

# The False Choice Between Race and Class and Other Affirmative Action Myths

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#### INTRODUCTION

In a 2011 discussion among progressive law professors about the likelihood that the U.S. Supreme Court would grant certiorari in *Fisher v. University of Texas at Austin*,<sup>1</sup> one professor opined that “working class whites are the problem”—the threat to affirmative action—because they keep standing as plaintiffs in cases like *Fisher* as well as *Gratz*, *Grutter*, and *Hopwood* before it. In fact, the professor was wrong in two regards. First, she was wrong on the facts: None of the plaintiffs in these germinal affirmative action cases self-identified as low-income, nor did the courts so identify them.

The professor was also wrong on the more important, big-picture point. She had bought into the myth that this Article dispels, the widely held belief that we must choose between using affirmative action to support racial and ethnic

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1. I refer here to the first time the U.S. Supreme Court granted certiorari in the case. As this Article goes to press, the Court has recently agreed to reconsider the case in light of the U.S. Court of Appeals for the Fifth Circuit’s decision that the University of Texas scheme satisfies strict scrutiny, without need for remand to the federal district court for further findings of fact. See Adam Liptak, *Supreme Court to Weigh Race in College Admissions*, N.Y. TIMES (June 29, 2015), <http://www.nytimes.com/2015/06/30/us/supreme-court-will-reconsider-affirmative-action-case.html> [hereinafter Liptak, *Supreme Court to Weigh*].

minorities on the one hand or to achieve socioeconomic diversity on the other. In fact, we need not choose between the two, and we should aspire to diversify higher education—including its most elite sector—with low-income students of all colors.

The grip of this race-vs-class myth on the legal academy prevents legal scholars from being part of the solution to a pressing problem: how to get high-achieving, low-income strivers into educational institutions that will optimize their potential. Many sectors of the academy—economists, sociologists, educators, social psychologists—are dedicating time and resources to solving this problem, which has significant economic and governance implications for our nation. The economic implications include the enormous waste of human capital that results from our failure to channel low-income and first-generation students of all colors into institutions where they are good fits intellectually and most likely to achieve their optimal potential. The democratic or governance implication is that the current system effectively silences many voices by failing to get them into elite higher education and support them there, in the pipeline for our nation's leadership. Meanwhile, wealthier—but often less able—students get the coveted spots in that prestigious pipeline. The legal academy largely ignores this problem—and arguably even contributes to it—by framing affirmative action as a zero-sum game that necessarily pits racial/ethnic minorities against low-income whites. This Article aims to bring legal scholars into the broader conversation about equitable education access by dispelling the myth that supporting low-income whites necessarily undermines racial and ethnic minorities generally, and particularly in the elite higher education sector.

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The data on college access and family income can be parsed in a number of ways, but one trend is clear and consistent: Family wealth has an out-sized influence on who gets to college, where they go to college, and whether they complete college. Indeed, wealthy students fare far better than their low-income counterparts even when the latter have higher test scores. Half of high-income high school seniors with *average* test scores enroll in college, while only

44% of low-income high school seniors with *high* standardized test scores enroll.<sup>2</sup> Further, low-income students are less likely than high-income students to apply to highly selective colleges, where they would actually have a better chance at getting financial aid or a full ride scholarship.<sup>3</sup>

Indeed, family income data are even more dramatic for the elite higher education sector. Just six percent of students at the 193 most selective colleges are from the bottom income quartile, while two-thirds are from families in the top income quartile.<sup>4</sup> Among the nation's most selective colleges, just 14% of entering freshmen from the class of 2010 came from the bottom half of the income distribution, while 70% were from the highest-earning quartile.<sup>5</sup> The data is more damning still when considered in relation to the promise shown by eighth graders from across the socioeconomic spectrum: high-scoring students from low-income families complete college at nearly the same rate as low-scoring, high-income students (29% and 30%, respectively).<sup>6</sup>

We cannot know exactly what this failure to develop human capital to an optimal degree is costing us, but

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2. David Leonhardt, *Top Colleges, Largely for Elite*, N.Y. TIMES (May 24, 2011), <http://www.nytimes.com/2011/05/25/business/economy/25leonhardt.html?pagewanted=all> [hereinafter Leonhardt, *Top Colleges*].

3. Caroline M. Hoxby & Christopher Avery, *The Missing 'One-Offs': The Hidden Supply of High-Achieving, Low-Income Students* 1-2 (Nat'l Bureau of Econ. Research, Working Paper No. 18586, 2012), available at <http://www.nber.org/papers/w18586>; see also Jason DeParle, *For Poor, Leap to College Often Ends in a Hard Fall*, N.Y. TIMES (Dec. 22, 2012) <http://www.nytimes.com/2012/12/23/education/poor-students-struggle-as-class-plays-a-greater-role-in-success.html>.

4. Peg Tyre, *Improving Economic Diversity at the Better Colleges*, N.Y. TIMES OPINIONATOR (Feb. 5, 2014), <http://opinionator.blogs.nytimes.com/2014/02/05/improving-economic-diversity-at-the-better-colleges> (citing College Board).

5. Anthony P. Carnevale & Jeff Strohl, *How Increasing College Access is Increasing Inequality, and what to do About it*, in REWARDING STRIVERS: HELPING LOW-INCOME STUDENTS SUCCEED IN COLLEGE 71, 137 (Richard D. Kahlenberg ed., 2010) (studying the nation's top 193 universities).

6. Joydeep Roy, *Low Income Hinders College Attendance for Even the Highest Achieving Students*, ECON. POL'Y INST. (Oct. 12, 2005), [http://www.epi.org/publication/webfeatures\\_snapshots\\_20051012](http://www.epi.org/publication/webfeatures_snapshots_20051012) (citing U.S. DEPT OF EDUC., YOUTH INDICATORS 2005: TRENDS IN THE WELL-BEING OF AMERICAN YOUTH 50 (2005)).

McKinsey & Company calculated the cost of one aspect of this inequitable access to higher education. McKinsey concluded that the GDP lost in 2008 was between \$400 billion and \$670 billion—some 3 to 5% of total GDP—because of failure to close the income achievement gap so that between 1983 and 1998 the performance of students from low-income families was on par with that of high-income families.<sup>7</sup>

Despite the data demonstrating economic benefits of closing the income achievement gap, many universities and colleges focus on recruiting students with no financial need. They recruit and favor those who can front the full tuition.<sup>8</sup> Yet nearly 20% of admissions directors at private liberal-arts schools said that the “full-pay students they were admitting, on average, had lower grades and test scores than other admitted applicants.”<sup>9</sup> Further, recent years have seen a dramatic shift from need-based financial aid to so-called merit-based aid, as higher education institutions scramble for relatively affluent students with the GPAs and test scores to bolster the institutions’ rankings.<sup>10</sup>

This failure to maximize our raw human capital undermines our competitiveness as a nation, with economic consequences for generations to come. But that is just one damaging consequence of our current failure to value and

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7. MCKINSEY, THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA’S SCHOOLS 17 (2009), available at [http://silvergiving.org/system/files/achievement\\_gap\\_report.pdf](http://silvergiving.org/system/files/achievement_gap_report.pdf). That study drew the line between high and low annual household income at a low level—\$25,000—which is only a bit higher than the poverty line. That \$25,000 threshold was adopted because it is a qualifier for many government assistance programs. MCKINSEY, DETAILED FINDINGS ON THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA’S SCHOOLS 86 (2009), available at <http://www.ksde.org/Portals/0/Commissioner/Economic%20Impact%20of%20the%20Achievement%20Gap%20in%20America’s%20Schools.pdf>.

8. Tamar Lewin, *Universities Seeking out Students of Means*, N.Y. TIMES (Sept. 21, 2011), [http://www.nytimes.com/2011/09/21/education/21admissions.html?\\_r=0](http://www.nytimes.com/2011/09/21/education/21admissions.html?_r=0) [hereinafter Lewin, *Universities Seeking*] (reporting on a survey of 462 admissions directors and managers: more than half of the admissions officers at public research universities, and more than a third at four-year colleges; among all, 10% of admissions directors said full-pay students they admitted had lower grades and test scores than others they admitted).

9. *Id.*

10. See *infra* Part III.C.1.

support poor and working-class students in elite higher education. This failure also fuels the national trend toward an insular plutocracy and runs counter to our democratic values. As Lani Guinier argued convincingly a decade ago regarding racial minorities<sup>11</sup> and has recently reiterated regarding low-income students, this exclusion—this thwarting of the American dream story-line for low-income strivers—undermines our egalitarian ideals.<sup>12</sup> Failure to include the socioeconomically disadvantaged in the pipeline to our nation's leadership—a pipeline that has narrowed to make elite educational credentials essentially a requirement at the highest levels<sup>13</sup>—means that our future leadership will

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11. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 121 (2003) [hereinafter Guinier, *Admissions Rituals*].

12. See LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY* (2015) (reiterating many of the arguments she made in *Admissions Rituals*, *supra* note 11), *discussed in* Anya Kamenetz, *Q & A with Lani Guinier, Redefining the Merit in Meritocracy*, NPR (February 20, 2015), <http://www.npr.org/blogs/ed/2015/02/20/386120632/q-a-with-lani-guinier-redefining-the-merit-in-meritocracy> (arguing that the mission of higher education is to “develop a new cohort of potential leaders, and it’s very important that they be diverse, not just in terms of who can afford SAT prep but working class and poor, black and white”); *see also* Tomiko Brown-Nagin, *Rethinking Diversity and Proxies for Economic Disadvantage in Higher Education: A First Generation Students’ Project*, 2014 U. CHI. LEGAL F. 433, 434-36 (arguing that affirmative action has not been effective at ensuring social upward mobility, which was an objective of the Civil Rights Act and is in the “national interest” and that greater attention should be paid to bringing the “truly disadvantaged” into elite education).

13. See NICHOLAS CARNES, *WHITE COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY-MAKING* 5 (2013) (summarizing the educational credentials of various federal officials of all three branches of government); Benjamin Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1168-69 (2012) (finding that the educational credentials of Supreme Court justices have grown increasingly elite and that the current Roberts Court justices accumulated fifty-five total years of elite education, with elite defined as Ivy League or Stanford); Lisa R. Pruitt, *The Geography of the Class Culture Wars*, 34 SEATTLE U. L. REV. 767, 780-82 (2011) [hereinafter *Class Culture Wars*] (detailing educational credentials of members of Obama’s cabinet); John Schwartz, *Long Shot for High Court has Reputation for Compassion and Persuasion*, N.Y. TIMES (May 5, 2010), <http://www.nytimes.com/2010/05/06/us/06thomas.html> (noting that, if nominated and approved for the United States Supreme Court, Judge Sidney R. Thomas of the Ninth Circuit would be the only Supreme Court justice without a law degree

lack representation of a significant cohort: those who will have known the realities of a poor or working-class existence. Failure to include such low-income whites excludes a subset of that cohort—those who share an experience and understanding of economic disadvantage even as they enjoy the benefits of racial advantage, the benefits of whiteness.

Yet the perspectives of whites from low socioeconomic strata (SES) are surely valuable ones to have among leaders and policy makers who may otherwise take too much for granted regarding the ease of class mobility or the adequacy of the safety net.<sup>14</sup> After all, if low-income whites are struggling to achieve upward mobility and battling an array of challenges associated with socioeconomic status, we can be sure that low-income racial and ethnic minorities are also struggling.<sup>15</sup> In short, we might think of whites as the proverbial canaries in the coal mine of class (im)mobility.<sup>16</sup>

There are several other reasons we should seek and expressly value the perspectives of low-SES whites in the elite higher education sector. First, the presence of low-income whites—identified and valued as such—would help dispel the myth that poverty is strictly a Black, Latina/o, and American Indian problem.<sup>17</sup> It would also raise the visibility

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from Harvard, Yale, or Columbia; he graduated from the University of Montana Law School).

14. I am reminded of Justice Thurgood Marshall's comment in *United States v. Kras*: "It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are." *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting).

15. See, e.g., CARNES, *supra* note 13, at 12 (arguing that "the shortage of people from the working class in American legislatures skews the policy-making process toward outcomes that are more in line with the upper class's economic interests").

16. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).

17. As Trina Jones has written:

Somehow . . . race and class become mutually reinforcing. Blacks are poor because they are Black and Blackness gets constructed as poor. That is, poverty becomes a constitutive element of Blackness. Blacks are not only lazy, intellectually and morally inferior, they are also poor.

Trina Jones, *Race, Economic Class and Employment Opportunity*, 72 *LAW & CONTEMP. PROBS.* 57, 65 (2009). The same might be said of American Indians and,

of this “forgotten majority”<sup>18</sup> among our future leaders. Second, welcoming and valuing low-SES whites would remind us that the psycho-social barriers to higher education, which legal scholars primarily invoke in relation to racial and ethnic minorities, are also part of the experience of all low-income and first-generation students. These students would likely need special supports to survive and thrive. Finally, by valuing the perspectives of marginal whites,<sup>19</sup> by purposefully including them in elite higher education as in other sectors, we decrease the likelihood of their alienation from the mainstream and from progressive causes, including broad-based support for public higher education.

In this age of escalating wealth and income inequality, we need socioeconomic diversity in higher education more than ever before, yet it is sorely missing from our nation’s leadership and the pipeline to it. We are seeing instead a certain erasure or denial of class—of poor and working class whites in particular—in how the academy assesses and defines “diversity,” which has become a proxy for expressing what the academy values. Available evidence suggests a waning commitment to socioeconomic diversity, as evidenced by who gets admitted to elite educational institutions and the apparent reasons for admission or rejection. The current admissions and financial aid systems use racial disadvantage as a proxy for class disadvantage—however imperfect that proxy may be<sup>20</sup>—as leading institutions of higher education tend to ignore or devalue the wider array of low-income students.

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to a lesser extent, Latina/os. But the flip side of the coin is that whites are presumed to be affluent. See Lisa R. Pruitt, *Welfare Queens and White Trash*, 25 S. CAL. INTERDISC. L.J. (forthcoming 2016).

18. RUY TEIXEIRA & JOEL ROGERS, AMERICA’S FORGOTTEN MAJORITY: WHY THE WHITE WORKING CLASS STILL MATTERS (2000) (arguing that working class whites are often overlooked by the media and policy makers).

19. See generally Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497 (2010) (discussing this issue in the employment context, while noting its possible application in other contexts).

20. Hoxby & Avery, *supra* note 3, discussed *infra* notes 227-28.

This Article analyzes socioeconomic disadvantage as diversity from three vantage points: case law, rhetoric, and elite higher education admissions. The high-water mark for socioeconomic disadvantage as an aspect of “diversity” in case law came in *Bakke v. University of California*.<sup>21</sup> Justice Powell’s opinion in that case famously held that racial and ethnic disadvantage could be considered in the holistic review of applicants.<sup>22</sup> Virtually unnoticed and uncommented upon by judges and scholars since *Bakke*, however, is the fact that Powell also listed socioeconomic disadvantage as an aspect of diversity, treating it as on par with racial and ethnic disadvantage in that holistic review.<sup>23</sup> The U.S. Supreme Court and other federal courts since *Bakke* have largely ignored that stance, implicitly or explicitly re-defining diversity strictly in relation to underrepresented racial and ethnic groups. Meanwhile, the plaintiffs in affirmative action cases like *Grutter*, *Gratz*, *Hopwood*, and *Fisher* are often popularly perceived as socioeconomically disadvantaged whites who pitted the interests of that group against racial and ethnic minorities.<sup>24</sup> In fact, neither Alan Bakke nor any of the plaintiffs in more recent affirmative action cases self-identified as socioeconomically disadvantaged. Nor did the Supreme Court in any of these cases, or the Fifth Circuit in *Hopwood*, use socioeconomic disadvantage or any similar label in relation to any of these plaintiffs.

The second perspective on the content of diversity considered by this Article is that of higher education institutions, which tout their diversity but do so primarily in relation to the presence of underrepresented racial and ethnic groups. In seeking to signal their visual diversity, these institutions effectively erase class, denying class difference and the potency and complexity of socioeconomic disadvantage. This failure to value low-income students and their perspectives has adverse consequences for current and prospective students representing that demographic group, as reflected in the third perspective.

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21. 438 U.S. 265 (1978).

22. *Id.* at 315-17.

23. *Id.*

24. *See infra* Part II.

I call that third perspective—which considers the actual fate of poor and working-class whites in elite higher education—“diversity in action,” and I take it up in Part III.C. Data reveal that low-income applicants fare poorly when applying to selective institutions, not least because admissions schemes do not understand, let alone appreciate, these students’ accomplishments. The most comprehensive recent study, for example, shows that, even controlling for all other variables, holding a part-time job during high school can hurt an applicant’s prospects in the elite admissions race. This and other findings suggest that admissions personnel—or at least the guidelines for their decision-making—fail to grasp the economic necessity often motivating such work and that they do not value the experience gained from it.

Before discussing these three perspectives, I take up a few preliminary issues. First, in Part I, I situate my discussion in contemporary context: a nation increasingly attuned to income and wealth inequality and how these phenomena undermine access to higher education. Then, in Part II, I explain why we need not choose between race and socioeconomic class as the basis for affirmative action. I also posit in that section why we have come to assume that such a choice is necessary. In that same Part, I refute the argument that affirmative action should not be about poor and working class students because elite higher education has always been—and should continue to be—for the middle and upper classes. Finally, I briefly address the myth that low socioeconomic status is quickly alleviated by access to higher education, causing diversity of perspective of this population to fade quickly and render these students redundant of the affluent white norm.

A final word is necessary regarding the scope of this Article, which discusses both public and private colleges and universities. While my greater preoccupation as a law professor thinking about affirmative action is with public institutions because they operate under constitutional strictures that do not apply to the former,<sup>25</sup> private colleges

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25. Of course, even private universities are subject to Title VII and Title IX, but those are not my focus. In 2014, Students for Fair Admissions, Inc., the advocacy group that had been involved in *Fisher v. University of Texas at Austin*,

and universities are relevant, too. This is because they tend to be even more powerful in their ability to make or break careers, and certainly as paths into the highest levels of commerce and public service.<sup>26</sup> Evidence of these two sectors' influence on each other—including in the eyes of judges—goes back at least as far as Justice Powell's opinion in *Bakke*.

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filed a Title IX-based lawsuit against Harvard University, alleging that the undergraduate admissions process intentionally discriminates “on the basis of . . . race and ethnicity.” Complaint at 1, *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, No. 1:14-CV-14176-DJC, (D. Mass. Nov. 17, 2014). The Complaint alleges specific discrimination against Asian-Americans, citing a variety of studies that indicate tougher standards for Asian-Americans seeking admission to Harvard and other Ivy League schools. *Id.* at 47-51. The Complaint relies heavily on data from Dr. Richard Sander and Medha Uppala regarding SAT scores, and it finds that although Asian-American applicants consistently score in the highest percentages, they are underrepresented “by a factor of half or even two thirds—relative to the number of applications from Asian-Americans that Harvard receives.” *Id.* at 46-48. In addition, Table D shows that Harvard's racial demographics for admitted students has remained stable for the past 9 years, which the Complaint asserts is circumstantial evidence indicating discriminatory racial balancing in admitted classes. *Id.* at 67-68.

