diversity constituted a compelling government interest.<sup>64</sup> Rather, it found that UGA’s policy

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black applicants, creating a “dual-track admissions policy.” *Id.* Concerns over the constitutionality of the 1990–95 plan led UGA to implement its 1996 plan. *Id.*

57. “The AI is a statistic that weighs and combines an applicant’s SAT scores and GPA.” *Id.* at 1240 n.4.

58. *Id.* at 1240.

59. *Id.* At this stage, twelve factors were considered. Four of these factors were academic: AI score, SAT score, GPA, and curriculum quality. Five factors were nonacademic: parent/sibling ties to UGA, extracurricular activities, summer work, school-year work, and parents’ educational levels. Three factors were demographic: race, gender, and Georgia residency. *Id.* at 1241.

60. UGA considered Asian or Pacific Islanders, Blacks, Hispanics, American Indians, and multi-racial candidates as minorities for admissions purposes. *Id.*

61. *Id.* At the TSI stage, the maximum score was 8.15. *Id.* All candidates who scored 4.93 or higher were offered admission and those who scored 4.65 or lower were denied admission. *Id.* at 1241–42. Candidates scoring between 4.66 and 4.92 were further reviewed at a stage where race was not taken into consideration. *Id.*

62. Johnson’s TSI score was 4.1. If she had been classified as a minority, her score would have been 4.6, and she still would have been automatically rejected. *Id.* at 1242. However, UGA’s policy also awarded 0.25 points for being male, which would have precluded Johnson from rejection at the TSI stage. *Id.* Similarly, her co-plaintiffs, Aimee Bogrow and Molly Ann Beckenhauer, had TSI scores of 4.52 and 4.06, respectively. *Id.* If given an extra 0.75 points for being a male minority, Bogrow would have been automatically accepted and Beckenhauer would have been subjected to further review. *Id.*

63. *Id.* at 1243. The court did so because racial classifications are subject to strict scrutiny under the Equal Protection Clause. *Id.*

64. *Id.* at 1244. It should be noted that UGA, unlike UT, did not argue that racial preferences were warranted to remedy past discrimination. In fact, it “repeatedly disavowed that interest” and focused solely on the “educational benefits of student body diversity in higher education.” *Id.* This strategy may have been a poor choice, as the court noted, “language in

was not narrowly tailored to meet its asserted purpose.<sup>65</sup> Citing *Bakke*, the court noted that, in order to be constitutional, a race-based admissions policy “must truly assess each applicant as an individual rather than a member of a particular racial group.”<sup>66</sup> Drawing on factors laid out by the Supreme Court in *United States v. Paradise*,<sup>67</sup> the court held UGA’s policy unconstitutional, relying primarily on the mechanical and “arbitrary ‘diversity’ bonus” UGA awarded to minorities.<sup>68</sup> The court specifically disfavored the policy’s lack of flexibility in not allowing admissions officers to “adjust the bonus downwards” for minorities who had similar backgrounds as white applicants and added “nothing else to the diversity of the incoming class.”<sup>69</sup> Drawing on these facts, as well as the fact that UGA had not

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some opinions from the [Supreme] Court suggests . . . that the only interest sufficient to support a racial preference is remediating the defendant’s own past discrimination.” *Id.* at 1249.

65. *Id.* at 1251. Just as the *Hopwood* court did, the court refused to adopt Justice Powell’s opinion in *Bakke* as binding precedent, noting that it merely carries “persuasive value.” *Id.* at 1245. After a lengthy discussion of the concurring opinions in *Bakke*, the only clear fact the court found was that “no five Justices in *Bakke* expressly held that student body diversity is a compelling interest under the Equal Protection Clause even in the absence of valid remedial purpose.” *Id.* at 1248. It further found that “the status of student body diversity as a compelling interest justifying a racial preference in university admissions is an open question in the Supreme Court and in our Court.” *Id.* at 1250.

66. *Id.* at 1252.

67. 480 U.S. 149 (1987). The *Johnson* court slightly modified the *Paradise* factors because that case involved affirmative action in an employment context. To determine whether UGA’s program was narrowly tailored, the court examined:

- (1) whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; (2) whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity.

*Johnson*, 263 F.3d at 1253.

68. *Id.* at 1254. It was this “lack of flexibility” that was ultimately “fatal to UGA’s policy.” *Id.*

69. *Id.* at 1254–55. Not only did the court hint at the problem of privileged minorities receiving unnecessary preferences, it further discussed the importance of finding other applicants with unique skills and experiences that would add to the overall diversity of the class. It was critical of UGA’s policy for allowing “no favorable treatment of applicants whose personal backgrounds or skills, while undeniably promoting diversity, do not fit neatly into one of the categories predetermined by UGA.” *Id.* at 1255. The court then listed some examples, including:

“seriously considered race-neutral alternatives,”<sup>70</sup> the court held that UGA’s policy “did not even come close” to being narrowly tailored.<sup>71</sup>

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

On June 23, 2003, the Supreme Court decided the other two landmark cases involving the use of racial preferences in admissions at the University of Michigan.<sup>72</sup> In *Gratz v. Bollinger*<sup>73</sup> the Court addressed undergraduate admissions policy, and in *Grutter v. Bollinger*,<sup>74</sup> the Court addressed a law school admissions policy.

At issue in *Gratz* were the Office of Undergraduate Admissions (“OUA”) policies in effect during 1997 and 1998.<sup>75</sup> Under the 1997 plan, each applicant was given a “GPA 2” number, which combined GPA with other factors, including race, to create a composite score.<sup>76</sup> Admissions counselors then cross-referenced an applicant’s GPA 2 score with her ACT/SAT score using a set of “Guidelines tables” that dictated whether the applicant would be admitted, rejected, or held

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[i]ndividuals who come from economically disadvantaged homes; individuals who have lived or traveled widely abroad; individuals from remote or rural areas; individuals who speak foreign languages; individuals with unique communications skills (such as the ability to read Braille or communicate with the deaf); and individuals who have overcome personal adversity or social hardship.

*Id.* at 1255.

70. *Id.* at 1260.

71. *Id.* at 1251.

72. It was not merely a coincidence that both cases were argued and decided on the same day. The Sixth Circuit issued a judgment in *Grutter*, and prior to ruling on *Gratz*, the *Gratz* petitioner sought a writ of certiorari from the Supreme Court so both cases could be heard together, which was granted. *Gratz v. Bollinger*, 539 U.S. 244, 259–61 (2003).

73. *Id.*

74. 539 U.S. 306 (2003).