The same week, *Students for Fair Admissions, Inc.*, filed a second lawsuit against the University of North Carolina at Chapel Hill for violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Complaint at 1-2, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:14-CV-00954 (M.D.N.C. Nov. 17, 2014). This Complaint also includes data in support of the argument that race is more than a “plus factor” in the admissions process, with one compelling chart that illustrates how having a certain academic index number (a measure of applicant's academic strength) can either guarantee admission for an African-American applicant or nearly guarantee rejection for an Asian-American one. *Id.* at 18 tbl.A. The Complaint also strongly advocates increased use of socioeconomic factors in lieu of racial factors when seeking diversity in an admitted class. *Id.* at 32-35. See Sam Sanders, *New Affirmative Action Cases Say Policies Hurt Asian-Americans*, NPR (Nov. 20, 2014), <http://www.npr.org/blogs/codeswitch/2014/11/20/365547463/new-affirmative-action-cases-say-policies-hurt-asian-americans> (discussing the lawsuits specifically in relation to Asian-Americans).

26. See, e.g., Brief for Ass'n of Am. Law Schs. as Amicus Curiae Supporting Respondents at 6, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (writing that “[a] very small group of schools produces a remarkable share of the Congress and federal judiciary”); SHERYLL D. CASHIN, *PLACE, NOT RACE* 64 (2014) (discussing the “disproportionate impact on society” of elite institutions “in producing the leadership class” and quoting Anthony Marx, former president of Amherst College: “If America is to be true to the ideal of opportunity, it is particularly important that elite institutions lead the way.”); see also sources cited *supra* note 13.

There, Powell relied heavily on conceptions of diversity formulated by Harvard and other elite private universities in articulating his vision of what “diversity” means.<sup>27</sup> Finally, the priorities and practices of private institutions likely influence those of public institutions because the two groups compete for the “best” students, and both categories of institutions influence how “best” gets defined.<sup>28</sup>

### I. A RENEWED INTEREST IN CLASS IMMOBILITY AND HIGHER EDUCATION

*Generation Later, Poor Still Rare at Elite Colleges*, the August, 2014 headline proclaimed.<sup>29</sup> Richard Pérez-Peña’s front-page story in the *New York Times* was simply the latest among periodic media installments on the topic over the past decade or so. Many others have similarly announced the bad news for low-income, high-achieving strivers: *Efforts to Recruit Poor Students Lag at Some Elite Colleges*,<sup>30</sup> and *Top Colleges, Largely for the Elite*.<sup>31</sup>

To some extent, this national attention to the relative absence of low-income students in the prestigious higher education sector is a creature of our recent collective awareness of diminishing upward mobility and attendant recognition that the opportunity and hope represented by the

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27. See *infra* Part III.A.1.

28. Indeed, each institution competes with the others to assemble a student body that reflects its own elite brand. The importance of getting the right mix of students is conveyed by the title of Mitchell L. Stevens’s, *CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES* (2007); see also Ross Douthat, *Rape and the College Brand*, N.Y. TIMES (May 10, 2014), <http://www.nytimes.com/2014/05/11/opinion/sunday/douthat-rape-and-the-college-brand.html> (discussing the importance of higher education branding, but in a different context—in relation to the sexual assault crisis on college campuses that has recently drawn attention).

29. Richard Pérez-Peña, *Generation Later, Poor Still Rare at Elite Colleges*, N.Y. TIMES, August 26, 2014 at A1 [hereinafter Pérez-Peña, *Poor Still Rare*].

30. Richard Pérez-Peña, *Efforts to Recruit Poor Students Lag at Some Elite Colleges*, N.Y. TIMES, July 31, 2013, at A1 [hereinafter Pérez-Peña, *Efforts to Recruit Poor*].

31. Leonhardt, *Top Colleges*, *supra* note 2.

“American dream” have been seriously hollowed out.<sup>32</sup> That realization is, in turn, largely the result of our greater collective class-consciousness in the wake of the Great Recession<sup>33</sup> and the relatively short-lived “Occupy Wall Street” movement and the “we are the 99%” rhetoric that it spawned.<sup>34</sup> It is this burgeoning awareness of—even preoccupation with—inequality that made Thomas Piketty’s 2014 *Capital in the Twenty-First Century* a *New York Times* bestseller.<sup>35</sup> Indeed, the word “inequality,” unmodified, now signals economic inequality<sup>36</sup> in a way that was arguably not

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32. See generally GREGORY ACS, PEW CHARITABLE TRUSTS, DOWNWARD MOBILITY FROM THE MIDDLE CLASS: WAKING UP FROM THE AMERICAN DREAM 21 (2011), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/Pew\\_PollProject\\_Final\\_SP.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Pew_PollProject_Final_SP.pdf); JENNIFER L. HOCHSCHILD, FACING UP TO THE AMERICAN DREAM: RACE, CLASS AND THE SOUL OF THE NATION (1996); ROBERT D. PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS (2015) (showing how the growing inequality gap stifles class mobility); Eduardo Porter, *America’s Sinking Middle Class*, N.Y. TIMES (Sept. 18, 2013), <http://www.nytimes.com/2013/09/19/business/americas-sinking-middle-class.html?src=twrhp>; Joseph E. Stiglitz, *Equal Opportunity, Our National Myth*, N.Y. TIMES (Feb. 16, 2013), <http://opinionator.blogs.nytimes.com/2013/02/16/equal-opportunity-our-national-myth>; Joseph E. Stiglitz, *Student Debt and the Crushing of the American Dream*, N.Y. TIMES (May 12, 2013), <http://opinionator.blogs.nytimes.com/2013/05/12/student-debt-and-the-crushing-of-the-american-dream>.

33. See, e.g., Robert Frank, *Income Inequality Too Big to Ignore*, N.Y. TIMES, Oct. 17, 2010, at BU5; Bob Herbert, Op-Ed., *A Terrible Divide*, N.Y. TIMES, Feb. 8, 2011, at A27; Bob Herbert, Op-Ed., *Fast Track to Inequality*, N.Y. TIMES, Nov. 2, 2010, at A31; Paul Krugman, Op-Ed., *Why Inequality Matters*, N.Y. TIMES, Dec. 16, 2013, at A25; Roger Runningen, *Obama Says Income Disparity a Defining Challenge of Era*, BLOOMBERG (Dec. 4, 2013, 12:14 PM), <http://www.bloomberg.com/news/2013-12-04/obama-says-income-disparity-a-defining-challenge-of-era.html>.

34. See, e.g., Steven Greenhouse, *Occupy Movement Inspires Unions to Embrace Bold Tactics*, N.Y. TIMES, Nov. 9, 2011, at B1; Brian Stelter, *Camps Are Cleared, But ‘99 Percent’ Still Occupies the Lexicon*, N.Y. TIMES, Dec. 1, 2011, at A1.

35. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014); see *Best Sellers*, N.Y. TIMES BOOK REV., May 18, 2014, available at <http://www.nytimes.com/best-sellers-books/2014-05-18/hardcover-nonfiction/list.html>; see also PUTNAM, *supra* note 32.

36. Representative headlines include: “The Price of Inequality,” Thomas B. Edsall, *Separate and Unequal*, N.Y. TIMES, Aug. 5, 2012, at BR23; “Why Inequality Matters,” Krugman, *supra* note 33; “The Income Gap: How Much is Too Much?,” Yuki Noguchi, *The Income Gap: How Much is Too Much?*, NPR (Jan.

true in the past—at least not in legal circles where inequality is primarily associated with race and the protected classes.<sup>37</sup>

One strand of this media attention focuses on access to higher education, while a sub-strand of that regards access to elite education. The headlines reveal and reiterate the daunting reality that many college students (and, of course, would-be students) face: *As Merit-Aid Race Escalates, Wealthy Often Win*,<sup>38</sup> *Study Finds Family Connections Give Big Advantage in College Admissions*,<sup>39</sup> *Universities Seeking*

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26, 2014, 4:43 AM), <http://www.npr.org/2014/01/26/266476565/the-income-gap-how-much-is-too-much>; “Income Inequality Too Big to Ignore,” Frank, *supra* note 33. The Great Divide series on the *New York Times* Opinionator Blog now features regular commentary from luminaries such as Joseph Stiglitz on our nation’s widening income and wealth divide. *The Great Divide Series*, N.Y. TIMES OPINIONATOR <http://opinionator.blogs.nytimes.com/category/the-great-divide> (last visited Apr. 15, 2014). Indeed, “#inequality” on Twitter.com includes a string of posts about wealth and income inequality and “privilege” more broadly, but few focus primarily on race and ethnicity.

37. Cf. Michele E. Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality* 2014 UTAH L. REV. 389 (analyzing U.S. Supreme Court jurisprudence in relation to how those decisions aggravate economic inequality). See generally Jill M. Fraley, *Invisible Histories & the Failure of the Protected Classes*, 29 HARV. J. ON RACIAL & ETHNIC JUST. 95 (2013); Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, and Dialogic Default*, 35 FORDHAM URB. L.J. 629 (2008).

38. See Shankar Vedantam, *Elite Colleges Struggle to Recruit Smart, Low-Income Kids*, NPR (Jan. 9, 2013, 3:31 AM), <http://www.npr.org/2013/01/09/168889785/elite-colleges-struggle-to-recruit-smart-low-income-kids>; see also David Leonhardt, *A Nudge to Poorer Students to Aim High on Colleges*, N.Y. TIMES, Sept. 26, 2013, at A18 [hereinafter Leonhardt, *A Nudge to Poorer Students*]; Tamar Lewin, *Study Finds Family Connections Give Big Advantage in College Admissions*, N.Y. TIMES, Jan. 9, 2011, at A12 [hereinafter Lewin, *Study Finds Family Connections*]; Jay Mathews, *As Merit-Aid Race Escalates, Wealthy Often Win*, WASH. POST, April 19, 2005, at A08; David Leonhardt, *New Prize Rewards Economic Diversity at Colleges*, N.Y. TIMES (Apr. 7, 2015), [http://www.nytimes.com/2015/04/07/upshot/07up-leonhardt.html?\\_r=0&abt=0002&abg=0](http://www.nytimes.com/2015/04/07/upshot/07up-leonhardt.html?_r=0&abt=0002&abg=0) [hereinafter Leonhardt, *New Prize*]; Tamar Lewin, *Universities Seeking*, *supra* note 8.

39. Lewin, *Study Finds Family Connections*, *supra* note 38.

*Out Students of Means,*<sup>40</sup> and *Education Gap Grows Between Rich and Poor.*<sup>41</sup>

While those headlines focus on the benefits affluent students get from their families' wealth, other stories focus on the other end of the socioeconomic spectrum. These stories highlight the struggles of low-income students: *Elite Colleges Struggle to Recruit Smart, Low-Income Kids,*<sup>42</sup> *College May Become Unaffordable for Most in the U.S.,*<sup>43</sup> and *Colleges Show Uneven Effort to Enroll Poor.*<sup>44</sup> Such news reports are typically based on hard data and empirical studies<sup>45</sup> indicating that access to elite education is increasingly the province of the wealthy, while the stream of poor and working class kids who get to college is dwindling.<sup>46</sup> Among the

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40. Lewin, *Universities Seeking*, *supra* note 8; *see also*, Michael Lewis, *Harvard Admissions Needs "Moneyball for Life,"* N.Y. TIMES (June 20, 2015), <http://www.nytimes.com/2015/06/21/opinion/sunday/harvard-admissions-needs-moneyball-for-life.html> (suggesting that Harvard admits students based on its prediction of how wealthy they will become and therefore how much they can give back to Harvard as alumni).

41. Sabrina Tavernise, *Poor Dropping Further Behind Rich in School*, N.Y. TIMES, Feb. 10, 2012, at A1.

42. Vedantam, *supra* note 38; *see also* Leonhardt, *A Nudge to Poorer Students*, *supra* note 38.

43. Tamar Lewin, *College May Become Unaffordable for Most in the U. S.*, N.Y. TIMES, Dec. 3, 2008, at A19.

44. Richard Pérez-Peña, *Colleges Show Uneven Effort to Enroll Poor*, N.Y. TIMES, May 31, 2013, at A1 (reporting that 40% of University of California students receive Pell Grants, including 34% at Berkeley and 36% at UCLA, while only 16% do at the University of Michigan).

45. *See infra* notes 77-78 and accompanying text; *see also* THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (2009); David Leonhardt, *A Simple Way to Send Poor Kids to Top Colleges*, Mar. 31, 2013, at SR5 [hereinafter Leonhardt, *A Simple Way*] (discussing Caroline Hoxby & Sarah Turner, *Expanding College Opportunities for High-Achieving, Low Income Students* (Stanford Inst. for Econ. Policy Research, Discussion Paper No. 12-014, 2013)); Hoxby & Avery, *supra* note 3; Sean F. Reardon, *No Rich Child Left Behind*, N.Y. TIMES OPINIONATOR (Apr. 27, 2013), <http://opinionator.blogs.nytimes.com/2013/04/27/no-rich-child-left-behind> [hereinafter Reardon, *No Rich Child*] (discussing Reardon's own empirical work, as well as that of Bailey and Dynarski of the University of Michigan).

46. One-third of undergraduate students in the United States are first-generation college students, and these students are less likely to graduate or to

economically disadvantaged, a high attrition rate means that fewer still earn college degrees.<sup>47</sup> Numerous scholars are engaged in designing interventions to stem the flow of lost human potential.<sup>48</sup> Indeed, this phenomenon attracted the

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graduate on time than their counterparts with better-educated parents. Paul Tough, *Who Gets to Graduate*, N.Y. TIMES MAG., May 18, 2014, at 26 (detailing various empirical students of college completion rates in relation to race and first-generation status); Amy Scott, *When You're the First to go to College*, MARKETPLACE (Sept. 16, 2013, 3:45 PM), <http://www.marketplace.org/topics/wealth-poverty/first-family/when-youre-first-go-college>; see also Hoxby & Avery, *supra* note 3; Amy Scott, *First Generation College Students Go Viral*, MARKETPLACE (Nov. 21, 2013, 6:25 AM), <http://www.marketplace.org/topics/wealth-poverty/first-family/first-generation-college-students-go-viral>; Amy Scott, *Separate Housing for First-Generation Students*, MARKETPLACE (Dec. 13, 2013, 2:25 PM), <http://www.marketplace.org/topics/economy/first-family/separate-housing-first-generation-students>. To help understand the odds of someone going to college and becoming first-generation when neither of that person's parents has a college degree, consider that roughly 70% of those over the age of twenty-five do not have at least a bachelor's degree. U.S. CENSUS BUREAU, DETAILED YEARS OF SCHOOL COMPLETED BY PEOPLE 25 YEARS AND OVER: 2000 TO 2014, at tbl.A-4 (2014), available at <https://www.census.gov/hhes/socdemo/education/data/cps/historical/index.html>. This suggests that about 70% of the populace are parents to 30% of college students. Conversely, 30% of the over-age-25 populace—those with at least one degree—are the parents of about 70% of college students.

47. See, e.g., Jason DeParle, *For Poor, Leap to College Often Ends in a Hard Fall*, N.Y. TIMES, Dec. 22, 2012, at A1, [hereinafter DeParle, *Hard Fall*]; Leonhardt, *A Simple Way*, *supra* note 45; David Leonhardt, *Colleges are Failing in Graduation Rates*, N.Y. TIMES, Sept. 8, 2009, at B1; Eduardo Porter, *Dropping out of College, and Paying the Price*, N.Y. TIMES June 25, 2013, at B1; Tough, *supra* note 46, at 26; Jim Burrell, *Getting College Students Across the Finish Line*, MARKETPLACE (May 10, 2013, 12:57 PM), <http://www.marketplace.org/topics/economy/education/getting-college-students-across-finish-line>; Susan Dynarski, *For the Poor, the Graduating Gap Is Even Wider than the Enrollment Gap*, N.Y. TIMES (June 2, 2015), <http://www.nytimes.com/2015/06/02/upshot/for-the-poor-the-graduation-gap-is-even-wider-than-the-enrollment-gap.html?abt=0002&abg=0&r=1>; Tyre, *supra* note 4; Reardon, *supra* note 45 (reporting that University of Michigan economists Martha J. Bailey and Susan M. Dynarski “found that the proportion of students from upper-income families who earn a bachelor's degree has increased by 18 percentage points over a 20-year period, while the completion rate of poor students has grown by only 4 points”).

48. A conference sponsored by the UC Davis Center for Poverty Research in March, 2015, for example, was titled *Increasing College Access and Success for Low-Income Students*, UC DAVIS CTR. POVERTY RES. <http://poverty.ucdavis.edu/increasing-college-access-and-success-low-income-students> (last visited May 28, 2015). The scholars at this conference focused principally on students' status as

attention of President Obama in January, 2014, when he announced a new initiative on college access for low-income students.<sup>49</sup>

Institutions of higher education have long been held out as vehicles of social mobility, but the data and media coverage of it highlighted a different reality. One reason for this failure is the rising cost of higher education.<sup>50</sup> Another is increasing stratification within the higher education sector.<sup>51</sup>

A sharp disconnect exists between this surfeit of media attention to the burgeoning inequality gap and higher education access on the one hand and, on the other, what we see within institutions of higher education themselves. Analysis shows that even as media attention to class—often

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low income, though most addressed race, too, and how the two factors intersected to undermine student success.

49. See *Education, Knowledge and Skills for the Jobs of the Future*, WHITE HOUSE, <http://www.whitehouse.gov/issues/education/higher-education> (last visited April 1, 2014). Interestingly, although this initiative has been the subject of a great deal of media attention, the only information about it on the White House website is that which addresses the goal of “Helping Middle Class Families Afford College.” Information under that heading includes, for example, “Doubling Investments in Pell Grants” and “Helping Students Manage Student Loan Debt.” *Id.*; see also Alan Greenblatt, *Colleges Guide Low-Income Students from Getting in to Graduating*, NPR (Jan. 16, 2014), <http://www.npr.org/2014/01/16/262789593/white-house-seeks-ways-to-get-poor-kids-through-college> (reporting on a White House summit of higher education leaders gathered to discuss how to increase low-income access to higher education). Greenblatt notes that no “policy initiatives” are expected to accompany this White House push. *Id.*

50. See Ron Lieber, *Student Loan Facts They Wish They Had Known*, N.Y. TIMES (May 1, 2015), <http://www.nytimes.com/2015/05/02/your-money/things-they-wish-theyd-known-about-student-loans.html>. This lack of information is a big part of what economists Hoxby and Avery are seeking to respond to in designing an intervention to inform low-income strivers of their best higher education options. Hoxby & Avery, *supra* note 3; see also Jonathan Glater, *Student Debt and Higher Education Risk*, 103 CAL. L. REV. 101 (2015) (discussing the increase in student borrowing that creates more risk when investing in higher education and suggesting an insurance model to mitigate the risk of borrowing for college to “preserve access to higher education”).

51. See, e.g., SUZANNE METTLER, *DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM 4-5* (2014) (arguing that higher education in the United States has evolved into a “caste system: It takes Americans who grew up in different social strata and it widens divisions between them and makes them more rigid”); see also Carnevale & Strohl, *supra* note 5, at 73-74; DeParle, *supra* note 3.

referred to in the higher education context as “socioeconomic status” or “socioeconomic disadvantage”<sup>52</sup>—has increased, that attention has not been matched by the rhetoric or actions of elite educational institutions. In practice, such institutions often do very little to recruit or support low-SES students. Indeed, in many ways, the external-relations arms of these colleges and universities, along with those of associated higher-education organizations—what we might think of collectively as a “diversity public relations complex,”<sup>53</sup> e.g., *U.S. News & World Report*, *The Princeton Review*, LSAC—systematically erase class. These institutions thus effectively narrow conceptions of diversity from what was probably the most expansive point, a “broad[] array of qualifications and characteristics,”<sup>54</sup> as articulated by the United States Supreme Court in *Bakke* thirty-six years ago.

This brings me to yet another cluster of headlines, a strand of media attention to higher education access that focuses on who gets a “hand up” in the admissions race, particularly in the most prestigious sector.<sup>55</sup> This strand

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52. For purposes of this Article, I use the terms class and socioeconomic status interchangeably, although “class” is typically considered a more complex concept. See Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 453-54 (1997) (explaining that class tends to implicate multiple generations, whereas economic disadvantage speaks more to a “snapshot” of what person has in terms of both material goods and, for example, cultural competency); see also IMPROVING THE MEASUREMENT OF SOCIOECONOMIC STATUS FOR THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: A THEORETICAL FOUNDATION 4 (2012), available at [http://nces.ed.gov/nationsreportcard/pdf/researchcenter/socioeconomic\\_factors.pdf](http://nces.ed.gov/nationsreportcard/pdf/researchcenter/socioeconomic_factors.pdf) (writing that the “big 3” of SES measurement have long been family income, parental educational status, and parental occupational status); Angela P. Harris, *Theorizing Class, Gender and the Law: Three Approaches*, 37 LAW. & CONTEMP. PROBS. 37, 38-39 (2009).

53. This includes awards for diversity granted by national institutions and publications. See *infra* note 129 and accompanying text; see also Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2193-94 (2013); Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, S. CAL. L. REV. (forthcoming 2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2620545](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620545) (theorizing and critiquing the many roles and meanings of “diversity,” both within higher education and in wider society).

54. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

55. Media attention is surpassed, perhaps, by scholarly attention. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM*

reemerged in 2011, in relation to the most recent challenge to affirmative action in college admissions, *Fisher v. University of Texas at Austin*.<sup>56</sup> Even before the U.S. Supreme Court granted certiorari in *Fisher*, the media and academics were abuzz with talk of the case's possible outcome and implications.<sup>57</sup> Headlines included, *Affirmative Action Headed for the Dustbin of History*,<sup>58</sup> *The Liberals Against Affirmative Action*,<sup>59</sup> *Does Affirmative Action Do What It Should?*,<sup>60</sup> *When Class Became More Important to a Child's*

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CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998); RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996); RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT* (2012) [hereinafter *MISMATCH*]; Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEM. L. REV. 239 (2012); Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631 (2011) [hereinafter Sander, *Class in American Legal Education*]; Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997) [hereinafter Sander, *Experimenting with Class-Based Affirmative Action*].

56. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

57. See, e.g., Adam Liptak, *College Diversity Nears Its Last Stand*, N.Y. TIMES, Oct. 16, 2011, at SR4 [hereinafter Liptak, *Diversity Nears Its Land Stand*]; Richard D. Kahlenberg, *The Next Big Affirmative-Action Case*, CHRON. HIGHER EDUC. (Jan. 27, 2011), <http://chronicle.com/blogs/innovations/the-next-big-affirmative-action-case/28476>. Academic commentary on the *Fisher* decision includes Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L.J. 661 (2014); Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL'Y REV. 367, 373 (2013); Vinay Harpalani, *Fisher's Fishing Expedition*, 15 U. PA. J. CONST. L. HEIGHT. SCRUTINY 57 (2013); Marvin Lim, *Percent Plans: A "Workable, Race-Neutral Alternative" to Affirmative Action?*, 39 J.C. & U.L. 127 (2013).

58. Steve Nelson, *Affirmative Action Headed for the Dustbin of History*, HUFFINGTON POST (Oct. 17, 2012, 6:48 PM), [http://www.huffingtonpost.com/steve-nelson/affirmative-action-supreme-court\\_b\\_1964833.html](http://www.huffingtonpost.com/steve-nelson/affirmative-action-supreme-court_b_1964833.html); see also Liptak, *College Diversity Nears Its Last Stand*, *supra* note 57.

59. David Leonhardt, *The Liberals Against Affirmative Action*, N.Y. TIMES, Mar. 10, 2013, at SR5 [hereinafter Leonhardt, *The Liberals Against Affirmative Action*].

60. Dan Slater, *Does Affirmative Action Do What it Should?*, N.Y. TIMES, Mar. 17, 2013, at SR1.

*Education than Race*,<sup>61</sup> and *Race vs. Class: The False Dichotomy*.<sup>62</sup> As this cluster of headlines suggests, these tended to be opinion pieces, as the media weighed in on what, once again, seemed to evolve into a debate over whether affirmative action based on socioeconomic disadvantage—which would not invoke constitutional scrutiny—should replace affirmative action based on race. These headlines, like the conversation with which I opened this Article, imply that we must choose between affirmative action based on race and that based on class.

In the next Part, I argue that the oft-discussed choice between class-based and race-based affirmative action is one we have been tricked into debating—“tricked” because it is actually a false dilemma. In that Part I also take up other myths about affirmative action. These include the “low-income whites are the problem” myth and “the poor students don’t belong in elite universities” myth.

## II. OUTSMARTING KAHLENBERG AND SANDER: WHY WE DO NOT HAVE TO CHOOSE BETWEEN RACE AND CLASS

Richard Kahlenberg has called the relative absence of low-income students the “dirty little secret of American higher education.”<sup>63</sup> I agree with Kahlenberg that we have long paid too little attention to class disadvantage in higher education, and we need to do more to include and fully integrate low-income students into elite college and university sector. But Kahlenberg also bears some blame for our collective failure to take the class problem in higher

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61. Sarah Garland, *When Class Became More Important to a Child's Education than Race*, ATLANTIC (Aug. 28, 2013, 7:02 AM), <http://www.theatlantic.com/national/archive/2013/08/when-class-became-more-important-to-a-childs-education-than-race/279064> (reporting that children in the 10th percentile of income in 1963 fell behind children in the upper echelon of wealth by about a year or so in educational achievement, while that gap has widened to four years in 2013).

62. Sherrilyn A. Ifill, Op-Ed., *Race vs. Class: The False Dichotomy*, N.Y. TIMES, June 14, 2013, at A27.

63. Greenblatt, *supra* note 49 (quoting Richard Kahlenberg of The Century Foundation).

education more seriously, as well as for our failure to ameliorate it.

Since his publication of *The Remedy: Class, Race, and Affirmative Action* nearly two decades ago,<sup>64</sup> Kahlenberg has been a frequent spokesperson in favor of class-based affirmative action, while also a well-known and vocal opponent of race-based affirmative action.<sup>65</sup> Because he has pitted the two bases for affirmative action against each other—suggesting that they are mutually exclusive—Kahlenberg seems to have convinced most progressives that a choice between the two is necessary.<sup>66</sup> Somewhat ironically then, in light of his goal, Kahlenberg’s advocacy appears to have led most liberal elites to downplay class-based disadvantage—or to ignore it outright—lest they be seen as opposing race-based affirmative action.<sup>67</sup>

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64. KAHLENBERG, *supra* note 55.

65. See RICHARD D. KAHLENBERG & HALLEY POTTER, A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL PREFERENCES 2 (2012), available at <http://tcf.org/assets/downloads/tcf-abaa.pdf> (“While higher education’s vigorous defense of affirmative action on one level represents a sincere desire for greater racial equality, it has another less virtuous side to it, as racial preferences avoid the hard work of addressing deeply rooted inequalities and instead provide what Stephen Carter has called ‘racial justice on the cheap.’”); RICHARD D. KAHLENBERG, *A Liberal Critique of Racial Preferences: Programs to Increase Diversity in Higher Education Should be Based Primarily on Class*, WALL ST. J. (Oct. 10, 2012), <http://online.wsj.com/news/articles/SB10000872396390444897304578046531385328710> (arguing that a “better vision” of affirmative action would be “based not on race but on economic status”).

66. This race vs. class framing is also reflected in a considerable body of critical race scholarship, both theoretically and in reference to a wide-range of contexts. See, e.g., Fran Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1050-53 (1989); John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 217, 219-20 (1982); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 365 n.227 (1987); Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 804 (2003) (arguing that talk about “doing race” versus “do[ing] class” is a paradox because the two intersect).

67. *But see* Guinier, *supra* note 11, at 121-22 (arguing that “[u]sing race to probe the underlying inequalities in the admissions process may create surprising opportunities for grassroots coalitions that include both people of color and poor and working-class whites”).

Kahlenberg's counterpart in the law school sector is Professor Richard Sander. Like Kahlenberg, Sander has been a vigorous and persistent opponent of race-based affirmative action. Sander has famously and controversially argued that race-based affirmative action disserves underrepresented minorities because they are not well-matched in terms of ability with the institutions to which they get admitted.<sup>68</sup> Also like Kahlenberg, Sander supports class-based affirmative action.<sup>69</sup> Specifically Sander has expressed

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68. See MISMATCH, *supra* note 55, at 4. In 2011, the *University of Denver Law Review* published a symposium on the issue, anchored by an article by Richard Sander, *Class in American Legal Education*, *supra* note 55. But see Michal Kurlaender & Eric Grodsky, *Mismatch and the Paternalistic Justification for Selective College Admissions*, 86 SOC. EDUCATION 294 (2013) (finding that students who were supposedly overmatched—at a college or university where their credentials were not typical—did not earn higher grades than at less prestigious schools; overmatched students were no more or less likely to drop out of schools where they are “overmatched” and they were less likely to drop out of schools where they were overmatched than they would have been had they attended less demanding institutions). Others have written about class in relation to race in the affirmative action context, but in ways very different to Sander. See Jewel, *supra* note 55, at 240 (discussing “class” in relation to affirmative action and “analyz[ing] class disadvantage as it relates to affirmative action”); *Id.* at 263-72 (delivering a comprehensive discussion of empirical studies regarding what groups are most and least educationally disadvantaged based on race, class, or a combination of the two); *Id.* at 246-48 (citing Roslyn Arlin Mickelson, *The Structure of Opportunity and Adolescents’ Academic Achievement Attitudes and Behaviors*, in MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 348, 360 (John U. Ogbu ed., 2008) (discussing extensively Annette Lareau’s *Unequal Childhoods*, which focused on class differences in child-rearing practices)). Regarding the race and class intersection, Jewel suggests that “[b]ecause whiteness functions as a kind of cultural capital and because race and culture intersect to interpose unique barriers for disadvantaged minorities, race-conscious measures might fairly be conceptualized as a type of class-based affirmative action.” *Id.* at 311.

69. MISMATCH, *supra* note 55 (concluding that class-based preferences in law school admissions can produce socioeconomic diversity of a kind that is lacking in most elite law schools). In a more recent article, Sander wrote:

[A]s a practical matter, whenever discussions of law school diversity become concrete, the discussion almost invariably focuses on race. Sometimes gender and sexual orientation come up as important diversity topics as well, but almost never is there an explicit focus on class. Indeed, there is no official data generated by law schools that even considers socioeconomic issues, and there are almost no research efforts anywhere in the legal academy that have a mandate to help the legal academy understand socioeconomic questions.

concern about the lack of economic diversity in law schools and frequently compared affirmative action based on race/ethnicity with that based on socioeconomic disadvantage.<sup>70</sup>

Kahlenberg and Sander have thus implied that affirmative action in college and law school admissions is a zero-sum game to be won either by racial/ethnic minorities as such or by the socioeconomically disadvantaged as such.<sup>71</sup> Their rhetoric and stances seem to have squelched our collective imagination about what is possible in higher education admissions preferences. We appear not to consider how great the need is for both groups on elite college campuses.<sup>72</sup> My position is that we should respond to that need, even if giving admissions preferences to both groups means fewer affluent students on those campuses, even if it means diverting “merit-based” financial aid away from affluent students who appear more intelligent and talented so that more “need-based” financial aid can support high-

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In short, a serious discussion in the legal academy about how to address socioeconomic diversity is long overdue.

*Class in American Legal Education*, *supra* note 55, at 631-32, 633. I agree with Sander that this lack of data is a problem, as is the general lack of concern for socioeconomic diversity, but I do not believe we will convince law schools to change their practices in this regard if we pit race against class.

In a still more recent article, Sander and Stuart Taylor, Jr., again contrast race-based affirmative action with affirmative action on other bases: “The desire to be sensitive [about race] . . . has also made racial preferences a force for economic inequality: academically well-prepared working-class and poor Asian and white students are routinely passed over in favor of black and Hispanic students who are more affluent as well as less well-prepared.” Richard Sander & Stuart Taylor, Jr., *The Painful Truth About Affirmative Action*, THE ATLANTIC (Oct. 2, 2012, 10:30 AM), <http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/>.

70. See *Experimenting with Class-Based Affirmative Action*, *supra* note 55, at 472-73.

71. Noah Zatz uses the term “zero-sum” game to refer to a similar dynamic in the employment context. Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 69 (2002).

72. See *infra* text accompanying notes 168-70 (discussing an empirical study by Park et al., finding that cross-racial interactions on campus increase with the degree of socioeconomic diversity on campuses).

achieving, low-income students.<sup>73</sup> To the extent colleges, universities, and graduate and professional schools are up against resource limits, the solution is to divert so-called “merit-based aid” to “need-based” assistance so that more low-income students of all colors are admitted to elite institutions and financially supported there.<sup>74</sup>

If we are convinced that we must choose between racial/ethnic diversity and socioeconomic diversity, most liberals are going to choose the former, lest they appear racially insensitive.<sup>75</sup> This phenomenon is reflected in the conversation I recounted at the outset of this Article. That conversation went beyond assuming that a choice must be made between race and class not to blaming whites generally nor even conservative whites in particular for legal challenges to affirmative action. Rather, that conversation shifted the blame specifically onto low-income whites.<sup>76</sup>

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73. See SHERYLL D. CASHIN, *PLACE, NOT RACE*, at xvi, 56-57 (2014) (calling the term “merit-based” aid a euphemism and asserting, for example, that “[a]ffluent people of all colors who call an SAT score merit are complicit in” endorsing “[p]henotypic diversity [that] assuages what is left of white guilt and helps mask exclusion”). Georgia Nugent, former President of Kenyon College and a senior fellow at the Council of Independent Colleges, offered this explanation of merit-based aid:

What I call “so-called merit aid.” And here’s what it means. Let’s say that your full tuition at your college is \$20,000. So you could take \$15,000 of your financial aid and offer it to one quite needy student. Or, you could take your same amount of resources and you could offer \$5000 in financial aid to three affluent students. So, in terms of the college’s revenue, offering the large package to the single student nets \$5000 for the college. Offering the small sweetener to the affluent student nets the college \$45,000.

NPR Staff, *When Money Trumps Need in College Admissions*, NPR (Apr. 24, 2014), <http://www.npr.org/2014/04/24/306167197/when-money-trumps-need-in-college-admissions>; see also Richard Sander & Aaron Danielson, *Thinking Hard About “Race-Neutral” Admissions*, 47 U. MICH. J.L. REFORM 967, 971-72 (2014) (discussing how universities are subject to market forces and how this influences who gets admitted and the distribution of financial aid among those students).

74. See *infra* Part III.C.1 (discussing the shift from need-based aid to merit-based aid).

75. See Leonhardt, *The Liberals Against Affirmative Action*, *supra* note 59; CASHIN, *supra* note 26.

76. This is remarkably similar to a phenomenon Martha Mahoney theorized in relation to racism generally—making low-income, low-status whites the

But the speaker's factual premise was wrong. Abigail Fisher was not a socioeconomically disadvantaged white plaintiff,<sup>77</sup> and neither the Supreme Court in *Gratz*<sup>78</sup> or *Grutter*,<sup>79</sup> nor the Fifth Circuit in *Hopwood v. University of Texas*,<sup>80</sup> identified the plaintiffs in those cases as

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scapegoat, even though those who benefit most from racism are affluent whites. She wrote that, “[f]or more privileged white Americans, racism often appears to be something that working-class whites (particularly Southerners) do to African Americans and other people of color”). Mahoney, *supra* note 66, at 807. This occurs even though those who benefit most from structural racism—and, I would say from race-based affirmative action—are affluent, high-status whites.

77. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); see Adam Liptak, *Race and College Admissions, Facing a New Test by Justices*, N.Y. TIMES (Oct. 8, 2012), [http://www.nytimes.com/2012/10/09/us/supreme-court-to-hear-case-on-affirmative-action.html?\\_r=0](http://www.nytimes.com/2012/10/09/us/supreme-court-to-hear-case-on-affirmative-action.html?_r=0).

78. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

79. The *Grutter* majority opinion made no mention of socioeconomic disadvantage. *Grutter v. Bollinger*, 539 U.S. 306 (2003). In her briefs, Grutter described herself thusly:

[A] 43-year-old mother and business entrepreneur, someone who had started her own business ten years earlier and made it successful, someone who had been a “first” in many of her professional achievements, and someone interested in non-traditional methods of education. These life experiences would have brought a substantial amount of genuine diversity to a law school class composed largely of students (of whatever race or ethnicity) who come to the school directly from college.

Petitioner's Reply Brief at 1, *Grutter*, 539 U.S. 306 (2003), (No. 02-241), 2003 WL 1610793, at \*1 (citation omitted). Barbara Grutter also argued: "To the Law School, at least, it is obvious that 'students from groups which have been historically discriminated against' have experiences that are integral to this mission, *regardless of whether they are rich or poor or 'victims' of discrimination.*" Brief for the Petitioner at 37, *Grutter*, 539 U.S. 306 (2003), (No. 02-241), 2003 WL 164185, at \*37 (quoting Brief in Opposition at 3, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir.), cert. granted, 537 U.S. 1043 (2002), (No. 02-241), 2002 WL 32101026, at \*3) (emphasis added by Petitioner). The majority in the case did not comment on these arguments. *Grutter*, 539 U.S. 306.

80. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1998). The Fifth Circuit described Cheryl Hopwood thusly:

Plaintiff Hopwood is a fair example of an applicant with a unique background. She is the now-thirty-two-year-old wife of a member of the Armed Forces stationed in San Antonio and, more significantly, is raising a severely handicapped child. Her circumstance would bring a different perspective to the law school. The school might consider this an advantage to her in the application process, or it could decide that her

socioeconomically disadvantaged.<sup>81</sup> Indeed, as I detail below, neither Alan Bakke, Barbara Grutter nor Jessica Gratz clearly self identified as SES-disadvantaged.<sup>82</sup> Abigail Fisher, a middle-class product of the Houston suburbs certainly did not.<sup>83</sup> Nevertheless, the perception that these cases pitted low-SES whites against racial minorities persists and appears to be pervasive.<sup>84</sup> To be sympathetic to low-income

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family situation would be too much of a burden on her academic performance. We do not opine on which way the law school should weigh Hopwood's qualifications; we only observe that "diversity" can take many forms. To foster such diversity, state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race.

*Id.* at 946-47. Hopwood described herself as "a certified public accountant who worked twenty hours a week while obtaining her undergraduate degree from California State University in 1988. Her husband serves in the military. She has been active in Big Brothers and Big Sisters, and has a severely handicapped child." Brief for Plaintiffs-Appellants Hopwood and Carvell, at 4 n.4, *Hopwood*, 78 F.3d 932 (1994), (No. 94-50664), 1994 WL 16173330, at \*4 n.4.

81. *See infra* notes 108-13.

82. *See infra* notes Part III.A.1-4.

83. *See infra* Part III.