75. Although the Court discussed the 1995, 1996, 1999, and 2000 policies as well, this Note will only discuss the 1997 and 1998 policies. This is because the basic method by which applicants were evaluated drastically changed from 1997 to 1998, whereas the policies from other years were only minor variations of the 1997 and 1998 plans. *Gratz*, 539 U.S. at 253–57.

76. *Id.* at 254. These other factors were defined as “SCUGA” factors and consisted of “the quality of an applicant’s high school (S), the strength of an applicant’s high school curriculum (C), an applicant’s unusual circumstances (U), an applicant’s geographical residence (G), and an applicant’s alumni relationships (A).” *Id.* Under the U category, applicants could receive points for “underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying (for example, men who sought to pursue a career in nursing).” *Id.* at 255.

for further review.<sup>77</sup> OUA used a different table for minorities,<sup>78</sup> and many applicants with identical GPA 2 and ACT/SAT scores were subject to different admissions decisions based on whether they fell into the minority category.<sup>79</sup> In 1998, OUA scrapped the Guideline Tables method in favor of a “selection index.”<sup>80</sup> Under this scenario, applicants were awarded up to 150 points based on numerous factors.<sup>81</sup> Race was one of the factors considered, and minority applicants were automatically awarded twenty points, which was twenty percent of the points necessary to gain automatic admission.<sup>82</sup> Jennifer Gratz, a white Michigan resident denied admission in 1995, brought suit along with Patrick Hamacher, another white Michigan resident, who was denied admission in 1997.<sup>83</sup>

Chief Justice Rehnquist issued the *Gratz* opinion, in which the Court found a compelling interest in attaining racial diversity in higher education, but held that OUA’s plan was not narrowly tailored to meet that interest.<sup>84</sup> The *Gratz* opinion did not discuss the “compelling interest” prong at length, and deferred to its reasoning in *Grutter* to address that issue.<sup>85</sup> In holding that the admissions policy

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77. *Id.* Counselors used four separate tables depending on the type of applicant: (1) in-state, non-minority; (2) in-state, minority; (3) out-of-state, non-minority; (4) out-of-state, minority. *Id.* at 254 n.7.

78. OUA classified underrepresented minorities as Blacks, Hispanics, and Native Americans. *Id.* at 253–54.

79. *Id.* at 254. The University even acknowledged that it admits “virtually every qualified . . . applicant from these groups.” *Id.* (citation omitted).

80. *Id.* at 255.

81. These factors included “high school grade point average, standardized test scores, academic quality of an applicant’s high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership.” *Id.* There was also a “miscellaneous” category where race could be considered. *Id.*

82. *Id.* Admissions decisions were based on a point system with the following scale: 100–150—Admit; 95–99—Admit or Postpone; 90–94—Postpone or Admit; 75–89—Delay or Postpone; 0–74—Delay or Reject. *Id.*

83. *Id.* at 251. Gratz’s father was a police officer and her mother was a secretary. Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 480 (2005). She lived in a “Detroit working-class suburb,” had a high school GPA of 3.8, and an ACT score in the eighty-third percentile. *Id.* Hamacher was a varsity athlete and choir member from Flint, Michigan. *Id.* He had a 3.4 GPA and scored above the ninetieth percentile on the ACT. *Id.*

84. *See Gratz*, 539 U.S. at 269–70.

85. *Id.* at 268 (“[F]or the reasons set forth today in *Grutter*,” the Court rejected petitioners’ argument that “diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest.”).

is not narrowly tailored, the Court took issue with the twenty points automatically awarded to an applicant “solely because of race.”<sup>86</sup> It found that awarding those points made race “‘decisive’ for virtually every minimally qualified underrepresented minority applicant,”<sup>87</sup> which goes against the “individualized consideration” required to survive strict scrutiny, as outlined by Justice Powell in *Bakke*.<sup>88</sup>

At issue in *Grutter* was the admissions policy used at the law school beginning in 1992.<sup>89</sup> Different from the admissions plans previously discussed, the law school did not rely on any specific quantitative calculus to make admissions decisions.<sup>90</sup> Rather, it sought to admit a “critical mass of underrepresented minority students . . . so as to realize the educational benefits of a diverse student body.”<sup>91</sup> Sometimes an applicant’s race played “no role” in an admissions decision, while other times it was a “‘determinative’ factor.”<sup>92</sup> An expert witness for the petitioners, however, generated a statistical analysis<sup>93</sup> and concluded that “membership in certain minority groups ‘is an extremely strong factor in the decision for acceptance . . . .’”<sup>94</sup> Ultimately, however, the law school’s official admissions policy was to evaluate candidates “based on all the

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86. *Id.* at 270.

87. *Id.* at 272.

88. *Id.* The Court determined that Justice Powell’s opinion “emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individuals possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education.” *Id.*

89. *Grutter v. Bollinger*, 539 U.S. 306, 315–19 (2003).

90. Director of Admissions Dennis Shields “did not direct his staff to admit a particular percentage or number of minority students, but rather to consider an applicant’s race along with all other factors.” *Id.* at 318. However, Shields did admit that he generated and often consulted “daily reports,” which “kept track of the racial and ethnic composition of the class (along with other information such as residency status and gender).” *Id.*

91. *Id.* Erica Munzel, who succeeded Shields as Director of Admissions, testified that she understood critical mass to mean “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.” *Id.*

92. *Id.* at 319.

93. Dr. Kinley Lamtz generated “admissions grids” based on combinations of GPA and LSAT scores, similar to the guideline tables used in the undergraduate scheme. *Id.* at 320. He made “cell-by-cell” comparisons of applicants with similar LSAT/GPA combinations but of different races “to determine whether a statistically significant relationship existed between race and admission rates.” *Id.*

94. *Id.*

information available in the [admissions] file”<sup>95</sup> in order to produce “classes both diverse and academically outstanding. . . .”<sup>96</sup> Barbara Grutter, a white Michigan resident who was denied admission in 1997, brought suit, alleging violations of the Equal Protection Clause.<sup>97</sup>

The majority opinion in *Grutter*, authored by Justice O’Connor, discussed at length whether diversity constituted a compelling interest under strict scrutiny. The Court favorably cited Justice Powell’s *Bakke* opinion<sup>98</sup> and held that the law school possessed “a compelling interest in attaining a diverse student body.”<sup>99</sup> The Court cited several reasons to support this assertion, including the notions that “cross-racial understanding” and the breaking down of racial stereotypes benefit classroom discussion by making it “livelier, more spirited, and simply more enlightening and interesting . . .,” and that a racially diverse class “better prepares students for an increasingly diverse workforce and society.”<sup>100</sup> In deciding whether the law school

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95. *Id.* at 315. This information included “a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School,” as well as GPA and LSAT score(s). *Id.*

96. *Id.* at 316. Although the law school took into account all forms of diversity, it was particularly concerned with racial diversity, “with special reference to the inclusion of students from groups . . . like African Americans, Hispanics and Native Americans, who without this commitment might not be represented . . . in meaningful numbers.” *Id.*

97. Grutter had a 3.8 GPA and a 161 LSAT score. She was initially placed on the waiting list, but ultimately rejected. *Id.*

98. The Court determined that *Bakke*’s only holding was that “a State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” *Id.* at 322–23 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (2003)).