84. I note, however, that this framing is also suggested by a great deal of critical race scholarship, which often compares the relative disadvantage of poor blacks and poor whites. *See* Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1614 n.95 (2011) (acknowledging that whiteness is not monolithic but stating that "whites across differences can nevertheless trade on whiteness, if only psychologically" . . . "notwithstanding the material deprivations that working-class whites historically have experienced, they were able to draw on the psychological wages of whiteness, which they treated as a material resource against the background of presumptions of black inferiority.") (citing W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 700 (1965)); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1741 (2003) (discussing how, "[i]n the realm of social relations, racial recognition in the United States" as an "act of subordination," so that judicially defining "racial identity based on white supremacy reproduced that race subordination at an institutional level," which can be observed in the labor context, as the institutionalization of race "stifled class tension among whites" and motivated white people to define themselves by their whiteness so as to have an advantage over similarly situated Blacks in the working class); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 474 (2014); Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 LAW & CONTEMP. PROB. 57, 65 (2009) (suggesting that poor whites can still access portions of white privilege, while poor blacks are additionally harmed by their race).

whites in the admissions race, then, has come to suggest insensitivity—or even opposition—to applicants who are racial and ethnic minorities.<sup>85</sup>

Further, even if the *Hopwood*, *Grutter*, *Gratz*, and *Fisher* plaintiffs had self-identified or been identified by the courts as socioeconomically disadvantaged, it would not necessarily follow that poor and working-class whites are “the problem.” I acknowledge, however, that SES-disadvantaged whites clearly do *have* a problem. They have what might be thought of as a marketing problem. This problem is created in part by the Kahlenberg/Sander-fueled assumption that institutions must in fact choose between underrepresented minorities on the one hand and socioeconomically disadvantaged whites on the other, an assumption that has surely contributed to the erasure of class in higher education.<sup>86</sup> But the marketing or reputation problem is also surely a function of the association of working class whites with bad taste,<sup>87</sup> conservative

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85. Cf. LANI GUINIER, *THE TYRANNY OF MERITOCRACY* (2015), *discussed in* Anya Kamenetz, *Q & A with Lani Guinier, Redefining the Merit in Meritocracy*, NPR (Feb. 20, 2015), <http://www.npr.org/blogs/ed/2015/02/20/386120632/q-a-with-lani-guinier-redefining-the-merit-in-meritocracy> (arguing that “[t]he mission of higher education . . . is to develop a new cohort of potential leaders, and it’s very important that they be diverse, not just in terms of who can afford SAT prep but working class and poor, black and white”); *see also infra* notes 169-71 and accompanying text (noting that greater socioeconomic diversity in higher education settings tends to enhance cross-race interactions at those institutions).

86. *See infra* Part II. In fact, as detailed below, Barbara Grutter’s family of origin was socioeconomically disadvantaged, but I rarely hear proponents of race-based affirmative action acknowledging the highly salient economic distinction between Barbara Grutter and Abigail Fisher. This may be because Grutter did not self-identify as a product of socioeconomic disadvantage. Grutter did, however, claim to represent diversity based on her work experiences and the fact she was a mother.

87. *See* Jill M. Fraley, *Invisible Histories and the Failure of the Protected Classes*, 29 HARV. J. ON RACIAL & ETHNIC JUST. 95, 95-96 (2013) (describing disdain for poor whites, including in popular culture representations) Harris, *supra* note 52, at 41-42 (discussing the enduring link between class and consumption); John Hartigan, Jr., *Unpopular Culture: The Case of ‘White Trash,’* 11 CULTURAL STUD. 316, 325-27 (1997) (describing aspects of poor white culture as “unpopular”).

politics,<sup>88</sup> and racism.<sup>89</sup> As *New York Times* columnist Charles Blow wrote in the wake of President Obama's election, the left sees the white working class as "hollow, dim and mean."<sup>90</sup> The right is hardly more charitable.<sup>91</sup> Given these widely held associations, it would not be surprising if biases (implicit or otherwise) are operating in relation to lower-income whites in elite college admissions.

As this Part has illustrated, thinking about SES status in relation to higher education implicates race—not only the race or ethnicity of underrepresented minorities, but also whites, whiteness, and relationships among races. Race is, after all, relational<sup>92</sup> and whites "have" race, too.<sup>93</sup> In this

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88. See Hartigan, *supra* note 87, at 323; *Class Culture Wars*, *supra* note 13, at 787.

89. See Mahoney, *supra* note 66, at 807 (quoted at *supra* note 76). Recall that W.E.B. DuBois focused on the decision of working class whites to claim the psychological wages of whiteness instead of aligning themselves with blacks. See *supra* note 84.

90. Charles M. Blow, *She Who Must Not Be Named*, N.Y. TIMES, Dec. 4, 2010, at A23.

91. See CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA 1960–2010 (2012) (arguing that government programs have created a new white lower class), discussed in Nicholas Confessore, *Tramps Like Them*, N.Y. TIMES, SUN. BOOK REV., Feb. 12, 2012, at BR9 (describing Murray's characterization of poor and working-class whites as "no longer part of a virtuous silent majority," instead, they are "increasingly alienated from what Murray calls 'the founding virtues' of civic life").

92. See, e.g., JOHN A. POWELL, RACING TO JUSTICE (2012); William Aal, *Moving from Guilt to Action: Antiracist Organizing and the Concept of "Whiteness" for Activism and the Academy*, in THE MAKING AND UNMAKING OF WHITENESS 294, 306 (Birgit Brander Rasmussen et al. eds., 2001); Michael Omi, *(E)racism: Emerging Practices of Antiracist Organizations*, in THE MAKING AND UNMAKING OF WHITENESS, *supra*, at 266-67 (quoting GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS 210 (1998)).

93. See EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM & RACIAL INEQUALITY IN CONTEMPORARY AMERICA 103-29 (3d ed. 2010) (describing whites' tendencies to see race as something that shapes minorities' experiences but not their own); Dorothy A. Brown, *Tales from a Tax Crit*, 10 PITT. TAX REV. 47, 48, 58 (2012). On the issue of the transparency of whiteness generally, see, e.g., Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2035 (1995) (referring to the transparency of whiteness and defining this term as the tendency for whiteness to vanish from whites' self-perception); Martha R. Mahoney,

relatively short Article, I do not take up the vast and complex array of this project's racial implications. I do, however, take as my starting point three key assumptions that implicate race, and I do not further defend these here. My first assumption is that the viewpoints and life experiences of poor and working class students are valuable in educational settings.<sup>94</sup> The second, closely related point is that the viewpoints and life experiences of poor and working-class whites are not represented by affluent and middle-class whites.<sup>95</sup> The third is that the viewpoints and life experiences

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*Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1663-64 (1995) (citing RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS 1 (1993)).

Critical race scholars have lately begun to see the notion of “white invisibility” as less compelling. As Ruth Frankenberg explains, “the current ‘conditions and practice of whiteness’ render ‘the notion that whiteness might be invisible . . . bizarre in the extreme.’” Ruth Frankenberg, *Mirage of an Unmarked Whiteness*, in THE MAKING AND UNMAKING OF WHITENESS 72, 73 (Birgit Brander Rasmussen ed. 2001); see also John Hartigan, Jr., *Establishing the Fact of Whiteness*, 99 AM. ANTHROPOLOGIST 495, 498 (1997); Douglas Hartmann et al., *An Empirical Assessment of Whiteness Theory: Hidden from How Many?*, 56 SOC. PROBS. 403 (2009).

94. See Lisa R. Pruitt, *Who's Afraid of White Class Migrants? On Denial, Discrediting and Disdain (and Toward a Richer Conception of Diversity)*, 31 COLUM. J. GENDER & L. 284 (2015) [hereinafter *White Class Migrants*] (arguing that whites, like those of other races and ethnicities, who are raised working class and migrate into the professoriate bring distinctive and valuable perspectives with them). Part of their value is derived from the fact that, as embodiments of white poverty, they dispel the pervasive myth that only non whites are poor. See Lisa R. Pruitt, *Welfare Queens & White Trash*, 25 S. CAL. INTERDISC. L.J. (forthcoming 2016) (quoting Bell Hooks, Rachel Godsil, and others for this proposition); see also CARNES, *supra* note 13, at 12.

95. See, e.g., ELIZABETH ARIES WITH RICHARD BERMAN, SPEAKING OF RACE AND CLASS: THE STUDENT EXPERIENCE AT AN ELITE COLLEGE (2013) (documenting how race and class shape student experiences at Amherst College); Elizabeth Aries & Maynard Seider, *The Interactive Relationship Between Class Identity and the College Experience: The Case of Lower Income Students*, 28 QUALITATIVE SOC. 419, 419-22 (2005) (discussing how class influences the experiences of college students); Brooke Lea Foster, *What it is Like to be Poor at an Ivy League School*, BOS. GLOBE MAG. (Apr. 9, 2015), [http://www.bostonglobe.com/magazine/2015/04/09/what-like-poor-ivy-league-school/xPtq15uzDb6r9AUFER8R00/story.html?s\\_campaign=8315#](http://www.bostonglobe.com/magazine/2015/04/09/what-like-poor-ivy-league-school/xPtq15uzDb6r9AUFER8R00/story.html?s_campaign=8315#) (describing first-generation student experiences at Harvard University). While legal scholarship tends to treat whiteness as monolithic, we have good reason to doubt that middle and upper income whites understand or relate to the experiences of lower-income whites.

of poor and working class whites are distinct from the viewpoints and life experiences of poor and working class students who are also underrepresented minorities.<sup>96</sup> In addition to the economic and democratic goals I have already highlighted, then, the free speech goals associated with diversity in higher education are also served by the inclusion of low-SES whites.

In calling attention to socioeconomically disadvantaged whites and their underrepresentation in elite higher education, I make no claim that we are living in a post-racial era.<sup>97</sup> Quite the contrary, I believe we need to take seriously the intersections of different races and ethnicities with different classes. We must move beyond the simplistic and pervasive associations of whiteness with affluence and of blackness and brownness with socioeconomic disadvantage.<sup>98</sup>

This brings me to another myth: the proposition that poor students do not belong at selective colleges and universities. Some, most notably Deborah Malamud, have asserted that affirmative action has never really been about helping those in poverty and that it makes sense for middle-class blacks to

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See DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA* 165-66 (2013), reviewed by Lisa R. Pruitt, *Acting White? Or Acting Affluent? A Book Review of Carbado & Gulati's Acting White? Rethinking Race in 'Post-Racial' America*, 18 J. GENDER RACE & JUST. 159, 174-76 (2015) (using the example of a poor white striver, Oralea, to illustrate how whites can be outsiders in upscale settings such as elite law firms, thereby deviating from the presumption of white power).

Recall that critical race theorists often invoke W.E.B. Du Bois' analysis of poor whites' choice to align themselves with affluent whites. See *supra* note 84. The alignment does not, however, necessarily flow in the other direction, in part because of long-standing intra-racial animus against poor whites. See Pruitt, *White Class Migrants*, *supra* note 94.

96. Briefly, low-income whites have the distinct experience of experiencing low SES disadvantage with racial privilege. See Pruitt, *White Class Migrants*, *supra* note 94.

97. See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1062-63 (2011); James, *supra* note 84, at 457-58 & n.167.

98. Pruitt, *Acting White?*, *supra* note 95, at 183-84 (explaining how working-class whites are different from the monolithic whiteness, which assumes affluence, that Carbado and Gulati depict); Lisa R. Pruitt, *Welfare Queens & White Trash*, *supra* note 94; Pruitt, *White Class Migrants?*, *supra* note 94.

be the ones to integrate white institutions dominated by middle-class whites.<sup>99</sup> I disagree. My position is that we are in particular need of low-income students of all colors in higher education—including in elite institutions—and that those institutions owe these students the support they need to succeed there.<sup>100</sup>

In short, we need socioeconomic integration in the same way we need racial integration. Being second-generation college is very often a world apart from being first-generation college.<sup>101</sup> Being raised in a low-income household is fundamentally different from having heard one's parents or grandparents reminisce about the income-related hardships and deprivations of their youth. It is also different from seeing one's extended family still living in poverty.<sup>102</sup> What we need both as a matter of fairness and for the sake of a broadly diverse pipeline to our nation's leadership are people with first-hand experiences of being low-SES and/or first-generation college.<sup>103</sup>

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99. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 950-51 (1997).

100. See *infra* notes 191-93 and accompanying text (discussing Tough, *supra* note 46).

101. See Pruitt, *White Class Migrants*, *supra* note 94.

102. See Ruthann Robson, *A Couple of Questions Concerning Class Mobility*, 36 HARV. REV. 165, 165 (2009) (featuring anecdote where author's son asked her when his grandparents—the author's parents—"g[o]t so poor," suggesting that he understood his relative affluence as the norm from which his grandparents had regressed); cf. Chris L. Jenkins, Theola Labbe-DeBose & Peyton M. Craighill, *D.C. Residents See Class, Not Race, as City's Great Divider* (June 19, 2011), [http://www.washingtonpost.com/local/dc-residents-see-class-not-race-as-citys-great-divider/2011/06/17/AGZdU9bH\\_story.html](http://www.washingtonpost.com/local/dc-residents-see-class-not-race-as-citys-great-divider/2011/06/17/AGZdU9bH_story.html) (noting that black respondents to poll, even those who had achieved middle class status, were more likely to "feel economic insecurity, even if they are doing well now . . . [and that] they had friends and family members who were unemployed or in the economic doldrums").

103. We get this perspective only rarely in the media. See Rachel Wagner, *Bootstrapping My Way into the Ivory Tower*, CHRON. HIGHER EDUC., Jan 6, 2012, at D21-22; Claire Vaye Watkins, *The Ivy League was Another Planet*, N.Y. TIMES (March 28, 2013), <http://www.nytimes.com/2013/03/29/opinion/elite-colleges-are-as-foreign-as-mars.html>; cf. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 172 (2014) (referring to the ways in which elite whites have "managed interactions" with racial minorities, explaining that "well-off whites have

Lastly, one might assert that low-SES students will no longer have that status when they graduate; at that point, their race or ethnicity will still matter, but their class of origin will not. In other words, the socioeconomic diversity they represent will expire once they earn a degree. As college graduates, the argument goes, they should be on the road to the middle class, at least economically.<sup>104</sup> College socialization experiences will likely have moved them in that direction socio-culturally, too. In thinking about graduate or professional school admissions, then, class of origin is arguably less relevant or indicative of diversity-type value.

The reality, however, is that while these individuals' income band may improve with education, they will likely not have evaded the enduring consequences and markers of where they came from.<sup>105</sup> Their class of origin will not have "come out in the (metaphorical middle-class) wash." It is telling, for example, that there is an organization called "Association of Working Class Academics"<sup>106</sup>—not the Association of Academics *Who Grew up Working Class*.

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experienced integration only on their own terms—in controlled settings, such as elite colleges and universities, and with only token numbers of non-whites").

104. *But see* Wagner, *supra* note 103, at D21.

105. The socioeconomic ambiguity of being a working-class person with a college degree—or two or three—is also reflected in a Call for Papers from 2014 for the interdisciplinary journal *Rhizomes*:

Tired of hearing your relatives and childhood friends denigrated by implication when the more privileged assume everyone in their group is ignorant and prejudiced, of seeing people from your background misrepresented through "reality" TV minstrel shows, of being told that you are now middle-class because you have a graduate degree and a college teaching job and so you should get over your past—while you struggle to afford professional expenses colleagues from the bourgeoisie pay with ease? . . . Write back.

*Call for Papers: Rhizomes Special Issue, Working-Class Academics*, U. PA. (Jan. 13, 2014), <https://call-for-papers.sas.upenn.edu/node/54868>; *see also* Timothy J. Haney, *Factory to Faculty: Socioeconomic Difference and the Educational Experiences of University Professors*, 52 CRS/RCS 160 (2015) (reporting survey of faculty at ninety-five Canadian universities to analyze how socioeconomic background influences faculty experiences within university and graduate school); Pruitt, *White Class Migrants*, *supra* note 94.

106. ASSOC. WORKING CLASS ACADEMICS, <http://awcaonline.org/wordpress> (last visited Apr. 8, 2015).

Despite the expectation that class migrants would want to shed the working-class label and folkways and to embrace fully the more salubrious milieu in which they have, at least nominally, arrived,<sup>107</sup> class of origin—one's socioeconomic provenance, if you will—is not so easily shrugged off.

Indeed, while class migrants are no doubt relieved to better have their material needs met, they may not want to leave behind entirely features of working-class culture that they—wittingly or unwittingly—hold deeply and even dearly.<sup>108</sup> Further, they will certainly still know something of the class migration phenomenon because they will still be living it. Thus their perspectives will remain distinct from those of other whites. Those perspectives will also be different from those of low-SES nonwhites because they will have experienced the challenge of class migration even while enjoying racial privilege.

In the next Part, I survey three perspectives on socioeconomic disadvantage as diversity in higher education. I look first at the U.S. Supreme Court's jurisprudence on affirmative action, starting with the *Bakke* decision in 1978, which offered the court's initial discussion of socioeconomic diversity. I then analyze the rhetoric and representations of diversity in higher education with a particular view to whether the term includes socioeconomic class. Lastly, I discuss more fully what we know about whether and how elite institutions value low-income students in the admissions and financial aid processes. There I synthesize current data on the extent to which low-SES students are present in those institutions.

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107. See JOHN GUILLORY, *CULTURAL CAPITAL: THE PROBLEM OF LITERARY CANON FORMATION* 13 (1993) ("Acknowledging the existence of admirable and even heroic elements of working-class culture, the *affirmation* of lower-class identity is hardly compatible with a program for the abolition of want.").

108. See Pruitt, *White Class Migrants*, *supra* note 94, at Part IV.

### III. THREE VANTAGE POINTS ON SOCIOECONOMIC DISADVANTAGE AS DIVERSITY

#### A. *Diversity in Case Law: An Early Nod to Class*

##### 1. *Bakke's* Capacious Definition of "Diversity"

Socioeconomic disadvantage as a component of diversity got more explicit attention in the 1978 decision in *UC Regents v. Bakke* than in any affirmative action case since. Two opinions in *Bakke* mentioned "economic disadvantage" or "socioeconomic disadvantage." The first was that of Justice Powell, joined in part by four other justices, and the second was the concurring and dissenting opinion of those four justices, authored by Justice Brennan and joined by Justices White, Marshall, and Blackmun.

In rejecting the University of California's argument that the admission system then in place at the UC Davis School of Medicine was narrowly tailored to achieve the state interest in a diverse student body, Justice Powell wrote at length about the *content* of diversity:

It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.<sup>109</sup>

Justice Powell thus saw diversity as a capacious concept that was about more than race or ethnicity. Indeed, he went on to endorse Harvard College's admission scheme, of which diversity had long been a "tenet."<sup>110</sup> Justice Powell called the Harvard plan an "illuminating example" of a program that takes "race into account in achieving the educational diversity valued by the First Amendment" but without "a

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109. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

110. *Id.* at 322 (quoting the Harvard College Admissions Program).

fixed number of places to a minority group.”<sup>111</sup> Here Justice Powell quoted extensively from the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as amici curiae: “In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups.”<sup>112</sup>

Note the clustering of “economic” disadvantage with “racial and ethnic” disadvantage as aspects of diversity. Justice Powell suggested that following Harvard’s lead is a good thing in college admissions, and Harvard had set these types of disadvantage apart from other characteristics or skills that represent diversity, implying that they are on par with each other but also that they were then relatively new to Harvard’s conception of diversity. Justice Powell continued:

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are ‘admissible’ and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates’ cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.<sup>113</sup>

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111. *Id.* at 316.

112. *Id.*

113. *Id.* at 316-17 (citing and quoting App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae at 2-3, *Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188007 at \*2-3). Justice Powell continued:

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year . . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of students from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only “admissible” academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

Justice Powell thus endorsed holistic review of candidates based on a definition of diversity that was very wide ranging—certainly including socioeconomic disadvantage, but also including geography,<sup>114</sup> musical and athletic abilities, and, of course, race and ethnicity. Some would consider these comments dicta regarding everything except race and ethnicity because those were the only components of “diversity” with constitutional implications. But a highly respectable argument can be that Justice Powell’s holding is that race-conscious admissions are allowable only if part of a broader admissions process that holistically considers all factors that increase a school’s diversity—including socioeconomic class.

Whether or not Justice Powell’s comments regarding socioeconomic class were dicta, it is surely significant that Powell treated socioeconomic disadvantage as on par with racial and ethnic disadvantage—and that he saw both as core components of diversity. It is thus surprising that Justice Powell’s inclusion of socioeconomic disadvantage appears to have had relatively little influence in shaping what we mean by “diversity” in the educational context. Sanford Levinson, observing how the diversity rationale for affirmative action has taken hold, likens the Court speaking to a game of Simon Says: “[I]f Simon says, ‘Start talking about diversity—and downplay any talk about rectification of past social injustice,’ then the conversation proceeds exactly in that direction.”<sup>115</sup> By the same token, if the Court endorses a definition of diversity in the way that Powell endorsed Harvard’s, we might expect that definition to hold sway beyond the walls of the Court among “all properly socialized lawyers, and many non-lawyers as well.”<sup>116</sup> This has not in fact happened, although as I discuss further below, Justice Souter’s dissent in *Gratz* appears to invoke this aspect of Justice Powell’s

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*Id.* It is interesting to note that until Harvard began paying attention to race, it was apparently not paying attention to socioeconomic diversity, but it was already seemingly looking for balance and diversity in the athletic and musical abilities of those whom it admitted.

114. *See infra* notes 171, 192 (discussing findings of Espenshade and Radford).

115. Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 578 (2000).

116. *Id.*

opinion by noting that the Michigan undergraduate admissions scheme at stake in that case valued socioeconomic disadvantage as highly as racial/ethnic disadvantage.<sup>117</sup>

Returning to *Bakke* for a moment, it is important to remember that only Justice Powell endorsed diversity—however defined—as the sole rationale for race-based affirmative action as part of a holistic assessment of applicants. The four concurring and dissenting justices also endorsed holistic review in affirmative action, but they did so because they believed it necessary to remedy disadvantages “cast on minorities by past racial prejudice.”<sup>118</sup> Writing for this group, Justice Brennan discussed socioeconomic diversity, but he did so in a very different way from Justice Powell. Whereas Justice Powell had treated racial/ethnic disadvantage as akin to socioeconomic disadvantage, Justice Brennan contrasted the two bases of disadvantage in disputing the oft-heard proposition that socioeconomic disadvantage might be a proxy for racial/ethnic disadvantage.<sup>119</sup> Quoting a report by the Association of American Medical Colleges, Justice Brennan wrote:

With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an

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117. See *infra* Part III.A.3.

118. *Bakke*, 438 U.S. at 324-25 (Brennan, J., dissenting in part, concurring in part).

119. *Id.* at 360. Justice Brennan wrote that when used improperly, racial preferences may reinforce the deleterious stereotype that minorities cannot be self-sufficient:

First, race, like, “gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society.” . . . State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own.

*Id.* (citations omitted). Interestingly, treating low-income whites as diversity candidates would potentially stigmatize them, but given contemporary celebration of “diversity” in higher education, I believe low-income whites would enjoy a net gain from this designation and the support typically accompanying it in higher education.

indicator of past discrimination, whites greatly outnumber racial minorities simply because whites make up a far larger percentage of the total population and therefore far outnumber minorities in absolute terms at every socioeconomic level. For example, of a class of recent medical school applicants from families with less than \$10,000 income, at least 71% were white. Of all 1970 families headed by a person *not* a high school graduate which included related children under 18, 80% were white and 20% were racial minorities. Moreover, while race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically advantaged whites, while economically advantaged blacks score less well than do disadvantaged whites. These statistics graphically illustrate that the University's purpose to integrate its classes by compensating for past discrimination could not be achieved by a general preference for the economically disadvantaged or the children of parents of limited education unless such groups were to make up the entire class.<sup>120</sup>

In short, Justice Brennan assumed—but did not provide evidence for the proposition—that low-income whites will be admitted in the normal course of medical school admissions but that minority applicants will not. Brennan did not say that low-income whites do not represent diversity, but he assumed that they do not need a leg up in the admissions process.<sup>121</sup>

Interestingly, Justice Brennan and those joining his opinion did not seem curious about the relative presence or absence of low-income whites among those admitted to UC Davis's School of Medicine, and they provided no data to support their assumption that low-income whites were being admitted. Rather, they expected some low-income whites to be admitted simply because whites are 71% of a certain income band of low-SES applicants. Whether or not this was

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120. *Id.* at 376-77 (citing B. WALDMAN, ECONOMIC AND RACIAL DISADVANTAGE AS REFLECTED IN TRADITIONAL MEDICAL SCHOOL SELECTION FACTORS: A STUDY OF 1976 APPLICANTS TO U.S. MEDICAL SCHOOLS 34, 42 (1977)) (footnotes omitted).

121. As I document in some detail below, this is no longer the case. Low-income whites appear to be losing the elite admissions game: Mostly they are losing out to affluent whites. *See infra* Part III.C. Further, the achievement gap across socioeconomic strata is now wider than that across racial/ethnic lines, as reflected by various metrics. *See supra* notes 45, 47 (discussing Reardon, Bailey and Dynarski).

a fair assumption in the 1970s, we have reason to believe it is not a fair assumption now, as detailed in Part III.C.

In the decades since *Bakke* was decided, diversity has been a buzzword in university and graduate school admissions. Indeed, diversity long ago burst from the confines of the academy to be taken up as an aspiration in corporate and law firm hiring.<sup>122</sup> Although critiques of the concept surfaced early on and have multiplied in recent years,<sup>123</sup> the post-*Bakke* jurisprudence has done little to

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122. See generally Adam Liptak, *The Case Against Gay Marriage: Top Law Firms Won't Touch It*, N.Y. TIMES, Apr. 11, 2015, at A1 (discussing the importance of “diversity” in the eyes of the current generation of law students and young lawyers); Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017 (2011); David B. Wilkins, *From ‘Separate is Inherently Unequal’ to ‘Diversity is Good for Business’: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004); Deborah Rhode, *Law is the Least Diverse Profession in the Nation and Lawyers Aren’t Doing Enough to Change that*, WASH. POST (May 27, 2015), <http://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that> (reporting that all participants in study of managing partners at large law firms and general counsel of Fortune 100 companies said “diversity was a high priority”); David B. Wilkins & Young-Kyu Kim, *The Action after the Call: What General Counsels Say About the Value of Diversity in Legal Purchasing Decisions in the Years Following the ‘Call to Action,’* (May 1, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2609103](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2609103) (analyzing the extent to which a Call to Action regarding diversity by corporations changed those corporations’ hiring decisions with respect to outside counsel). See also Pruitt, *White Class Migrants*, *supra* note 94 (describing the University of California’s attention to promotion of diversity by its professoriate).

123. See Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622 (2003); Brown-Nagin, *supra* note 12; Deo, *supra* note 57; James, *supra* note 84, at 430-31. Nancy Leong and Charlotte Garden have called diversity a “flimsy” concept. Charlotte Garden & Nancy Leong, *“So Closely Intertwined”: Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1182 (2013). More recently, Richard Lempert has noted that “diversity” diverts our attention from the benefits of the racial integration that is promoted by race-based affirmative action. Richard Lempert, *Affirmative Action in the United States: A Brief Summary of the Law and Social Science*, (Dec. 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2541899](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2541899) (last visited May 23, 2015); see also Carla D. Pratt, *The End of Indeterminacy in Affirmative Action*, 48 VAL. U. L. REV. 535, 542 (2014) (asserting that the Supreme Court’s decision in *Fisher* will force institutions of higher education to be more precise about what they mean by diversity).

dampen progressive enthusiasm for the concept and its utility in preserving affirmative action.<sup>124</sup>

But the meaning of “diversity”—its content, if you will—has evolved over the years, generally narrowing in scope. Unlike the early signal sent by Justice Powell’s opinion in *Bakke* regarding the value of socioeconomic diversity, more recent judicial signs suggest that socioeconomic disadvantage has fallen from favor in conceptions of what we mean by diversity in the context of higher education. The discussion of the next two Supreme Court decisions on affirmative action, as well as a Fifth Circuit decision that preceded them, illustrates the point.

## 2. *Hopwood*, *Grutter*, and *Gratz*: Limiting Diversity to Race and Ethnicity

Neither the Fifth Circuit in *Hopwood v. University of Texas*,<sup>125</sup> nor the majority opinion in *Grutter*<sup>126</sup> discussed socioeconomic disadvantage. The majority in *Gratz* mentioned socioeconomic disadvantage only in passing, in describing the Michigan undergraduate admissions program.<sup>127</sup> The Fifth Circuit suggested that Cheryl Hopwood, an applicant to the University of Texas Law School, represented diversity because she was a military wife raising a severely disabled child.<sup>128</sup> It is not clear that this characterization implicated socioeconomic status, but the court’s conception was nevertheless a broad one.

By the time the U.S. Supreme Court considered the companion cases of *Grutter* and *Gratz* in the 2002–2003 term, the Court was apparently out of the business of opining on the

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124. See *infra* Part III.B.

125. 78 F.3d 932 (5th Cir. 1996).

126. *Grutter v. Bollinger*, 539 U.S. 306, 316-22 (2003) (not commenting on the plaintiff’s arguments about herself as representing diversity based on various life experiences).

127. *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003).

128. *Hopwood*, 78 F.3d at 946-47 & n.31; see also note 80 (quoting the court’s description of Cheryl Hopwood). Professor Levinson calls this paragraph describing Hopwood a “gratuitous comment.” Levinson *supra* note 115, at 581. I am not sure I agree with that assessment.

meaning of “diversity” beyond its explicit inclusion of underrepresented racial and ethnic minorities. Barbara Grutter complained that the University of Michigan failed to appreciate the difference between rich and poor applicants,<sup>129</sup> but the *Grutter* majority made no mention whatsoever of socioeconomic disadvantage or any other label for it, e.g., first-generation college.<sup>130</sup> Regarding her own background, Grutter did not explicitly mention class or socioeconomic disadvantage. She described herself as:

a 43-year-old mother and business entrepreneur, someone who had started her own business ten years earlier and made it successful, someone who had been a “first” in many of her professional achievements, and someone interested in non-traditional methods of education. These life experiences would have brought a substantial amount of genuine diversity to a law school class composed largely of students (of whatever race or ethnicity) who come to the school directly from college.<sup>131</sup>

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129. Grutter wrote, among other things, “To the Law School, at least, it is ‘obvious that students from groups which have been historically discriminated against have experiences that are integral to this mission, *regardless of whether they are rich or poor or victims of discrimination.*” Brief for the Petitioner, *supra* note 79, at 37 (internal quotations omitted).

130. Justice O’Connor, writing for the majority, stated:

We have never held that the only governmental use of race that can survive strict scrutiny is past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

*Grutter*, 539 U.S. at 328. The *Grutter* Court did, however, cite a case that included the word “economic.” *Grutter*, 539 U.S. at 367 n.8 (citing *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997)).

131. Petitioner’s Reply Brief, *supra* note 79, at \*1 (citation omitted). Other documents, however, have revealed that Grutter did, in fact, grow up in an economically disadvantaged household. June Kronholz, *Does a White Mom Add Diversity? Barbara Grutter Believed she was a Prime Candidate for Michigan’s Law School*, WALL ST. J., June 25, 2003, at B3. That fact, along with other features of her family of origin, might have caused the University of Michigan Law School to view Grutter as representing diversity had she used that information. Interestingly, Grutter did not have a college counselor at her high school, and she didn’t know about SAT prep classes. *Id.* This signals that she also would not have known to play up the circumstances of her family of origin in her law school application. Ironically, then, because of her background, Grutter presumably did not know how to present her background to enhance the interest of an admissions

Similarly, the white plaintiff in the companion case regarding undergraduate admissions, Jennifer Gratz, did not clearly self-identify as SES-disadvantaged.<sup>132</sup> Indeed, the *Gratz* majority mentioned socioeconomic disadvantage only in describing how the University's definition of diversity in relation to discretionary admissions had evolved to include, among other factors, socioeconomic disadvantage.<sup>133</sup> The majority opinion did not comment, however, on the merits of that enumerated inclusion. The court merely struck the scheme, which gave a great deal of weight to being an underrepresented minority, as insufficiently tailored to achieve the compelling state interest in a diverse student body.

### 3. Souter's Dissent in *Gratz*: Suggesting a Quid Pro Quo Between Race and Class

Justices Souter and Ginsburg dissenting in *Gratz*, however, relied on the breadth of the University's conception of diversity to justify their finding that Michigan's undergraduate admissions scheme was more like the one the Court upheld in *Grutter* than it was like the quota system that was struck as unconstitutional in *Bakke*. Justice Souter wrote:

The plan here, in contrast [with the plan at stake in *Bakke*], lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, *socioeconomic*

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committee. See SOTOMAYOR, *infra* note 202 (describing her naivety about the college application process); WATKINS, *supra* note 103. As for the adult-life experiences that Grutter did tout in her application, the law school obviously did not see these as contributing to the institution's diversity. See Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, in EDUCATION LAW STORIES 83, 83-110 (Michael A. Olivas & Ronna Greff Scheider eds., 2007) (describing Grutter as one of nine children of an itinerant preacher).

132. Gratz described herself in terms of academic qualifications, without reference to her class or other characteristics that might reflect diversity. See Brief for the Petitioners at 2, *Gratz*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 164186.

133. *Gratz*, 539 U.S. at 278 (O'Connor, J., concurring) (quoting App. to Pet. for Cert. at 117a, *Gratz*, 550 U.S. 244 (2003) No. 02-516).

*disadvantage*, athletic ability, and quality of a personal essay. A nonminority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20-point bonus.<sup>134</sup>

In the prior paragraph, Justice Souter had described the problem with the University of California's admission scheme in *Bakke*:

The *Bakke* plan “focused *solely* on ethnic diversity” and effectively told nonminority applicants that “[n]o matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the [set-aside] special admissions seats.”<sup>135</sup>

Justice Souter thus reprised Justice Powell's approval (in *Bakke*) of treating socioeconomic disadvantage as on par with racial/ethnic disadvantage in the context of holistic review of applicants.

Indeed, for Justices Souter and Ginsburg, an apparently critical redeeming characteristic of Michigan's undergraduate admission scheme was that it valued not only minority race or ethnicity, but also a wide array of other characteristics. Among those enumerated characteristics was socioeconomic disadvantage. On this basis, Justice Souter evaluated Michigan's undergraduate admission scheme as similar to its law school admissions scheme.<sup>136</sup> In so doing, Souter arguably implied that its inclusion of socioeconomic disadvantage offset, justified, or—at a minimum—complemented its inclusion of race/ethnicity.<sup>137</sup>

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134. *Id.* at 293-94 (Souter, J., dissenting) (emphasis added) (citation omitted).

135. *Id.* at 293 (citation omitted).

136. In light of the total absence of a discussion of socioeconomic disadvantage in *Grutter*, Justice Souter's suggestion that the inclusion of socioeconomic disadvantage (along with other components of diversity) redeemed the undergraduate admissions scheme in *Gratz* seems disingenuous. Justice Souter's attention to socioeconomic disadvantage in *Gratz* is arguably more a metaphorical bone thrown to proponents of socioeconomic diversity than it is a genuine concern for that aspect of diversity.

137. The Court did, however, cite a case that included the word “economic” in the style. *Gratz*, 539 U.S. at 367 n.8 (citing *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997)).

Importantly, this thinking, like Justice Powell's in *Bakke*, defies the "either/or" framing associated with Kahlenberg and Sander, a framing that now dominates the affirmative action debate.

4. *Fisher v. University of Texas at Austin*: Turning the Value of Socioeconomic Diversity on its Head

The most recent affirmative action case to make it to the U.S. Supreme Court, *Fisher v. University of Texas at Austin*,<sup>138</sup> reflects the trend not to discuss the content of diversity but to assume that the term refers to racial and ethnic difference, perhaps exclusively so. Because the white plaintiff in that case, Abigail Fisher, was a privileged child of the Houston suburbs, it is not surprising that she did not claim to represent socioeconomic disadvantage or diversity.

Indeed, regarding class, Fisher made a novel argument. Fisher turned the value sometimes associated with socioeconomic disadvantage as diversity on its head by claiming that she should be compared in the admissions process specifically to other middle class applicants, across all races. Fisher argued that the University of Texas at Austin was using its admissions slots outside the 10% Plan<sup>139</sup>—those slots that referenced a personal achievement index that included attention to race/ethnicity—to admit middle-class Black and Hispanic students. Fisher asserted that the University did this because those more affluent students would defy the negative stereotypes associated with socioeconomically disadvantaged Black and Hispanic

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138. 133 S. Ct. 2411 (2013).

139. The Ten Percent Plan gave automatic admission to any public college or university to the top ten percent of graduates of all high school classes. *Id.* at 2416. Interestingly, Justice Thomas, arguably the Justice most opposed to affirmative action programs, indicated that he has no problem with using the Top Ten Percent Plan. He does object to the improper use of race in the pool of applicants admitted outside of the Top Ten Percent plan. Thomas writes: "In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission." *Id.* at 2432 (Thomas, J., concurring).

students who were being admitted under the 10% Percent Plan.<sup>140</sup>

Not only was Fisher not a socioeconomically disadvantaged white, she creatively (if not convincingly) attempted to leverage her relative affluence to craft an argument that skirted the arguable value of socioeconomic disadvantage as a type of diversity. Instead, Fisher essentially argued that those alike on the basis of class should be compared to one another and that, within her middle-class SES band (or, perhaps, any other), no racial or ethnic preference should be given to underrepresented minorities. Implicit in this argument is a suggestion that Fisher might have appeared to be a more valuable applicant if she had been a socioeconomically disadvantaged white. Because she was not, she asked to be compared to like applicants in terms of class.

The Court did not respond to Fisher's argument, in this regard. That is not surprising given its decision to remand the case to the Fifth Circuit for a determination of whether remand to the federal district court was necessary for further findings of fact regarding whether the admissions scheme was sufficiently narrowly tailored to achieve the interest in a diverse student body.<sup>141</sup> The Fifth Circuit has since held that no such remand is necessary because the university's admissions scheme meets constitutional muster, and the U.S. Supreme Court has agreed once again to consider the matter.<sup>142</sup>

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140. Reply Brief for Petitioner at 12-13, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3875237, at \*12-13. This claim seems to support Tina Jones's argument that Blackness is conflated with poverty. *See Jones, supra* note 17.

141. *Fisher*, 133 S. Ct. at 2421-22 (2013).

142. The Fifth Circuit has since made that determination, upholding the University of Texas at Austin's use of race in admissions. *Fisher v. Univ. of Tex. at Austin*, 09-50822, 2014 WL 3442449 (5th Cir. July 15, 2014). On June 29, 2015, the U.S. Supreme Court again granted certiorari in the case and will consider that more recent Fifth Circuit decision. *See Liptak, Supreme Court to Weigh, supra* note 1.

## 5. Conclusion

This review of the affirmative action cases reveals that *Bakke* was a high-water mark for recognizing SES disadvantage as diversity. Federal appellate court attention to the content of diversity has since waned. In *Hopwood*, the Fifth Circuit hinted that the plaintiff represented diversity, perhaps partly on the basis of class, but the Supreme Court majorities in *Gratz* and *Grutter* were silent on the content of diversity. Similarly, the Supreme Court in *Fisher* said nothing about the meaning of diversity, not even hinting at a response to Abigail Fisher's argument that her application should be assessed in relation to those within the same socioeconomic band as she.

In some ways, the Court's diminishing attention to class is odd given that it has occurred even as the Court has moved away from the position articulated by Justice Brennan in his *Bakke* opinion—that affirmative action based on race is justified by past discrimination. In short, the Court has stood by the diversity rationale articulated by Justice Powell in *Bakke*, even as it has simultaneously ignored his view that diversity is about more than race and ethnicity.