99. *Grutter*, 539 U.S. at 328. Interestingly enough, at the end of the opinion, Justice O’Connor noted that all affirmative action policies should have “reasonable durational limits.” *Id.* at 342. She stated, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” *Id.* at 343. This decree seems to undercut the “diversity rationale” the Court posits as its basis for upholding the law school’s plan. If diversity constitutes a valid government interest in 2003, seemingly, it should also constitute a valid interest in 2028. With her statement, Justice O’Connor implies that one of the goals of affirmative action is to remedy current and past discrimination, and that in the future, when discrimination no longer exists, racial preferences will no longer be necessary. However, earlier in its opinion, the Court rejects this rationale as a reason for upholding the constitutionality of race-based admissions policies. *Id.* at 328 (“[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”).

100. *Id.* at 330. Prior to outlining these positive benefits, the Court examined the law school’s decision to value diversity in its admissions model by citing numerous academic



plan was narrowly tailored, the Court again cited *Bakke* considerations that “a race-conscious admissions program cannot use a quota system”<sup>101</sup> and that it must consider each applicant as an individual, where race is not “the defining feature of his or her application.”<sup>102</sup> Ultimately, the majority held that the law school’s policy included a “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>103</sup>

#### E. *Smith v. University of Washington*

The Ninth Circuit, in *Smith v. University of Washington*,<sup>104</sup> became the first court to apply *Grutter* and *Gratz* in the context of university admissions. The University of Washington Law School (“UW”) admissions policy, like many other schools’ policies, took race into consideration.<sup>105</sup> At UW, all applicants were assigned an index score based on their GPA and LSAT, and categorized as “presumptive admits” or “presumptive denials” based on the score.<sup>106</sup> All presumptive admits were either admitted or referred to the

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freedom principles, stating, “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.* at 329. Rather than enthusiastically endorse the law school’s view, the Court merely deferred to the law school’s “assessment that diversity will, in fact, yield educational benefits.” *Id.* Because the law school and its amici proffered sufficient evidence in support of their assertion and the policy was implemented in good faith, the Court accepted the law school’s diversity rationale. *Id.* at 330.

101. *Id.* at 334.

102. *Id.* at 337. The Court found it permissible for race to be a “plus factor,” just as Justice Powell did in *Bakke*. *Id.* at 341.

103. *Grutter*, 539 U.S. at 337 (2003). To support this view, the Court cited a number of facts. First, the law school had no policy of automatic acceptance or rejection based on any single nonacademic variable, and did not award any predetermined “bonus” based on race, as the undergraduate scheme did. *Id.* Second, the admissions policy made it clear that diversity considerations are not strictly limited to race, including “admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.” *Id.* at 338. Third, the law school frequently accepted nonminority applicants with grades and test scores lower than minority applicants who are rejected, which showed that it “seriously weigh[ed] many other diversity factors besides race.” *Id.*

104. 392 F.3d 367 (9th Cir. 2004).

105. *Id.* at 371.

106. *Id.* at 370.

Admissions Committee for further scrutiny.<sup>107</sup> The plaintiffs, three white Washington residents who were denied admission to UW, specifically challenged the constitutionality of three UW policies: first, the mailing of “ethnicity substantiation letters”<sup>108</sup> to selected minority applicants; second, the preferences given to Asian American applicants; third, the disproportionately high number of white applicants referred to the Admissions Committee from the presumptive admit category.<sup>109</sup>

The court discussed the recent University of Michigan cases at length before finding that UW’s admissions program “comported with the criteria set forth in *Grutter*.”<sup>110</sup> Regarding the ethnicity substantiation letter, the court held that it actually provided for a more narrowly tailored plan, ensuring that the awarding of a plus factor was actually based on “information about the role that race or ethnicity played in the applicant’s life, rather than simply relying on the applicant’s minority status.”<sup>111</sup> The plaintiffs contention that Asian American applicants had an unfair advantage was based on their assertion that UW could still attract a “critical mass” without giving them preference.<sup>112</sup> If UW did not take race into consideration, Asian Americans would have constituted roughly seven to nine percent of the student body—arguably a critical mass.<sup>113</sup> However, the court held that “*Grutter* explicitly refrained from setting a cap on what could constitute a critical mass,” and refused to impose one itself.<sup>114</sup> In response to the disproportionately large number of white

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107. *Id.*

108. These letters provided minorities an opportunity to supplement their applications with further information regarding “the role that race or ethnicity played” in their lives. *Id.* at 377.

109. *Id.* at 369–70.

110. *Id.* at 376. The court explicitly quoted *Grutter*, holding that UW’s admissions policy represented a “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.” *Id.*

111. *Id.* at 377. Although the plaintiffs argued that the opportunity for minorities to supplement their applications in this respect unduly burdened white candidates, the court rejected this claim, noting, “The Law School directed *all applicants* to write a 700-word essay addressing their potential contributions to diversity.” *Id.* at 378 (emphasis added).

112. *Id.* at 378.

113. In 1994, Asian Americans accounted for 18 percent of the admitted class, and in 1996, they accounted for 14 percent of the admitted class. *Id.*

114. *Id.* at 379. The court also relied on three other factors to uphold the admissions preference for Asian American students. First, it noted that the term “Asian American” is by no

applicants referred to the Admissions Committee,<sup>115</sup> the court found that race was not the sole determinative factor in UW's decision, relying on the fact that no statistics were kept regarding the race of each applicant admitted.<sup>116</sup> For these reasons, the court held UW's admissions policies to be constitutional, and consistent with the principles espoused in *Grutter*.<sup>117</sup>

#### *F. The Public Debate over Class-Based Affirmative Action*

While no case has examined a purely class-based admissions preference scheme, many scholars, journalists, and university administrators have lobbied for its adoption, as it is no secret that low-income students are highly underrepresented in our nation's most selective universities.<sup>118</sup> One explanation for this phenomenon is that schools in low-income areas typically lack the resources to offer college preparatory curricula or employ guidance counselors familiar with selective colleges.<sup>119</sup> There is also a large disparity in both the

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means homogenous, and encompasses a wide range of minority groups that each have different cultures, backgrounds, and languages. *Id.* at 378. Second, it found that one of UW's reasons for enrolling a large number of Asian Americans was to promote its "preeminent Asian law program," and it deferred to the "educational judgment that such diversity is essential to [UW's] educational mission." *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, at 328). Third, it compared UW's class size to the much larger class size at the University of Michigan Law School, noting that 7 to 9 percent of a Michigan Law School class would be twenty-five to thirty-two students, whereas 7 to 9 percent of a UW class would only include twelve to fifteen students. *Smith*, 392 F.3d at 379.