### B. *Diversity Rhetoric in Higher Education: Looking Past Class*

The shift away from valuing SES disadvantage as diversity has not been limited to case law. Colleges and universities themselves appear eager to depict their institutions as racially and ethnically diverse, but most seem far less (if at all) concerned about communicating their bona fides in valuing socioeconomic disadvantage as an aspect of diversity.<sup>143</sup> As Nancy Leong documented in *Racial*

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143. Cf. Leonhardt, *New Prize*, *supra* note 38; David Leonhardt, *The Least Economically Diverse Top College, Seeking to Change*, N.Y. TIMES, Jan. 16, 2015, at A17 (noting that Washington University, which is the "least economically diverse top college" in the nation with only 6% of students receiving Pell grants, is trying to shed that distinction by offering more need-based aid); Tyre, *supra* note 4 (noting that Amherst, Emory and Vassar are leaders among colleges and universities seeking to create more economically diverse student bodies; 22% of students at those institutions come from low-income families). The U.S. News and World Report evaluates the top twenty-five colleges and universities on the basis

*Capitalism*, university websites are flush with pictures of people who appear *not* to be non-Hispanic white. In short, they are chock full of people who represent racial/ethnic diversity,<sup>144</sup> what we might think of as visible or optical diversity, what Justice Thomas has called “racial aesthetics.”<sup>145</sup> This is an important way in which these institutions signal to the world—including prospective students—that they value and embody this type of diversity. Universities may be similarly able to signal with visual cues their diversity in terms of sexuality.<sup>146</sup> But it is difficult to send clear visual signals of socioeconomic diversity—in part because those from humble backgrounds are presumably class passing to the extent they can afford to do so and would likely make a particular effort in this regard for a staged photo for a university publication.<sup>147</sup>

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of economic diversity. See *Economic Diversity Among the Top 25 Ranked Schools*, U.S. NEWS & WORLD REPORT, <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/economic-diversity-among-top-ranked-schools> (last visited July 10, 2015).

144. Leong, *supra* note 53, at 2191-92. Leong writes, “[N]onwhiteness is a recruitment tool, a way of marketing the school to both white and nonwhite students who care about racial diversity. Signaling the presence of nonwhiteness at a school is a way for the school to signal its commitment to creating a safe environment for students of color.” *Id.* Leong notes that nonwhite students are overrepresented in photos, with blacks and Asians portrayed in photos at a rate 50% higher than those enrolled. *Id.* at 2192; see also Eugene Y. Lowe, Jr., *Promise and Dilemma: Incorporating Racial Diversity in Selective Higher Education*, in PROMISE AND DILEMMA: PERSPECTIVES ON RACIAL DIVERSITY IN HIGHER EDUCATION 3, 3 (Eugene Y. Lowe, Jr., ed. 1999) (observing that “[c]elebrating the value of racial and ethnic diversity has become routine in educational circles”); Sander & Danielson, *supra* note 73, at 968 (2014) (noting that the “predominant construction of ‘diversity’ in higher education focuses on race or, specifically, on under-represented minorities”) (internal quotations omitted).

145. Justice Clarence Thomas used the term “racial aesthetics” in his dissent in *Grutter*, repeating the term “aesthetics” throughout his opinion. 539 U.S. 306, 355-57 (2003) (Thomas, J., dissenting); CASHIN, *supra* note 26, at 50 (2014) (using the term “optical diversity”).

146. See generally Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715 (2014) (discussing the distinction between being perceived to be gay on the basis of observable appearances and being perceived to be gay on some other basis); see also *infra* note 147 (discussing the *New York Times Magazine* cover photo of students).

147. See generally Lisa R. Pruitt, *How You Gonna’ Keep Her Down on the Farm*, 78 UMKC L. REV. 1085 (2010); Eli Wald, *The Visibility of Socioeconomic Status*

Further, indications abound that not all higher education institutions actually value socioeconomic diversity. If they do value it, they may not communicate that fact. The Law School Admissions Council (LSAC), for example, tracks the race and/or ethnicity of applicants and admittees in great detail, using thirty-two subcategories that capture a great deal of nuance, e.g., Asian-Filipino, Hispanic/Latino-Cuban.<sup>148</sup> Many law schools follow this taxonomy in tracking those they admit and enroll. Most institutions pay far less attention to socioeconomic status. The LSAC does not collect or distribute to law schools data on the income or education level of applicants' parents,<sup>149</sup> and their failure to collect this data makes it difficult for law schools to use socioeconomic

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*and Class-Based Affirmative Action: A Reply to Professor Sander*, 88 DENV. U. L. REV. 861 (2011). Further, thrift store wardrobes and a certain practiced slouchiness are hip in some milieu. It might also be seen as in bad taste to attempt a visual depiction of socioeconomic diversity because this would require a depiction of socioeconomic disadvantage. Interesting in this regard is the *N.Y. Times Magazine* cover photo for a May 2014 story by Paul Tough. Tough, *supra* note 46. The story, about interventions to support academically vulnerable undergraduate students, occasionally mentions socioeconomic disadvantage and first-generation college as dimensions of disadvantage (along with rurality), but it is not clear that anyone in the cover photograph of twenty-four students is non-Hispanic white. My best guess is that three of the students could easily be non-Hispanic whites, but even they are racially/ethnically ambiguous. It thus seems that the *New York Times* intended primarily to depict racial or ethnic disadvantage, although two of the women appear to be holding hands, which suggests diversity based on sexuality as well.

148. See Kevin Brown & Tom I. Romero, II, *The Social Reconstruction of Race & Ethnicity of the Nation's Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133, 1184-85 (2011) (citing LSAC ethnicity questionnaire, and noting that LSAC records ethnicity along thirty-two subcategories, including Asian-Filipino, Asian-Indian, Asian-Vietnamese, Hispanic/Latino-Central American, Hispanic/Latino-Chicano/Mexican, Hispanic/Latino-Cuban).

149. Sander, *Class in American Legal Education*, *supra* note 55, at 631-32 (noting the lack of "official data generated by law schools that even considers socioeconomic issues, and there are almost no research efforts anywhere in the legal academy that have a mandate to help the legal academy understand socioeconomic questions"). *But see* ANN M. GALLAGHER & PHIL HANDWERK, L. SCHOOL ADMISSION COUNCIL, BEHIND THE DATA: COMPARING LAW SCHOOL APPLICANTS TO ALL COLLEGE FRESHMEN 3 (2012), available at <http://www.lzac.org/flipbooks/behindthedata/#/4/zoomed>. The data from this LSAC survey is distinct from SES data about law school applicants. The latter is not collected systematically or made available to law schools.

disadvantage in decision making or to track the extent to which they are achieving socioeconomic diversity. My own institution, UC Davis School of Law, Martin Luther King, Jr., Hall, does not collect data on the number of socioeconomically disadvantaged students admitted, and it considers an applicant's socioeconomic background only if the applicant writes about it in his or her application essay.<sup>150</sup> Yet low-SES applicants may not know that inclusion of such information might enhance their application, and thus fail to do so.<sup>151</sup>

Another sign that the academy does not value poor and working-class white applicants and students as representing diversity is that awards, rankings, and other recognition for diversity generally do not factor SES disadvantage into their calculations. For example, in the fall of 2012, UC Davis School of Law was named to *The National Jurist's* "Diversity Honor Roll," but that award was based on "number of minority students and faculty members."<sup>152</sup> It makes no

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150. Email from Kristen Mercado, UC Davis School of Law Admissions Office, to Professor Lisa R. Pruitt (Sept. 18, 2012) (on file with author). Relying on these students to self-identify as SES-disadvantaged is ineffective when the students do not know to leverage their SES status in the admissions process. Further, the reason they do not know closely relates to their SES status. *See supra* Watkins, *supra* note 103; *supra* notes 79, 86 (discussing Barbara Grutter's application to the University of Michigan Law School). A vicious cycle thus keeps SES-disadvantaged students in place within the class hierarchy. Low-income and first-generation applicants lack knowledge about how to position themselves in order to get admitted, which means they are unlikely to succeed in the admissions process. This failure to get admitted begets a lack of opportunity for themselves, which they typically pass on to their children due to the lack of "insider" knowledge about the admissions process. *Cf.* Andrew Cohen, *Student Group Mentors and Guides First Generation Professionals*, BERKELEY L. (Oct. 15, 2014), <http://law.berkeley.edu/article/student-group-mentors-and-guides-first-generation-professionals> (detailing UC Berkeley Law School's "first-generation professional" mentoring program).

151. *See* Watkins, *supra* note 103; *supra* notes 129, 131 (discussing Barbara Grutter's biography).

152. *Most Diverse Law Schools*, THE NAT'L JURIST, Nov. 2012, at 22-24, available at <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist1112/#/22>. The rankings are based on the percentage of minority faculty members and student assessments as to whether the faculty makes up "a broadly diverse group of individuals." Karen Dybis, *Most Diverse Faculty*, THE NAT'L JURIST, May 27, 2009, available at <http://www.nationaljurist.com/content/most-diverse-faculty-0>. UC Davis School of Law also placed 5th in Princeton Review's "Most Diverse Faculty," based on school data and student surveys. *Most Diverse Faculty*, PRINCETON REV.,

mention of metrics that would reflect other aspects of diversity such as socioeconomic class.

This erasure of class is presumably due in part to academic guilt about our collective class privilege, just as those of us who are white, experience guilt about our race privilege. Furthermore, those of us who are parents may well be motivated—consciously or not—to do nothing that would jeopardize the passing of our class-based advantage onto our children. We have incentives, in other words, to acquiesce to the notion that high SAT scores and “merit-based aid,”<sup>153</sup> for example, are really reflections of merit, a position we are willing to temper only with sensitivity to entrenched racial disadvantage and, perhaps, to sensitivity regarding sexual minorities or those with other immutable or quasi-immutable characteristics that render them outsiders.

Other motivations to ignore class are less self-serving and may even be altruistic. For example, we may think it best for would-be class migrants that we not call attention to their status as such. We may expect those whose families of origin are low-SES to feel ashamed of their socioeconomic background and therefore pass as middle class to the extent they are fiscally and socially able to do so.<sup>154</sup> We may assume that a stigma accompanies the “diversity” designation, that it implies objectively inferior credentials.<sup>155</sup>

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2015, available at <http://www.princetonreview.com/law-school-rankings?rankings=most-diverse-faculty> (last visited July 10, 2015); see also Lisa R. Pruitt, *Who's Afraid of White Class Migrants: On Denial, Discrediting and Disdain (and Toward a Richer Conception of Diversity)*, 31 COLUM. J. GENDER & L. 284 (2015).

153. See CASHIN, *supra* note 26, at xvi, 56-57 (2014) (calling the term “merit-aid” a euphemism and asserting, for example, that “[a]ffluent people of all colors who call an SAT score merit are complicit in” endorsing “[p]henotypic diversity [that] assuages what is left of white guilt and helps mask exclusion”). See generally GUINIER, *supra* note 11.

154. See Helen Joy Policar, *The Shadow of the American Dream: The Clash of Class Ascension and Shame*, 31 REVISION 19, 19 (2010) [hereinafter Policar, *Shadow of the American Dream*] (noting the “cultural taboos against discussing class identity”).

155. See *supra* note 118 (quoting Justice Brennan in *Bakke*). The stigma argument is, of course, widely associated with Justice Thomas’s views on affirmative action.

These are fair points, but it is also possible that recognizing these students as representing valuable, diverse voices will be a net gain for them. If institutions convey to low-income and first-generation students that their perspectives as such are valued, the students may feel less isolated and be endowed with greater confidence. This, in turn, could lead them to set more ambitious goals and to thrive in achieving those goals. So, too, being able to network (and commiserate) with a critical mass of others from lower-SES origins might be beneficial to the students.

These assumptions seem to be behind the strategies of some colleges, including the establishment of dorms and specific programs dedicated to supporting first-generation students.<sup>156</sup> Similarly, UC Berkeley's law school, for example, initiated a first-generation professional program in 2011.<sup>157</sup> The program focuses on giving students from low socioeconomic backgrounds exposure to professional etiquette, law firm culture, and networking skills because many of them have little experience in these areas. In addition, the program seeks to bridge the gap between these students and their classmates, many of whom enjoy "ladders to success" through family connections or parents who are lawyers.<sup>158</sup>

Indeed, William Kidder's study of the post-Prop 209 admissions landscapes of the University of California's eight campuses appears instructive on this point.<sup>159</sup> Kidder found that underrepresented minorities, especially those with the strongest credentials and those who are African-American, were more likely to spurn an offer from a UC campus after Prop 209 than they were before Prop 209, when race conscious admissions were allowed.<sup>160</sup> Kidder suggests that

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156. See Scott, *First Generation College Students Go Viral*, *supra* note 46 (describing a YouTube campaign of first-generation students boasting their status as such); Scott, *Separate Housing for First-Generation Students*, *supra* note 46.

157. Cohen, *supra* note 150.

158. *Id.*

159. William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 70 (2013).

160. *Id.* at 69.

this drop in acceptances at UC campuses occurred because these students felt less valued by the University after race-conscious admissions ended. Kidder invoked this evidence to dispute the idea that race-conscious admissions create stigma for underrepresented minorities and that students are keen to avoid that stigma.<sup>161</sup>

Meanwhile, higher education has moved beyond valuing racial and ethnic diversity to valuing status as a sexual minority. UC Davis, for example, keeps an “Out List” of “LGBTQIA+ professionals.”<sup>162</sup> The list is touted as a “valuable resource for the campus community . . . not only because it offers positive role models for students . . . but also because awareness of out professionals creates a climate of tolerance for all students.”<sup>163</sup> This practice of naming and claiming shows how designating characteristics or identities to be aspects of “diversity” can de-stigmatize the characteristic or identity. The same would presumably be true of and for first-generation and low-income students.

Katharine Bartlett offers a similar observation in relation to diversity on corporate boards: Diversity conveys

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161. *Id.* at 70.

162. For example, the University of California, Davis, keeps an “Out List” of “LGBTQIA+ professionals . . . including faculty, staff, administrators, and graduate students at all levels.” Email from Provost Ralph J. Hexter (April 21, 2015, at 9:05 am) available at <http://lgbtqia.ucdavis.edu/resources/list>. The University explains the reason for the list:

The Out List is a valuable resource for the campus community. Having examples of out professionals in such a wide range of fields is incredibly significant to LGBTQIA+ students, not only because it offers positive role models for students and encourages students to pursue networking/mentoring opportunities without fearing discrimination, but also because awareness of out professionals creates a climate of tolerance for all students, LGBT+ and non-LGBT+ alike.

*Id.* Such list keeping makes sense, of course, because it helps chip away at—and guard against resurgence of—the shame that was, until recently, associated with being a sexual minority. See KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR HUMAN RIGHTS (2007) (explaining how shame associated with same-sex attraction compels covering); Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1 (2013) (analogizing the metaphorical closet that LGBTQ folks traditionally “come out” from to the situation of undocumented immigrants, who also face stigmas and prejudices).

163. *Id.*

“an important social ideal.”<sup>164</sup> Further, diversity’s elasticity accommodates “continual redefinition.”<sup>165</sup> This provides an opportunity for those who value diversity to advertise their efforts and “shap[e] the meaning of diversity and the attitudes others should have toward it.”<sup>166</sup>

It is surely possible that the opportunity Bartlett identifies could be deployed in relation to first-generation and low-income students, including white ones.<sup>167</sup> If we treat these applicants and students as reflecting diversity in higher education, we are signaling their value and thus shaping favorable attitudes toward them. Doing so could also decrease the shame typically associated with being “low class” and thus encourage these students to share the perspective gained from that vantage point. In short, these students would surely benefit from being treated as if their voices and perspectives are not only distinct, but in fact highly valuable.

Finally and importantly, a 2013 study found that socioeconomic diversity on college campuses enhanced cross-racial interaction on those campuses.<sup>168</sup> That is, a socioeconomically diverse institution is associated not only

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164. Katharine T. Bartlett, *Showcasing: The Positive Spin*, 89 N.C. L. REV. 1055, 1057-58 (2011) (citing Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1027-31 (2011)). Stephen Rich goes as far as to argue in a forthcoming article that “diversity” has become a proxy for equality in contemporary legal rhetoric. Rich, *supra* note 53. He articulates a taxonomy for the different meanings and uses of diversity: “diversity-as-end-state,” “diversity-as-strategy,” and “diversity-as-motivation.” *Id.* at Part III.

165. Bartlett, *supra* note 164, at 1059.

166. *Id.*

167. Indeed, this desire to be seen and welcomed is expressed in a statement from a first-generation college student at the University of Michigan who credited the university for taking care of his financial needs, but not for communicating to him his value as a first-generation, low-income student: “Just to have someone from the university come up and say, ‘You belong here’ and ‘We’re so excited to have you here,’” he says, “that would have changed everything for me.” Jennifer Guerra, *Fitting in on Campus: Challenges for First-Generation Students*, NPR (Feb. 16, 2015), <http://www.npr.org/blogs/ed/2015/02/16/385470288/fitting-in-on-campus-challenges-for-first-generation-students>.

168. Julie J. Park et al., *Does Socioeconomic Diversity Make a Difference? Examining the Effects of Racial and Socioeconomic Diversity on the Campus Climate for Diversity*, 50 AM. EDUC. RES. J. 466, 486 (2013).

with more frequent interaction across class lines, it is associated with more frequent interactions across race/ethnicity lines as well.<sup>169</sup> Indeed, that study concluded that “both socioeconomic and racial diversity are essential to promoting a positive campus racial climate.”<sup>170</sup> Contrary to what is suggested by the dominant “either/or” framing of affirmative action then, institutions that value racial and ethnic diversity have a great deal to gain by achieving socioeconomic diversity, too. The next Part looks closely at what universities are doing in these regards.

C. *Diversity in Action: Low-SES Students are Underappreciated by Selective College and Universities*

More problematic than the shift in rhetoric that has narrowed what constitutes “diversity”—especially within the elite higher education community—is the corresponding phenomenon of what is happening in higher education admissions, what I call “diversity in action.” The data suggest that many elite admissions schemes fail to understand, let alone favor, the socioeconomically disadvantaged, whatever their color.<sup>171</sup> As the headlines collected above at Part II

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169. *Id.* at 466-67.

170. *Id.*

171. See David Leonhardt, *Better Colleges Failing to Lure Talented Poor*, N.Y. TIMES (Mar. 16, 2013), <http://www.nytimes.com/2013/03/17/education/scholarly-poor-often-overlook-better-colleges.html?ref=davidleonhardt>. [hereinafter Leonhardt, *Better Colleges Failing*] (reporting that only 34% of high-achieving high school seniors in the bottom one-fourth of the income distribution attend any of the country's 238 most selective colleges); David Leonhardt, *Rethinking Affirmative Action*, N.Y. TIMES (Oct. 13, 2012), <http://www.nytimes.com/2012/10/14/sunday-review/rethinking-affirmative-action.html?ref=davidleonhardt> [hereinafter Leonhardt, *Rethinking Affirmative Action*] (noting that low-income students, controlling for race, receive little to no preference in the admission process); see also Garland, *supra* note 61 (reporting that children in the 10th percentile of income in 1963 fell behind children in the upper echelon of wealth by about a year or so in educational achievement, while that gap has widened to four years in 2013); Greenblatt, *supra* note 49 (“Among top-performing high school students who hail from the bottom half of the income distribution, fewer than half go on to receive post-secondary degrees.”) (citing Anthony P. Carnevale & Jeff Strohl, SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE 11, 54 (2013)). The authors studied students who scored in the top half of the test score

indicate, most elite colleges and universities are doing a poor job of admitting low-income and working-class students, even as some purport to be looking for those students.<sup>172</sup> Colleges and universities admit some low-SES students who are also underrepresented minorities, but those students get the admissions nod because of their status as the latter. Yet among underrepresented minorities, SES-advantaged applicants are more likely to be admitted than low-SES applicants,<sup>173</sup> except in selective private colleges, where low-SES minorities get a slight nod over high-SES minorities.<sup>174</sup>

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distribution. They found that over 240,000 of these high-scoring students who come from the bottom half of the income distribution did not receive a two- or four-year degree within eight years of their high school graduation. See Leonhardt, *Top Colleges*, *supra* note 2 (reporting that just “44 percent of low-income high school seniors with high standardized test scores enroll in a four-year college, according to a Century Foundation report compared with about 50 percent of high-income seniors who have average test scores.”). *But see* ESPENSHADE & RADFORD, *supra* note 45, at 98 fig.3.9 (finding that elite private colleges are more likely to admit lower income blacks than higher income blacks); *id.* at 97 fig.3.8 (finding that with respect to elite public universities, SES-advantaged applicants are more likely to be admitted, but only for Hispanics and Asians; for blacks, SES had little impact on admissions, though upper middle class blacks were slightly less likely to be admitted than blacks in other SES bands). Espenshade and Radford performed a regression analysis correlating factors such as race, social class, and sex with student admissions to private and public NCSE institutions in Fall 1997. They found that for white applicants, acceptance into public universities and social class were related in an inverse U-shaped pattern. They found a similar pattern for nonwhite students into public universities as well, except the acceptance rate even increases for upper class students. They note that for Hispanic and Asian students, expected admission rates are the greatest for students from the highest social class backgrounds. Espenshade and Radford theorize that because of limited financial aid budgets, public institutions have a greater incentive to admit students whose families can pay for the entire educational cost. *Id.* at 97-98.

172. See Vedantam, *supra* note 38; see also Leonhardt, *A Nudge to Poorer Students*, *supra* note 38; Leonhardt, *New Prize*, *supra* note 143; Lewin, *Study Finds Family Connections*, *supra* note 38; Lewin, *Universities Seeking*, *supra* note 8; Mathews, *supra* note 38.

173. See, e.g., CARBADO & GULATI, *supra* note 95, at 118 (2013) (noting that Lani Guinier was perhaps the first to observe that “many top universities were pursuing black racial diversity primarily by admitting first-generation immigrants of African and Caribbean descent”) (citing Lani Guinier, OP-ED, *Our Preference for the Privileged*, BOS. GLOBE, July 9, 2004, at A13).

174. See ESPENSHADE & RADFORD, *supra* note 45, at 98 (finding that elite private colleges are more likely to admit lower income blacks than higher income blacks).

The evidence we have thus reveals that not only does higher education rhetoric about diversity ignore SES diversity and disadvantage, diversity in action—what most elite tertiary institutions *do*—suggests that they place little value in socioeconomic diversity. Recent gnashing of teeth among the national media aside, poor and working-class whites struggle in particular in the admissions process, apparently because they are not consistently seen as representing the much-sought-after, highly-valued “diversity.” Further, what they do represent—along with what they have done in high school—appears not to be very desirable, as detailed below. According to the most comprehensive and recent study of elite college admissions, the “admission preference accorded to low-income students appears to be reserved largely for nonwhite students.”<sup>175</sup> This leaves poor and working class whites one of the least represented demographic segments on the campuses of elite colleges and universities.<sup>176</sup> Indeed, depending on how you slice and dice the segments, poor and working class whites are probably the most underrepresented groups on these campuses in proportion to their share of the wider population.<sup>177</sup>

Indeed, race aside for a moment, the numbers regarding socioeconomically disadvantaged students of all colors are telling. At the University of Michigan in 2003—the year the U.S. Supreme Court decided *Gratz* and *Grutter*—the number of freshmen from families earning at least \$200,000 a year exceeded the number of freshmen “from the entire bottom

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175. *Id.* at 128.

176. While most of my discussion of these issues of socioeconomic disadvantage references data related to undergraduate education, I also discuss the erasure of class in the context of legal education. While these are distinct realms for some purposes, much of my analysis applies to both contexts.

177. While we do not have a racial breakdown of current data, we do know that about 70% of the college-aged population do not have a parent with at least a bachelor’s degree. *See supra* note 46. We do not know the percentage of college-aged students who are first-generation, and we do not know how many first-generation students are at elite colleges in particular. The data in the following paragraphs represents what we do know about this phenomenon.

half of the income distribution.”<sup>178</sup> The data from many private colleges are even more dramatic. Children from families in “the bottom earnings quintile have a much lower chance of getting into selective schools than members of racial minorities, to say nothing of children from wealthy homes.”<sup>179</sup> In short, affluent students outnumber “middle-class” students at many universities<sup>180</sup>—never mind the working-class or poor, those typically referred to as “low-income.”<sup>181</sup>

Indeed, recent studies show that—despite some rhetoric suggesting the contrary—most elite colleges give no admissions advantage to low-income students based on their low-income status.<sup>182</sup> Anthony Marx, former president of

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178. Leonhardt, *Top Colleges*, *supra* note 2 (“As entering freshmen, only 15 percent of students came from the bottom half of the income distribution. Sixty-seven percent came from the highest earning fourth of the distribution.”).

179. Greenblatt, *supra* note 49.

180. See Leonhardt, *The Liberals Against Affirmative Action*, *supra* note 59; Leonhardt, *A Nudge to Poorer Students*, *supra* note 38; David Leonhardt, *As Wealthy Fill Top Colleges, Concerns Grow Over Fairness*, N.Y. TIMES (Apr. 22, 2004), <http://www.nytimes.com/2004/04/22/us/as-wealthy-fill-top-colleges-concerns-grow-over-fairness.html>; Leonhardt, *Better Colleges Failing*, *supra* note 171; Leonhardt, *The Least Economically Diverse Top College*, *supra* note 143; Leonhardt, *Top Colleges*, *supra* note 1; Leonhardt, *Rethinking Affirmative* *supra* note 171.

181. See, e.g., Leonhardt, *A Simple Way*, *supra* note 45; Alison Fu, *Dirks, Napolitano Attend White House Summit on Higher Education for Low-Income Students*, DAILY CALIFORNIAN (Jan. 17, 2014), <http://www.dailycal.org/2014/01/16/dirks-napolitano-attend-white-house-summit-higher-education-low-income-students>; Claudio Sanchez, *White House Makes College for Low-Income Students a Priority*, NPR (Jan. 16, 2014, 4:00 PM), <http://www.npr.org/blogs/codeswitch/2014/01/16/263128207/white-house-makes-college-for-low-income-students-a-priority>; *Friday Buzz: College Presidents Pledge Access for Low-Income Students at White House Summit*, AM. COUNCIL ON EDUC. (Jan. 17, 2014), <http://www.acenet.edu/news-room/Pages/friday-buzz-College-Presidents-Pledge-Access-for-Low-Income-Students-at-White-House-Summit>.

182. Leonhardt, *Top Colleges*, *supra* note 2 (citing WILLIAM G. BOWEN, MARTIN A. KURZWEIL & EUGENE M. TOBIN, EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION (2006)); see also Leonhardt, *The Least Economically Diverse Top College*, *supra* note 143 (noting that Washington University, which is the “least economically diverse top college” in the nation with only 6% of students receiving Pell grants, is trying to shed that distinction by offering more need-based aid); Tyre, *supra* note 4 (noting that Amherst, Emory and Vassar are leaders among colleges and universities seeking to create more economically diverse student

Amherst College and a leader among educators who have focused on increasing socioeconomic diversity, explains:

We claim to be part of the American dream and of a system based on merit and opportunity and talent . . . . Yet if at the top places, two-thirds of the students come from the top quartile and only 5 percent come from the bottom quartile, then we are actually part of the problem of the growing economic divide rather than part of the solution.<sup>183</sup>

How is it that poor and working-class students—especially white ones—get so consistently undervalued or overlooked in the college admissions process? In their 2009 book, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life*, Princeton sociologists Thomas Espenshade and Alexandria Walton Radford published findings from their 1997 survey of 67,000 students who were admitted to highly selective colleges, both public and private.<sup>184</sup> Espenshade and Radford concluded that whites and Asians needed higher grades and SAT scores to gain admission, while Blacks and Hispanics were favored in the admissions process.<sup>185</sup> I am neither surprised nor troubled by this information, but I find some of Espenshade and Radford's other findings deeply disturbing for what they reveal of elite attitudes toward (and/or ignorance of) poor and working-class students. Among their troubling conclusions was that an upper-middle-class white applicant to a selective private school was more than three times as likely to be admitted as a lower-class white with similar qualifications.<sup>186</sup>

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bodies; 22% of students at those institutions come from low-income families); cf. Leonhardt, *New Prize*, *supra*, note 38.

183. Leonhardt, *Top Colleges*, *supra* note 2.

184. See generally ESPENSHADE & RADFORD, *supra* note 45.

185. *Id.*

186. *Id.* at 98. The study found that among white applicants to selective public institutions, "upper-middle class [white] students have the highest expected probability of being accepted," and in private institutions "[w]hite middle- and upper-class applicants to private schools have a substantially greater advantage over students from either end of the socioeconomic spectrum [i.e., lower-class whites and upper class whites]." *Id.* at 97-98. Interestingly, for minority applicants to elite private schools, the authors found that the lower a family's socioeconomic position, the more likely the student was to be admitted. *Id.* at 98.

Ross Douthat, in a *New York Times* column about the book, opined that this appears to be a “money-saving tactic:” “Espenshade and Radford suggest that these institutions, conscious of their mandate to be multiethnic, may reserve their financial aid dollars ‘for students who will help them look good on their numbers of minority students,’ leaving little room to admit financially strapped whites.”<sup>187</sup> Douthat concluded that the “downscale, the rural and the working-class” whites appeared most disadvantaged in the admissions process.<sup>188</sup> Espenshade and Radford had found that lower-income blacks had an 87% likelihood of being admitted to elite private colleges, while the likelihood was 65% for lower-income Hispanics, and just 8% for lower-income whites.<sup>189</sup>

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Regarding selective public schools, the data show far less variation among whites based on class. An upper-middle-white class has a .56 probability of being selected, while a lower class white has a .48 probability of being selected (difference of .08). *Id.* at 97. Interestingly, upper class whites have a .49 probability of being selected, almost the same as lower class whites. *Id.* The result is a U-shaped pattern because all probabilities for whites in public schools are: lower class-.48, working-.50, middle-.52, upper middle-.56, upper-.49. *Id.*

187. Ross Douthat, *The Roots of White Anxiety*, N.Y. TIMES (July 18, 2010), <http://www.nytimes.com/2010/07/19/opinion/19douthat.html> (quoting ESPENSHADE & RADFORD, *supra* note 45, at 99 n.38). Many others have noted the cost implications of recruiting more low-income students. *See, e.g.*, Greenblatt, *supra* note 49 (quoting Richard Kahlenberg); Tyre, *supra* note 4.

188. Douthat, *supra* note 187. Hispanic applicants receive a 130 SAT point preference over white applicants. ESPENSHADE & RADFORD, *supra* note 45, at 93. Black applicants receive a 310 point bump. *Id.* Private institutions gave applicants from lower-class families a preference equal to 130 SAT points, though they weighted it disproportionately towards minorities. *Id.* at 92. This meant lower-class blacks had an 87% likelihood of being admitted, while the likelihood was 65% for lower-class Hispanics, and just 8% for lower-class whites. *Id.* at 92, 98. Private institutions gave working-class whites a 70 point SAT bump. *Id.* at 92. This translated to an 18% likelihoods of admission, while middle and upper-income whites had a 28% likelihood of admission. *Id.* at 92, 98.

189. ESPENSHADE & RADFORD, *supra* note 45, at 98. Here, Espenshade and Radford referred to private universities that were part of the National Study of College Experience, which collected information from “eight academic institutions that are part of the College and Beyond database assembled by the Andrew W. Mellon Foundation,” and together include “public and private research universities in addition to small liberal arts colleges, [with a] geographic spread encompassing all parts of the country.” *Id.* at 10. No list of schools is provided as a safeguard for confidentiality of student information, but the authors considered

Espenshade responded to Douthat's column, but his explanations did not fundamentally alter Douthat's summary of what the book reported. Espenshade wrote:

We find that applicants who demonstrate a strong commitment to career-oriented extracurricular activities while in high school have a slightly lower chance of being admitted to a top school. This outcome affects only students who have won awards or assumed leadership positions in these activities, not those known for their extensive involvement.<sup>190</sup>

Espenshade continued by listing some of the disfavored extracurricular activities, which might include 4-H clubs or Future Farmers of America, as Douthat mentioned, but which could also include junior ROTC, co-op work programs, and many other types of career-oriented endeavors.<sup>191</sup>

Espenshade thus challenged Douthat's association of these activities with rurality, asserting instead that such activities "could just as well suggest that these students are somewhat ambivalent about their academic futures."<sup>192</sup> This

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them representative because they compared these eight universities against the top fifty from U.S. News and didn't find any "statistically meaningful differences between the average characteristics of either group." *Id.* at 10 n.13.

190. Ross Douthat, *The White Anxiety Debate Continued*, N.Y. TIMES OPINIONATOR (July 28, 2010), <http://douthat.blogs.nytimes.com/2010/07/28/the-white-anxiety-debate-continued> (quoting Thomas Espenshade). The relevant passage from Espenshade states: "[e]xcelling in career-oriented activities is associated with 60 to 65 percent lower odds of admission. These activities include ROTC and co-op work programs. They might also encompass 4-H Clubs, Future Farmers of America, and other activities that suggest that students are somewhat undecided about their academic futures." ESPENSHADE & RADFORD, *supra* note 45, at 126. I find puzzling the distinction Espenshade draws between leadership and awards on the one hand and extensive involvement on the other. I would expect the two to go hand in hand, and I am unclear why winning awards and being a leader would be looked on less favorably than "extensive involvement."

191. Douthat, *supra* note 190 (quoting Thomas Espenshade).

192. *Id.* Regarding Espenshade and Radford's suggestion that these students are not admitted because they appear uncertain about their academic futures, Douthat responded by focusing on the difference between admissions and acceptances:

[I]t's a question of admissions offices looking at students who went to the effort of applying to elite schools (an act that already suggests a strong interest in an academic future of some sort) and downgrading their

is consistent with what Espenshade and Radford say in their book, presenting the bias, if you will, as one against students whose interests run to what they characterize as “career-oriented.”<sup>193</sup> In a somewhat similar vein, Espenshade and Radford found that holding a part-time job during high school could also hurt one’s admissions prospects.<sup>194</sup>

Espenshade and Radford’s findings regarding “career-oriented activities” and/or holding a part-time job are troubling for several reasons. First, Espenshade and Radford depict an admissions scheme that is not achieving optimal diversity or anything approaching it. If these institutions really seek diversity, broadly defined (consistent, for example, with Justice Powell’s opinion in *Bakke*), I would expect them to admit proven high school leaders, regardless of the nature of the extra-curricular activities in which they were involved or demonstrated their leadership.<sup>195</sup> Why is

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chances, for whatever reason, because they excelled in ROTC or the 4-H club or a co-op work program.

*Id.* Interestingly, Espenshade’s response to Douthat uses geographic diversity as a decoy to distract from the allegation of bias against rural and working-class whites. He writes:

Compared to otherwise similar applicants from California, those from Utah are 45 times as likely to be admitted to one of our elite colleges or universities. The advantage for applicants from West Virginia or Montana is 25 times greater, and nearly 10 times greater for students from Alabama. Because top private schools seek geographic diversity, and students from America’s vast middle are less likely to apply, it stands to reason that their admission chances are higher.

*Id.* What this response ignores is that all of those admitted from Utah, West Virginia and Montana might well be the children of highly educated parents living in metropolitan areas like Salt Lake City, Charleston, and Billings. If that is the case, little if any socioeconomic or lower-scale geographic diversity is being achieved.

193. See ESPENSHADE & RADFORD, *supra* note 45, at 124, 126-27, 129.

194. *Id.* at 120-22. This phenomenon did not occur at a statistically significant level.

195. I also must admit that I am not sure what sort of high school activities do not look “career-oriented.” This confusion presumably reflects both my age and my place of origin. I attended a poor rural school in the Arkansas Ozarks where chemistry and physics were taught on alternate years, and the most advanced math class taught on a regular basis was Algebra II. Our only extracurricular activities were basketball and an array of clubs such as Future Business Leaders of America and Future Homemakers of America. Presumably, involvement in the

experience gained leading a 4-H Club any less valued than that gained from leading the French Club or an ethnic organization?<sup>196</sup> Further, opportunities to participate in the “right” enrichment activities may not be available in all schools or all communities. When such enrichment activities are available, working-class families are unlikely to be able to afford the costs associated with participation in them.<sup>197</sup> Educational travel may similarly be beyond their reach.<sup>198</sup>

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arts or some such seems more impressive and more academic, but these activities were not available at my school.

Another reason that working-class high school students might engage in career-oriented activities is that they are hedging their bets in the event they don’t “make it” in higher education or, as the case may be, if they don’t get admitted to elite colleges. State universities may value practical skills more highly.

Barbara Kingsolver offers an excellent literary depiction of poor rural schools in her 2012 novel *Flight Behavior*, describing an anti-intellectual environment that values sports over academic rigor, dedicating resources accordingly. She writes, among other things, that students at such schools “wouldn’t know college bound from a hole in the ground. They don’t need it for life around here. College is kind of irrelevant.” BARBARA KINGSOLVER, *FLIGHT BEHAVIOR* 224 (2012). Kingsolver’s depiction is highly consistent with my own experiences.

196. The bias against working-class culture, if you will, as reflected in the devaluing of their extracurricular activities, is given voice in a hypothetical in the 2013 book, *Acting White? Rethinking Race in “Post-Racial” America*. There, Devon Carbado and Mitu Gulati offer a hypothetical involving Johnny, a black applicant to an elite business school. Johnny graduated from Andover but then did his bachelor’s degree at “State.” The authors explain that the business school rarely admits students from State, in part because State is insufficiently elite and most of the students at State are from working-class backgrounds. The admissions office has determined that the students from State are likely to have difficulty fitting into the milieu at an elite business school. Given this concern, whether Johnny is selected will be a function of whether he can differentiate himself from the category within which he is situated—the category of State students. CARBADO & GULATI, *supra* note 95, at 128-30. The authors suggest that Johnny may be able to differentiate himself from other “State” graduates because of his interest in the Tour de France and in European food and wine, all stemming from a semester abroad. *Id.* at 126-27. Of course, Johnny’s black skin will also differentiate him and make him more attractive. See Leong, *supra* note 53, at 2190-92; see also Pruitt, *Acting White?*, *supra* note 95, at 177-78.

197. See Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 77 (2015) (explaining the phenomenon of spatial privilege, including its relationship to socioeconomic privilege).