115. White individuals constituted 95 percent of the applicants from the presumptive admit category referred to the committee from 1994 to 1996, whereas the entire applicant pool was roughly 70 percent white. *Id.* at 381.

116. *Id.* at 382.

117. *Id.*

118. See Gose, *supra* note 21, at B5 (noting that at Harvard University, Princeton University, and the University of Virginia, less than 10 percent of enrolled students are eligible for federal Pell Grants (Pell Grants are generally available to students from the bottom 40 percent of U.S. income levels)); Kahlenberg, *supra* note 14, at 61 (citing a 2004 study that examined 146 of the nation's most selective universities and found that only 3 percent of enrolled students came from the lowest socioeconomic quarter of the population, compared to 74 percent from the highest quarter); David Leonhardt, *The New Affirmative Action*, N.Y. TIMES MAG., Sept. 30, 2007, at 76 (noting that amongst the top twenty-five universities as ranked by *U.S. News and World Report*, only two schools' Pell Grant recipients surpassed 15 percent).

119. Gose, *supra* note 21, at B5. For example, although the average high school GPA of an entering UCLA freshman is 4.2, some applicants from low-income areas in Los Angeles are incapable of earning higher than a 4.0 due to their schools' lack of Advanced Placement (AP)

quality and quantity of students' applications. The low-income<sup>120</sup> student's comparatively "thin" application is often found to be unimpressive next to the high-income student's submission—often strategically constructed by a highly paid admissions consultant—that recounts tales of volunteering abroad, attending leadership conferences, and planning youth group retreats.<sup>121</sup>

As previously noted, racial preferences do not adequately address the problem of low socioeconomic diversity either, because most recipients of racial preferences are already relatively advantaged.<sup>122</sup> This runs counter to the highly Americanized principle that all individuals, through hard work, determination, and discipline, have the opportunity to better their lives in order to ascend the social and educational ladder that often defines personal and professional success.<sup>123</sup>

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and Honors courses. Leonhardt, *supra* note 118, at 76. Additionally, low-income students "too often do not receive information at school . . . about tests such as the SAT, or how to pursue financial aid or beef up a college application." Anne Bromley, *Bowen Urges "Class-Based Affirmative Action,"* INSIDE UVA ONLINE (Apr. 23, 2004), [http://www.virginia.edu/insideuva/2004/08/bowen\\_william.html](http://www.virginia.edu/insideuva/2004/08/bowen_william.html) (quoting William Bowen, former Princeton President and strong proponent of class-based affirmative action).

120. This Note uses the term "low-income" to describe students who would receive preference from a class-based affirmative action policy. However, as noted in Part III, income is only one of the factors that should be taken into consideration when determining which students should receive admissions preferences.

121. As one journalist noted:

[Colleges] are aiming . . . for a diverse study body: an exceptional athlete, an exception musician, an exceptional scientist, and exceptional poet. Except that exceptionality . . . doesn't come cheap. Athletes require coaching and often traveling teams; musicians require lessons and instruments; scientists require labs and internships; poets require classes and opportunities for publication. None of these things is readily available to the average middle-class family . . . .

Neal Gabler, Op-Ed, *The College Admissions Scam*, BOSTON GLOBE, Jan. 10, 2010, at 9, available at [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2010/01/10/the\\_college\\_admissions\\_scam/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/01/10/the_college_admissions_scam/).

122. Approximately 86 percent of black students who enrolled in a sampling of twenty-eight selective colleges came from middle and upper-class families. Stuart Taylor, Jr., *Obama Logic Versus Racial Preferences*, NAT'L J., Feb. 23, 2008 at 1. Quite often, racial minorities at selective institutions are "advantaged students, enhanced with marginal minority status and privy to the accoutrements of wealth and privilege, but insulated from possible social detriments, which often accompany minority status." Edward C. Thomas, Comment, *Racial Classification and the Flawed Pursuit of Diversity: How Phantom Minorities Threaten "Critical Mass" Justification in Higher Education*, 2007 BYU L. REV. 813, 845.

123. Such mobility becomes incredibly difficult "when an important determinant of social position and earnings, attendance at a selective higher education institution, appears to be the

Another problem with only using racial preferences in admissions, which lends support to a class-based model, is the fact that wealthy students at selective universities often do not receive the benefit of interacting with an economically diverse student body.<sup>124</sup> Because the majority of U.S. citizens do not come from privileged backgrounds, wealthy graduates of selective institutions may lack a critical understanding of the inherent differences of persons from different social classes.

Opponents of class-based affirmative action cite a number of problems with adopting admissions policies that provide preferences for students from lower socioeconomic classes. The first, and most obvious criticism, is that class-based affirmative action violates the principle of merit.<sup>125</sup> Like those who oppose racial affirmative action, opponents of class-based measures are concerned that low-income students will be admitted over more “deserving” middle- and upper-class students.<sup>126</sup> Many proponents of race-based affirmative action, on the other hand, oppose class-based measures because they believe such plans will not benefit racial minorities to a significant degree. To support this, opponents cite the disparities in size between white and minority populations in the United States. For example, although 21 percent of black families make less than \$10,000 compared to roughly 7 percent of white families, the number of white families in

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near exclusive domain of more affluent groups.” Alicia C. Dowd, John J. Cheslock & Tatiana Melguizo, *Transfer Access from Community Colleges and the Distribution of Elite Higher Education, Report*, 79 J. HIGHER EDUC. 442, 442 (2008). As noted affirmative action proponent Richard Kahlenberg put it, “In determining which of two students has the greater long-run potential, surely a white truck driver’s kids are more deserving than [former White House Adviser] Vernon Jordan’s children.” Kahlenberg, *supra* note 16, at 11.

124. *Id.*

125. In his article on class-based college admissions policies, Professor Richard Banks defines merit as encompassing high grades and standardized test scores. R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1038 (2001). He further subdivides the rationale for merit-based admissions into two categories: “Merit-as-Reward,” characterizing the argument that those who excel should be rewarded for their efforts, and “Merit as Productive Efficiency,” characterizing the assumption that an institution will be most successful when its students have achieved significant prior academic success. *Id.* at 1041, 1048.

126. As one anti-affirmative action journalist wrote, “People with better qualifications would still lose jobs and university slots to people with worse qualifications, and their resentment probably wouldn’t be mollified by the fact that the beneficiaries of this policy might be white.” Michael Kinsley, *Say No to Class War*, TIME, Aug. 14, 2008, at 64.

this category doubles the number of black families.<sup>127</sup> Because a university utilizing a class-based system would be unable to subdivide its low-income applicants by race, it would be possible, and quite probable the critics claim, for an entire class to be assembled with very few minorities.<sup>128</sup> These few minorities, in turn, would feel marginalized, as the critical mass essential for true diversity described in *Grutter* would be lacking.<sup>129</sup>

Perhaps the most difficult question class-based affirmative action proponents must address is precisely how a class-based plan would work.<sup>130</sup> Scholars have argued that the problem with defining socioeconomic status by separating levels on a continuum—lower class, lower-middle class, middle class, etc.—is that this definition fails to fully categorize “groups of people with similar patterns of consciousness and action.”<sup>131</sup> Others have asserted that using more detailed descriptions like “working class” or “rural poor” is likewise unworkable because of the difficulty in determining which individuals actually fit into these groups.<sup>132</sup> A related argument that proponents of race-based affirmative action posit is that minorities still encounter more daily hardship than their similarly situated white

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127. Tung Yin, *A Caribolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213, 232 (1997).

128. See Thomas, *supra* note 122, at 849 (arguing that “a class-based approach would devastate minority enrollment because a university interested in racial diversity could no longer distinguish a poor minority from a poor white student”). *But see* Kahlenberg, *supra* note 16, at 11 (“Contrary to conventional wisdom, using a sophisticated definition of economic disadvantage—one that looks not only at income but at such factors as parents’ education, net worth, and neighborhood poverty—has produced a positive racial dividend.”).

129. As one scholar argued, “critical mass for a minority group is at least 15%, a figure that class-based affirmative action will not come close to producing.” Yin, *supra* note 127, at 244 (footnote omitted). This lack of critical mass also has the potential to create a negative domino effect for the few minorities who are admitted. In 1997, UC–Berkeley Law School admitted only fourteen black students, and all fourteen chose to go elsewhere, apparently over concerns that “they were going to come and be the only [black] person.” *Id.* at 245 (internal quotations omitted).

130. Professor Jerome Karabel has endorsed a “lottery” plan, whereby 5 to 10 percent of a university’s freshman class would be reserved for randomly selected low-income students who have “met a high academic threshold.” Karabel, *supra* note 8, at A23. While such a plan may sound promising, it is unlikely that it would be upheld in court, as it insulates low-income students from competing with all other students for a specified amount of seats. This insulation would probably be deemed unconstitutional. See *supra* note 35 and accompanying text.

131. Malamud, *supra* note 9, at 1864.

132. Kinsley, *supra* note 126.

class members because of the existence of sub-conscious racial attitudes that continue to permeate society. Overcoming this barrier, they claim, makes minority accomplishments in the face of adversity even more impressive.<sup>133</sup>

## II. ANALYSIS

The relevant case law shows that class-based affirmative action policies are constitutional. In addition, social science research indicates that class-based policies, if designed properly, will have the effect of boosting enrollment of low-income students, increasing socioeconomic diversity in higher education. Because these policies will also create significant racial diversity because of the high correlation between race and class, race-based preferences will no longer be necessary in university admissions.

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133. “Close examination of the economic situation of the black middle class reveals that it is, in the aggregate, systematically worse off than the white middle class . . . . [A] combination of present discrimination and the lingering effects of past discrimination suppresses the economic performance of the black middle class.” Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 967 (1997). Similarly, some scholars have even argued that wealthy minorities face greater obstacles in life than poor whites solely based on the color of their skin. See Yin, *supra* note 127, at 247. To support this, Yin cites a survey conducted by Professor Andrew Hacker that found “white college students regularly report that if they were suddenly to become outwardly black while they inwardly remain who they were, reasonable compensation would be one million dollars a year for life!” *Id.* at 246. Recently, Professor Charles Ogletree has illustrated this scenario by offering his view that President Obama’s daughters, although clearly privileged, should not be barred from taking advantage of racial preferences because they may encounter racial discrimination, unlike their white peers, and that they “are not going to be judged in a colorblind way throughout their lives.” Rachel L. Swarns, *Obama Walks a Delicate Path on Class and Race Preferences*, N.Y. TIMES, Aug. 3, 2008, at A1. However, President Obama has taken a different stance. When asked whether his daughters should receive preference in admissions, he responded:

Well, first of all, I think that my daughters should probably be treated by any admissions officers as folks who are probably pretty advantaged, and I think there’s nothing wrong with us taking that into account as we consider admissions policies at universities. I think that we should take into account white kids who have been disadvantaged and grown up in poverty and shown themselves to have what it takes to succeed.

*This Week with George Stephanopolous* (ABC television broadcast May 13, 2007).

*A. Class-based Affirmative Action Policies are Legally Sustainable*

Public policy aside, the threshold requirement for any admissions policy is that it be constitutional.<sup>134</sup> While class-based measures have not been specifically challenged in court, some justices have openly supported them.<sup>135</sup> Although scholars have disagreed over the type of review a court would apply to a class-based policy,<sup>136</sup> this debate is largely irrelevant, as an appropriate class-based plan<sup>137</sup> would satisfy strict scrutiny review.

The Supreme Court has already held that diversity constitutes a compelling government interest under the first prong of the test.<sup>138</sup> Although *Bakke*, *Gratz*, and *Grutter* all involved racial diversity, in no majority opinion did the Court define diversity solely in terms of race. Thus, in the context of admission, socioeconomic diversity also constitutes a compelling interest under strict scrutiny.<sup>139</sup> Just as a Hispanic student seemingly brings different views and experiences to a classroom predominantly filled with white students, a student from a lower socioeconomic class similarly brings different views and experiences to a classroom filled with affluent students.<sup>140</sup>

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134. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1975).

135. Yin, *supra* note 127, at 214.

136. See *supra* note 18 and accompanying text.

137. Exactly what constitutes an “appropriate” plan will be further discussed in Part III. As the prior cases show, whether an admissions scheme is constitutional largely depends on its particular characteristics. For the purposes of this section, this Note will focus more on the constitutionality of the general idea of substituting class-based preferences for racial preferences.

138. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003).

139. In fact, Justice Powell in *Bakke* explicitly proclaimed, “The diversity that furthers a compelling state interest encompasses a far broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” 438 U.S. at 315. He further explained that focusing solely on racial or ethnic diversity would seriously impede the attainment of “genuine diversity.” *Id.* This is significant because language in *Grutter* implied that the Court will likely defer to the educational judgment of universities who believe that greater socioeconomic diversity will improve the overall academic experience of their students. See *supra* note 98 and accompanying text.

140. “[I]ndividuals from various economic backgrounds can make significant contributions, and in order to create a true model for diversified higher education admissions, class-based considerations must play an essential role.” Kostka, *supra* note 1, at 291. “[F]rom an educational standpoint, a longshoreman’s child (of whatever race) is likely to enrich classroom discussion at least as much as another lawyer’s kid (of any race).” Kahlenberg, *supra* note 16, at 11.



The case law demonstrates that admissions policies using race as a determinative factor for most applicants are not narrowly tailored.<sup>141</sup> Thus, in order to be narrowly tailored, class-based initiatives must not make socioeconomic status so integral to the admissions decision that it becomes the decisive factor for low-income applicants. Because the Court in *Grutter* authorized the use of race as a “plus factor” in admissions,<sup>142</sup> universities that institute class-based preferences must carefully limit the weight that socioeconomic status plays in its decision in order to comply with legal standards.

Many universities have already implemented class-based affirmative action policies in their recruiting and admissions plans without being subject to lawsuits.<sup>143</sup> For example, Harvard has used data estimating family income through ZIP codes in conjunction with student test scores to target prospective low-income students.<sup>144</sup> The University of Virginia has increased information-sharing between financial aid and admissions for the purpose of recruiting more low-income students.<sup>145</sup> The University of California system has utilized a scheme whereby admissions officers take into account a student’s “life situation,” including such factors as “whether he or she lives in a high crime neighborhood, has been a shooting victim . . . or comes from a single-parent home.”<sup>146</sup> Additionally, many college applications give students an opportunity to discuss quasi-

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141. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003).

142. See *supra* note 100 and accompanying text.

143. At a 2003 Department of Education Conference, then-Education Secretary Roderick Paige declared that “university doors have now opened to rural and low-income students who never before had a prayer of attending those schools. Where once students from a small number of high schools held the monopoly on elite colleges, students from low-income and low-performing schools are now winning admission . . . .” Ronald Roach, *Class-based Affirmative Action: Battle over Race-conscious Approaches Pushes Idea to Surface—Affirmative Action Watch*, BLACK ISSUES IN HIGHER EDUC., June 19, 2003, available at [http://findarticles.com/p/articles/mi\\_m0DXK/is\\_9\\_20/ai\\_104521292/](http://findarticles.com/p/articles/mi_m0DXK/is_9_20/ai_104521292/).

144. Gose, *supra* note 21.

145. *Id.* Virginia does this by having admissions officers look for indicators—such as the occupation and education of an applicant’s parents—to flag prospective low-income students. They then contact the financial aid office to confirm the student’s status, and award them “a preference comparable to that received by children of alumni.” *Id.*

146. MacDonald, *supra* note 16, at 34. Under the system’s “Comprehensive Review” plan, “a student’s academic qualifications are boosted or demoted” according to these “life situation” factors. *Id.*

socioeconomic factors.<sup>147</sup> By using this information to create a holistic view of an applicant, rather than basing an admissions decision on a single, determinative factor, these admissions policies have avoided the unconstitutionality identified in *Gratz*.<sup>148</sup>

*B. Class-based Affirmative Action Policies Should Replace Strictly Racial Preferences*

Anti-affirmative action scholars have thoroughly documented the problems caused by racial preferences in university admissions.<sup>149</sup> While this Note has already examined the most obvious critique—the violation of the principle of merit—there are still other lasting negative consequences of using strictly racial preferences.

Racial preferences have an obvious discriminatory effect on white students because affirmative action's "main beneficiaries are economically privileged members of the eligible minority groups."<sup>150</sup> However, racial preferences also negatively affect minority students as well.<sup>151</sup> Although meant to encourage diversity and inclusion, racial preferences can have a shaming effect, as white students sometimes assume that every minority on campus is a product of

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147. These applications often ask students to describe unique personal circumstances, specific obstacles they have overcome in life, or, more generally, how they would contribute to diversity to campus. The Common Application, a non-profit organization that provides a uniform application for 350 colleges that "promote access [to higher education] by evaluating students using a holistic selection process," utilizes this strategy. THE COMMON APPLICATION, <http://www.commonapp.org> (last visited Nov. 30, 2010). It gives applicants an option to answer the following prompt: "A range of academic interests, personal perspectives, and life experiences adds much to the educational mix. Given your personal background, describe an experience that illustrates what you would bring to the diversity in a college community, or an encounter that demonstrated the importance of diversity to you." 2009–10 First Year Application, THE COMMON APPLICATION, AP-5 (2009), <https://www.commonapp.org/CommonApp/docs/downloadforms/CommonApp2010.pdf>.

148. See *supra* Part I.D.

149. See, e.g., WARD CONNERLY, *CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES* 109–35 (2000).

150. Malamud, *supra* note 133, at 939.

151. For further analysis of how affirmative action negatively affects minority law school students, see Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004); Peter Kirsanow, *False Hope*, NAT'L REV., Mar. 18, 2008 (noting that empirical evidence shows that preferences in college admissions "severely harm the graduation and career prospects of the intended beneficiaries").

affirmative action.<sup>152</sup> Those admitted because of affirmative action then lack confidence in their abilities because of the perception that they are academically inferior to their white classmates.<sup>153</sup> Regardless of whether these psychological effects influence minority performance, the unfortunate fact is that minorities admitted through affirmative action plans are often unable to meet rigorous academic standards and perform poorly in the classroom.<sup>154</sup>

While strictly racial preferences are not the correct answer to further diversity in higher education, neither is the complete eradication of any type of preference. If admissions decisions were solely based on numbers, a large number of minorities would not have access to higher education.<sup>155</sup> It is precisely this dilemma that

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152. In his scathing dissent in *Grutter*, Justice Thomas described this very phenomenon: "It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the law school because of discrimination, and because of this policy all are tarred as undeserving." 539 U.S. at 371 (Thomas, J., dissenting). Furthermore, in *Hopwood*, several minority students "stated generally that they felt that other students did not respect them because the other students assumed that minorities attained admission because of the racial preference program." *Hopwood v. Texas*, 78 F.3d 932, 953 (5th Cir. 1996). This stereotyping even continues as minorities enter their respective professions. In a survey of minority attorneys practicing in Washington, D.C., many black attorneys felt "their achievements were often discounted as the product of 'affirmative action' rather than their own ability." FINAL REPORT OF THE SPECIAL COMMITTEE ON RACE AND ETHNICITY TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE, AND ETHNIC BIAS (Jan. 1995), reprinted in MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 243, 246 (8th ed. 2007).

153. Studies have shown that

preferential treatment damages the self-esteem of those who benefit from it. One survey found that female managers who felt they had been hired or promoted because of their gender "had a low level of commitment to the company and experienced a great deal of conflict over their role in the company."

Yin, *supra* note 127, at 253.

154. Data from 1992 examining first-year performance of law students at the top fifty law schools (as measured by *U.S. News and World Reports*) found that over 50 percent of all black law students are in the bottom 10 percent of their classes. See Sander, *supra* note 151, at 426. Justice Thomas has also realized this problem, and addressed it in *Grutter*: "The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition." *Grutter*, 539 U.S. at 372 (Thomas, J., dissenting).

155. In a recent article, Jesse Rothstein and Albert Yoon examined how black student enrollment would be affected if race-blind policies were used in law school admissions. Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial*

poses continuing problems for admissions deans and other university administrators.

A class-based affirmative action model provides the balance and compromise needed between the two extreme positions on racial preferences.<sup>156</sup> Under this scheme, poor white students, along with poor minorities, would be placed on equal footing with their more affluent peers. Furthermore, disadvantaged minority students would still have proper access to higher education<sup>157</sup> without being unfairly singled out as the sole beneficiaries of the policy. Because of the loose definitional nature of socioeconomic status and the lack of clear, outward signals of low-income status (in contrast to race), both the beneficiaries and non-beneficiaries would be less aware of which students were given preference.<sup>158</sup>

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*Preferences Do?*, 75 U. CHI. L. REV. 649 (2008). Relying on data from the 1990–91 admissions cycle, the authors made the following conclusions: (1) “fewer than half as many black students would be admitted to law school”; (2) of those admitted, many would be “pushed several steps down the selectivity rankings,” causing them to pursue other careers; (3) the number of black law students beginning law school would decrease by 60 percent; and (4) “the number of black students enrolling at the most selective group of law schools would fall by over 90 percent.” *Id.* at 697. Although the authors relied on data from the 1990–91 admissions cycle, they concluded that the results would be similar for the 2000–01 admissions cycle as well. *Id.* at 710. Another article, relying on the same data, found that if race was not taken into consideration, 90 percent of incoming black students would not have gained admission to any law school. Clark D. Cunningham & N.R. Medhava Menon, *Correspondence: Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1296–97 (1999). Furthermore, another scholar found that if race were not taken into consideration, black enrollment at the most selective law schools in the country would have dropped to 0.44 percent. *See* Synnott, *supra* note 83, at 491.

156. As Bowen put it:

[S]ustaining effective programs of race-sensitive admissions is of paramount importance to the achievement of the equity objective—and, for that matter, to the future of America. But so is enhancing educational opportunities for those among us who have had to overcome barriers of all kinds, related to having grown up outside the reaches of the economic and educational elites.

Bromley, *supra* note 119.

157. In fact, there is some evidence that shows minority enrollment may actually increase under a class-based affirmative action policy. *See* Kahlenberg, *supra* note 16, at 11.

158. As previously discussed, recipients of preference in the admissions process (as well as those perceived as benefiting from affirmative action) often are stigmatized by their peers as less deserving of acceptance. *See supra* notes 151–52 and accompanying text.

### III. PROPOSAL

While the benefits of class-based affirmative action policies are clear, a major reason why these policies have not been fully implemented is that admissions offices have failed to construct plans that generate equitable results.<sup>159</sup> This section will identify which socioeconomic factors should be taken into consideration and how they should be measured.<sup>160</sup>

#### *A. Income*

The most important factor that class-based plans should examine is family income, as reported by parent or legal guardian tax returns.<sup>161</sup> However, automatic cutoffs or quotas for individuals at certain income levels should be avoided, and this measure should be used in conjunction with a holistic approach to determine whether an applicant's family truly suffers from financial hardship. Admissions offices should work with financial aid offices to share FAFSA<sup>162</sup> and other financial information about their applicants.<sup>163</sup> This assumes that schools will not see lack of income as a barrier to enrollment, an

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159. See, e.g., MacDonald, *supra* note 16. In addition to this problem, many universities fail to implement class-based affirmative action policies because of financial constraints. Any school that aims to increase its enrollment of low-income students must also increase the amount of financial aid available to those students. Therefore, this Note assumes that all universities who are willing to implement class-based plans also have the financial capabilities to handle increases in financial aid requests.

160. It is true that many selective institutions claim to already give preference to low-income applicants, but Bowen has stated, "I'm sure . . . [college presidents] believe in good faith that they are giving a boost to the miner's daughter. But, in fact, when you look at the data, as we have, it's simply not true." Gose, *supra* note 21, at B5.

161. This Note realizes that many low-income students may not come from a nuclear family. Thus, the term "family income" should really be measured as "household income," and not strictly limited to an applicant's parental income.

162. FAFSA is an acronym for the Free Application for Federal Student Aid, a government form which includes self-reported financial information from applicants who wish to receive financial aid for college. Federal Student Aid, Free Application for Federal Student Aid, <http://www.fafsa.ed.gov> (last visited Feb. 5, 2009).

163. This approach is similar to the one utilized at the University of Virginia. See *supra* note 145 and accompanying text.

assumption which is likely, given that many highly selective schools already provide low-income students with generous amounts of financial aid.<sup>164</sup>

### *B. Use of Other Socioeconomic Factors*

As many commentators have pointed out, socioeconomic status includes the measurement of many factors besides income.<sup>165</sup> One noted class-based affirmative action scholar describes class as “diachronic in the triple sense that class position is (1) intergenerationally transmitted, (2) mediated through the strategic behavior of social actors over time, and (3) incapable of being understood without reference to patterns of change in the economic organization of society.”<sup>166</sup> Drawing on these three broad characteristics of class, this Note identifies four main factors that class-based affirmative action plans should consider in defining an applicant’s socioeconomic status: geography, wealth, family educational history, and secondary school opportunities.

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164. Gose, *supra* note 21, at B5. Under its “Carolina Covenant” program, the University of North Carolina provides grants and work-study allocations which cover the cost of education to all students whose family incomes are at or below 200 percent of the poverty level, roughly \$42,400 for a family of four. *The Carolina Covenant*, U.N.C. AT CHAPEL HILL, <http://www.unc.edu/carolinacovenant> (last visited Feb. 24, 2010). Many “Ivy League colleges have also adopted need-blind admissions and increased student financial aid” resources for low-income students. Synnott, *supra* note 83, at 503. For example, Harvard University recently adopted a plan whereby students from families earning less than \$60,000 would not be required contribute to the cost of their education. Harvard University, *Harvard Expands Financial Aid for Low and Middle-Income Families*, HARV. GAZETTE, Mar. 30, 2006. During the 2005–06 school year, the first full year of its predecessor program (capping the income limit at \$40,000), 24 percent of Harvard’s incoming class took advantage of this generous offer. *Id.*

165. “The broad measure of socioeconomic status would . . . more fully capture the resource disparities associated with race than would an income-based conception of socioeconomic status. Banks, *supra* note 125, at 1066; *see also* Malamud, *supra* note 133, at 967 (noting that the black middle class is “systematically worse off than the white middle class . . . in the crucial areas of housing, work, income security, education, wealth accumulation, and the intergenerational transmission of middle-class status”).

166. Malamud, *supra* note 9, at 1855.

### 1. Geography

A student's neighborhood often reveals more about her socioeconomic status than her family income.<sup>167</sup> Take, for example, two applicants with identical family incomes. However, Applicant A's family has by far the highest income in their neighborhood, and Applicant B's family has by far the lowest income in their neighborhood. Because an applicant's environment is a critical factor in determining socioeconomic class, these applicants would likely be part of different socioeconomic classes.<sup>168</sup> To account for this crucial variable, admissions offices should utilize statistics on average income by ZIP code and/or school district and adjust their assessment of an applicant's socioeconomic status accordingly.<sup>169</sup>

### 2. Wealth

Admittedly, "wealth" can have a number of meanings and connotations, but for the purposes of this Note it will be defined as tangible asset ownership.<sup>170</sup> An applicant's (and her family's) tangible assets, such as stocks, mutual funds, and real estate would be

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167. Professor Banks looks at this issue from a racial perspective, noting that "[t]he components of a broader measure of socioeconomic status that would most increase racial diversity are . . . the socioeconomic characteristics of one's neighborhood and school—both of which differ dramatically by race" when income is held constant. Banks, *supra* note 125, at 1067.

168. This is because Applicant A would have a lack of exposure to other wealthy people and, as a result, would probably belong to a lower socioeconomic class. Conversely, Applicant B would be exposed to other, more wealthy individuals and would probably belong to a higher socioeconomic class.

169. Harvard University has utilized similar data in targeting low-income applicants to encourage them to apply. See *supra* note 145 and accompanying text.

170. Professor Malamud asserts that even the expectation of wealth can have a significant impact on a person's socioeconomic status. Malamud, *supra* note 9, at 1871. She cites the ability of individuals with accumulated or inherited wealth to have "the freedom to take risks, to make mistakes [and] to be cushioned from market forces." *Id.* at 1871–72. She also accurately points out that a wealthy individual "need not save money for retirement, limit himself to jobs that provide health benefits, or worry that his choices will render him unable to afford to raise children." *Id.* at 1871.

easy to identify and measure. However, another important, yet more difficult to determine marker of wealth is nontaxable (or non-reported) financial assistance from extended family members.<sup>171</sup> To obtain this information, universities should rely on self-reported applicant figures, which is the same practice followed when gathering FAFSA information for financial aid purposes.

### 3. Family Educational History

Education is “the major route for overcoming . . . the effects of intergenerational economic disadvantage.”<sup>172</sup> Because of its high correlation with financial wealth and security, prior family education is a key component in determining an applicant’s socioeconomic status. While many colleges already ask for this information on applications, admissions offices need to further scrutinize the data received not only in terms of education level, but also in education quality. For example, suppose Applicant A is the child of a Princeton graduate, while Applicant B is the child of a University of Phoenix Online graduate. The applicants should not be seen as part of the same socioeconomic class, as their respective parent’s occupation, income potential, and social circle may be vastly different from the other’s.

### 4. Secondary School Information

While secondary school information is often tied to an applicant’s geography, equating the two factors with each other might not always be appropriate, as in cases where students are bused to higher quality public schools or enrolled in private schools. Admissions offices should consider vital statistics like the percentage of students enrolled in free or reduced cost meal programs, average student test scores, and percentage of graduates who attend four-year colleges to assess the relative strength of an applicant’s secondary school program. As

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171. For a further explanation of how extended familial wealth can impact the socioeconomic status of individuals, see Malamud, *supra* note 9, at 1872 (discussing two hypothetical individuals who earn a similar salary but who possess vastly different amounts of wealth).

172. Malamud, *supra* note 9, at 1881.



previously mentioned, some high schools simply do not offer enough advanced-level courses and extracurricular activities for an applicant to be competitive with students from other schools.<sup>173</sup> To account for this, admissions offices should be diligent in gathering key demographic information, as well as information on courses and activities each secondary school has to offer. They should then use this information to evaluate low-income applicants in the context of their own surroundings rather than against the mostly privileged applicant pool.

#### CONCLUSION

While race-based affirmative action has largely engulfed public debate for the past few decades, class-based affirmative action models, comparatively, have seen very little attention.<sup>174</sup> As the racial gap in the United States has arguably become smaller, the socioeconomic gap in this country has grown larger.<sup>175</sup> Thus, it is only a matter of time before class-based affirmative action models become prevalent in university admissions.

This Note discussed the benefits and challenges associated with both race-based and class-based affirmative action admissions policies. In *Grutter*, Justice O'Connor historically called for an end to racial preferences in admissions by 2028.<sup>176</sup> While this goal may seem overly ambitious and unrealistic,<sup>177</sup> the fact remains that strictly racial policies have inherent flaws and must be adjusted. This Note implores universities to continue to experiment and implement various class-based policies in order to achieve a new model of

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173. See *supra* note 119 and accompanying text.

174. "Broad interest in class-based affirmative action arose in the 1990s . . . [b]ut the idea lost momentum as it became apparent that preferences based on income weren't a replacement for racial affirmative action." Gose, *supra* note 19, at B5.

175. See, e.g., G. William Domhoff, *Wealth, Income, and Power*, WHO RULES AMERICA?, <http://sociology.ucsc.edu/whorulesamerica/power/wealth.html> (last visited Nov. 30, 2010) (finding that in 2007, over 85 percent of the wealth in the United States was controlled by the top 20 percent of the population, up from 81 percent in 1983).

176. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

177. See Bromley, *supra* note 119 (quoting Bowen describing O'Connor's mandate as a "daunting task").

diversity that is legally sustainable, socially equitable, and educationally beneficial.<sup>178</sup>

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178. This sentiment is shared by Professor Malamud, among others, who urges administrators to, at the very least, “aim to collect a wider range of information from at least a sample of program applicants, so that more sophisticated metrics can be developed in the future.” Malamud, *supra* note 9, at 1898–99.