198. See ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* (2d ed. 2011) (documenting disparities in the parenting priorities and

Second, it is surely just plain wrong to hold against an applicant the fact s/he held a part-time job. Part-time employment could just as well be seen as a reflection of industry, not lack of ambition (or, perhaps more precisely, in the eyes of admissions personnel, a sign of the “wrong” ambition). It is also often a reflection of need.<sup>199</sup> Affluent parents presumably discourage their children from working for pay because it diminishes the time they have to invest in their studies and in the “right” unpaid internships and extra-curricular and enrichment activities, in addition to retaining a bit of leisure time.<sup>200</sup> As Anthony Marx expresses it, colleges reward overseas travel and elaborate service projects in the admissions process, but they fail to value a student’s “work at the neighborhood 7-Eleven to support your family.”<sup>201</sup>

Yet a third reason that Espenshade and Radford’s findings are so troubling is that they belie either a very narrow view by elite institutions regarding the ideal student or ignorance on the part of elite college admissions personnel or those who shape the guidelines they follow. That is, those setting admissions policy and making admissions decisions

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investments across class); Greg J. Duncan & Richard J. Murnane, *Introduction: The American Dream, Then and Now*, in *WHITHER OPPORTUNITY?* 3, 11 (Greg J. Duncan & Richard J. Murnane, eds., 2011) [hereinafter Duncan et al., *Introduction: The American Dream*] (finding that from 1972 to 2006, high-income families increased the amount they spent on their children by 150 percent, while low-income families’ spending increased by only 57%); Reardon, *No Rich Child*, *supra* note 45 (documenting the increase in resources that affluent parents invest in their children compared to those in other socio-economic strata).

199. See Catherine Rampell, *Freebies for the Rich*, *N.Y. TIMES* (Sept. 24, 2013), <http://www.nytimes.com/2013/09/29/magazine/freebies-for-the-rich.html> (discussing the consequences of a shift away from need-based financial aid).

200. See generally ANNETTE LAREAU, *UNEQUAL CHILDHOODS* (2d ed. 2001); Duncan et al., *Introduction: The American Dream*, *supra* note 198 (finding that from 1972 to 2006, high-income families increased the amount they spent on their children by 150%, while low-income families’ spending increased by only 57%); Reardon, *supra* note 45 (documenting the increase in resources that affluent parents invest in their children compared to those in other socio-economic strata). For a fascinating discussion of the different child-rearing priorities and practices of the white working class compared to the professional/managerial class, see JOAN C. WILLIAMS, *RESHAPING THE WORK FAMILY DEBATE: WHY MEN AND CLASS MATTER* 166-68 (2010).

201. Leonhardt, *Top Colleges*, *supra* note 2 (internal quotation marks omitted).

appear to be clueless about the lived realities of poor and working-class families—not only the consequences of their fiscal limitations (which may rise to the level of acute crisis), but also the ethic of industry associated with them.<sup>202</sup> As one commentator observed, elite admission processes give “little regard . . . to the actual forms of adversity that disadvantaged students of all races must overcome.”<sup>203</sup> Alternatively, admissions personnel may effectively not have leeway within the strictures provided by their institutions to admit low-income students because they simply do not meet set criteria.

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202. See *Class Culture Wars*, *supra* note 13, at 796-802; see also JOE BAGEANT, DEER HUNTING WITH JESUS: DISPATCHES FROM THE CLASS CULTURE WARS 13 (2009); JENNIFER SHERMAN, THOSE WHO WORK, THOSE WHO DON'T: POVERTY, MORALITY AND FAMILY IN RURAL AMERICA 154 (2010).

This failure to value work experience is arguably a phenomenon of recent vintage, perhaps a product of increased socioeconomic stratification which means fewer class migrants are in powerful positions to promote would-be class migrants. See Sonia Sotomayor, *My Beloved World* (2013) (detailing her numerous service sector jobs while a teenager, work which appeared to be valued in the Ivy League college admissions process in the early 1970s). William Henderson's study of partners at large Chicago law firms also supports this proposition in a roundabout way. Henderson found that the graduates of lower-ranked schools were more likely than their elite law school counterparts to remain with the firms and achieve partnership. Deborah Cassens Weiss, *Do Elite Law Grads Disdain Longtime Big Law Work? Stats Suggest Lower-Tier 'Strivers' Stick Around*, A.B.A. J., Mar. 2012, available at <http://www.abajournal.com/news/article/do-elite-law-grads-disdain-longtime-biglaw-work-stats-suggest-lower-tier>.

Because lower-ranked schools are associated with lower-status admittees, it stands to reason that many graduates of lower-ranked schools are the sort of strivers with the drive to make partner. See Sander, *supra* note 55, at 637-39 (documenting association of lower-class students with lower-ranked schools).

203. Slater, *supra* note 60. The struggle of low-income students is well summed up by this quote from Barmak Nassirian, director of federal relations for the American Association of State Colleges and Universities, “Poverty has its own gravitational force . . . . A blown gasket can be the difference between going to college, or not.” Greenblatt, *supra* note 49 (quoting Nassirian). Greenblatt's story also features this quote from Molly Corbett Broad, president of the American Council on Education: “There are some families where the cost of your application fee is a serious question around the family dinner table . . . . These are real factors why some academically gifted students never go to college.” *Id.* (internal quotations omitted). See generally CASHIN, *supra* note 26, at 78-79 (advocating for affirmative action based on having grown up in a place with structural disadvantages rather than based on race and ethnicity and frequently using the term “truly disadvantaged” and “actually disadvantaged” to refer to the applicants her proposal would favor).

In this elite context, most low-income students are the proverbial square peg that does not easily fit into a round hole.

One aspect of the problem is that admissions schemes seem not to be informed by the fact that only inferior educational opportunities are on offer to many high school students.<sup>204</sup> Recall that the Espenshade and Radford study found admissions office judgments of students as “careerist” and not adequately scholarly based on some of their course selections, with no apparent knowledge or consideration of how limited curricular choices were. In spite of this ignorance, admissions officers are assessing the students’ suitability for elite higher education.

I have already noted that admissions policy-makers and personnel appear to lack appreciation for real-life work experience.<sup>205</sup> Yet these very admissions officers are in control of the pipeline to our nation’s leadership.<sup>206</sup> Their apparent

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204. DOUGLAS J. GAGNON & MARYBETH J. MATTINGLY, LIMITED ACCESS TO AP COURSES FOR STUDENTS IN SMALLER AND MORE ISOLATED RURAL SCHOOL DISTRICTS 1 (2015), available at [http://scholars.unh.edu/cgi/viewcontent.cgi?article=1234&context=carsey&utm\\_source=2015\\_02\\_11\\_GagnonMattinglyAP&utm\\_campaign=2015\\_02\\_11\\_gagnon%2FmattlinglyAP&utm\\_medium=email](http://scholars.unh.edu/cgi/viewcontent.cgi?article=1234&context=carsey&utm_source=2015_02_11_GagnonMattinglyAP&utm_campaign=2015_02_11_gagnon%2FmattlinglyAP&utm_medium=email) (finding that students in rural high schools have considerably less access to AP classes than their urban counterparts, with 47.2% of rural school districts having no students enrolled in AP classes, compared to 20.1% for town districts, 5.4% for suburban districts, and 2.6% for urban districts). *But see* MITCHELL L. STEVENS, CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES 213 (2007) (documenting bias against “rural New England valedictorians” who are not valued in the admissions process because they are not seen as having been educated in an adequately rigorous environment, thus suggesting that admissions officers do know something about the limits of rural education).

205. This is further illustrated by the University of Michigan’s Law School rejection of Barbara Grutter, whose very strengths were in her employment experience and her juggling of work and family. It was also represented by the attributes of her family of origin, though she did not discuss those in her application or in the lawsuit. *See supra* notes 129, 131 (quoting Grutter’s description of herself in the case briefs). Wendy Parker described Grutter as one of nine children of an itinerant preacher. Parker, *supra* note 131.

206. *See, e.g.,* CARNES, *supra* note 13, at 12 (“[T]he shortage of people from the working class in American legislatures skews the policy-making process toward outcomes that are more in line with the upper class’s economic interests”) (emphasis omitted); Barton, *supra* note 13, at 1168-69 (documenting the overwhelmingly elite credentials of U.S. Supreme Court Justices); *Class Culture*

insularity is one more reason to be concerned about the relative absence of class migrants from influential positions—including those setting admissions policies.<sup>207</sup>

We do not know how many low-income/first generation white students have credentials that appear not to be cognizable to, let alone valued by, admission officers at selective institutions. Even the Espenshade and Radford study analyzes data that is now nearly two decades old. In part because the data kept are inadequately detailed, it is impossible to determine how many low-income students might get ahead and achieve their potential if they had the sort of opportunities and encouragement that would get them into the pipeline to an elite college. This means we cannot say precisely what we are wasting, as a nation, in terms of undeveloped human capital. We must also be concerned about poor and working-class minority students, of course, but at least we know that elite college admissions officers are on the lookout for them because their presence contributes to the visible racial and ethnic diversity that colleges and

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*Wars*, *supra* note 13, at 780-82 (documenting and commenting upon the elite credentials of members of Obama's cabinet).

207. I am reminded of Justice Clarence Thomas's dissenting opinion in *Grutter*, where he challenged the need for elite public law schools, writing: "there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school. Likewise, marginal improvements in legal education do not qualify as a compelling state interest." *Grutter v. Bollinger*, 539 U.S. 306, 357 (2003) (Thomas, J., dissenting). He further opined:

[T]he Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution. Unless each constituent part of this state interest is of pressing public necessity, the Law School's use of race is unconstitutional. I find each of them to fall far short of this standard.

*Id.* at 356. Justice Thomas thus challenges the need for a public university to be elite. Implicit in what he writes is the question whether the elite university exists to serve elites (and therefore whether the institution garners its elite status from those it educates), or whether it exists to give an elite imprimatur to those whom it educates—even if they were not among the established elites coming into the institution. In other words, which way does the elite status flow? Or is it a dialectic, a feedback loop between the institution and the students? The title of Mitchell Stevens' book suggests the latter with its apparent double entendre. MITCHELL L. STEVENS, *CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF THE ELITE* (2009).

universities so openly and energetically seek. I now turn to the related challenge of how low-SES students pay for their education, and how financial aid is used to shape the composition of elite universities' student bodies.

1. Bearing the Economic Burden of Higher Education:  
The shift from Need-Based Aid to Merit-Based Aid

Financial aid awards increasingly determine where a student goes to college, as opposed to whether the student goes to college at all.<sup>208</sup> The current trend in most elite educational institutions is to divert need-based financial aid to what we call merit-based aid in recent years.<sup>209</sup> Many schools use merit aid to target high performing students in an effort to increase the schools' rankings. This generally comes at a cost in terms of socioeconomic diversity because low-income students are effectively pushed out if they do not receive generous financial support.<sup>210</sup> Thus even though some schools have stepped up recruitment of low-income students, those students compete with a burgeoning pipeline of wealthy out-of-state applicants.<sup>211</sup> Indeed, merit-aid programs have also led to reductions in the representation of black students at top-tier schools.<sup>212</sup>

In spite of these disturbing trends, it is important to note that practices vary among schools, and there is some good news. Six Ivy League institutions—Brown, Columbia, Harvard, Princeton, Pennsylvania, and Yale—recently introduced “no-loan” policies for the neediest students, resulting in slight increases in Pell recipient enrollment.<sup>213</sup>

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208. See STEPHEN BURD, *NEW AM. FOUND., UNDERMINING PELL: HOW COLLEGES COMPETE FOR WEALTHY STUDENTS AND LEAVE THE LOW-INCOME BEHIND* 3, 6 (2013).

209. See Brown-Nagin, *supra* note 12, at 492-93.

210. See BURD, *supra* note 208, at 15.

211. See *id.* at 24; see also Kevin Carey, *The In-State Tuition Break: Slowly Disappearing*, N.Y. TIMES (May 18, 2015), <http://www.nytimes.com/2015/05/19/upshot/the-in-state-tuition-break-slowly-disappearing.html?abt=0002&abg=1> (noting the shift among public universities to seek more out-of-state students, while raising tuition for in-state students).

212. See BURD, *supra* note 208 at 5-6.

213. *Id.* at 10. It is possible that Ivy League schools other than these six have no-loan policies. The report included this note in a section that discussed

Washington University has for some time had the lowest proportion of Pell enrollment among private institutions (7%), with the lowest-income students paying a net price of \$18,000 a year. It has, however, recently announced a shift in its policies in order to attract more low-SES students.<sup>214</sup>

## 2. The Psychological Burden of Being Low-Income/First Generation

One aspect of the problem of admissions office tunnel vision may be that admissions decisionmakers discount the psychological consequences of being socioeconomically disadvantaged,<sup>215</sup> even as they appear earnest in their efforts to understand and take seriously the psychological barriers associated with being an underrepresented minority.<sup>216</sup> In fact, a limited body of scholarship has studied the consequences of class disadvantage in relation to educational achievement—even when it is not entangled with

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“[c]olleges that [o]ffer [g]enerous [f]inancial [a]id but [e]nroll [f]ew [l]ow-[i]ncome [s]tudents.” *Id.*

214. In 2003, Washington University’s then-financial aid director acknowledged “[p]roviding generous amounts of merit aid” as helping to transform the school into a top-ranked private college. *Id.* at 11. *But see* Leonhardt, *The Least Economically Diverse Top College*, *supra* note 143 (noting that Washington University, which is the “least economically diverse top college” in the nation with only 6% of students receiving Pell grants, is trying to shed that distinction by offering more need-based aid).

215. *See* Ryan P. Brown & Monica N. Lee, *Stigma Consciousness and the Race Gap in College Academic Achievement*, 4 *Self & Identity* 149, 152-54 (2005) (showing that stigmatized students high in stigma consciousness had lower GPAs than those with lower stigma consciousness); Jean-Claude Croizet & Theresa Claire, *Extending the Concept of Stereotype Threat to Social Class: The Intellectual Underperformance of Students from Socioeconomic Backgrounds*, 24 *Personality & Soc. Psychol. Bull.* 588, 592 (1998) (showing that lower-SES students solved fewer problems in an exercise than higher-SES students after they were told the exercise assessed intellectual ability); *see also* Foster, *supra* note 95; Guerra, *supra* note 167.

216. *See* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 *J. PERSONALITY & SOC. PSYCHOL.* 797, 805-06 (1995) (finding that African-American students, who had performed as well as their white counterparts, performed less well after they were told a test was indicative of intellectual ability, or after their racial identity was otherwise made salient prior to testing).

racial/ethnic disadvantage. Roslyn Arlin Mickelson, for example, found that “the strongest oppositional attitudes” among students, regardless of race, were manifest in those “whose parents had the least [amount of] education.”<sup>217</sup> Among the middle class, Mickelson found that “African Americans had stronger oppositional attitudes than Whites,” but “among the working class, Whites tended to have stronger oppositional attitudes than African Americans.”<sup>218</sup> Paraphrasing, Mickelson found that the “presence of an oppositional culture among working-class whites, likely generated in response to unequal opportunity structures, suggests that cultural disadvantage likely operates to obstruct the mobility of working-class whites and in much the same way that it operates to hinder blacks.”<sup>219</sup> She thus called for further study of the cultural disadvantage “experienced by working-class whites in the educational system.”<sup>220</sup>

One such study is Elizabeth Aries’ and Maynard Seider’s exploration of the experiences of working-class whites in elite colleges and universities. The authors compared the experiences of those students with the experiences of

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217. Mickelson, *supra* note 68, at 359-60 (defining “oppositional attitudes” as the belief by students that “social identity and/or ethnic authenticity are compromised by engaging in certain activities that are associated with academic achievement”).

218. *Id.* at 360.

219. Jewel, *supra* note 55, at 276 (paraphrasing Mickelson); *see also* RICHARD SENNETT & JONATHAN COBB, *THE HIDDEN INQUIRIES OF CLASS* (1972) (detailing the apparently counter-productive behavior of working class individuals in relation to those in positions of authority).

220. Jewel, *supra* note 55, at 277; *see also* John Hartigan, Jr., 112 *AM. J. SOC.* 1960, 1960-61 (2007) (reviewing EDWARD MORRIS, *AN UNEXPECTED MINORITY: WHITE KIDS IN AN URBAN SCHOOL* (2006)) (describing Morris’ book as providing “an account of how white and black teachers differently perceive the behaviors and backgrounds of the school’s few white students. In contrast to black teachers, who viewed white students generally as middle class, white teachers regarded these same subjects in highly stigmatized terms as ‘trailer trash.’ ‘The whiteness of these students,’ Morris reports, ‘did not act as a form of privilege in the eyes of most white teachers. Instead they viewed white students in this setting as somewhat anomalous and extended more positive attention to students in other racial groups.’”) (quoting MORRIS, *supra*).

students with the same SES profiles at state universities.<sup>221</sup> They found that lower income students face greater class-related challenges at elite institutions due not only to the severity of the income disparity when compared to their peers, but also because of a heightened awareness of class identity in that context.<sup>222</sup>

Studies of the high attrition rates among different cohorts of vulnerable students increasingly attend to the psycho-social hurdles facing low-income students. *Who Gets to Graduate?*, a New York Times Magazine cover story in May 2014, referenced the work of numerous scholars currently investigating the mindsets associated with at-risk student populations.<sup>223</sup> These studies suggest that, like other vulnerable student populations, first-generation college

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221. Aries & Seider, *supra* note 95, at 419.

222. *Id.* at 438-39; *see also* ARIES WITH BERMAN, *supra* note 95 (documenting the experience of low-SES and racial and ethnic minority students at Amherst); SOTOMAYOR, *supra* note 202 (recounting an acute awareness of her class identity, in addition to her Puerto Rican identity, while at Princeton University).

223. Tough, *supra* note 46 (detailing data regarding college completion rates in relation to race and first-generation status and reporting on empirically-informed interventions being used at the University of Texas at Austin to lower attrition rates among vulnerable students). The story discusses various at-risk groups, sometimes focusing on first-generation, sometimes focusing on racial and ethnic minorities, and using as its prime illustration an African-American woman from east Texas who is first-generation. Tough refers to the empirical work of a number of scholars at Stanford who study the psychology of education, including Claude Steele, Carol Dweck, Geoffrey Cohen, and Hazel Markus:

To the extent that the Stanford researchers shared a unifying vision, it was the belief that students were often blocked from living up to their potential by the presence of certain fears and anxieties and doubts about their ability. These feelings were especially virulent at moments of educational transition — like the freshman year of high school or the freshman year of college. And they seemed to be particularly debilitating among members of groups that felt themselves to be under some special threat or scrutiny: women in engineering programs, first-generation college students, African-Americans in the Ivy League.

*Id.* Regarding the work of David Yeager and Greg Walton in particular, which has informed many of the interventions to help at-risk students at the University of Texas, Tough writes: “the message needs to be targeted to the particular audience for each intervention. The anxieties that a high-achieving African-American freshman at an Ivy League college might experience are distinct from the anxieties experienced by a community-college student who was just placed into remedial math.” *Id.*

students are plagued with a sense that they do not belong and with nagging doubts about their ability to succeed. The story explains that first-generation students may experience setbacks like a bad grade on a test as a cue that they are not smart enough, that they can never succeed in higher education.<sup>224</sup> Such self-doubt often produces a destructive feedback loop that leads many such students ultimately to abandon their educational aspirations.<sup>225</sup> Studies such as these are among those I referenced earlier<sup>226</sup> as largely ignored by legal scholars who focus on racial disadvantages to the exclusion of class disadvantage, even when the two overlap.

### 3. Looking for Low-Income Strivers? But in all the Wrong Places

Meanwhile, in their 2013 study of elite colleges' professed struggle to find "low-income, high achievers," Caroline Hoxby and Christopher Avery disputed the oft-assumed correlation between income and race. They wrote that "[b]eing an underrepresented minority is not a good proxy for being low income."<sup>227</sup> Of college admission outreach efforts, they observed: "[i]f admissions staff do most of their outreach to low-income students by visiting schools that are largely Hispanic and black, the staff should realize that this strategy may lead to a student body that is . . . not [income] diverse."<sup>228</sup> These conclusions render somewhat suspect the efforts some colleges and universities tout regarding their efforts to achieve both racial/ethnic and socioeconomic diversity.

Indeed, reaching out to "schools that are largely Hispanic and black" is precisely what the University of California campuses, for example, do. Analysis of the demographic composition of the middle schools and high schools where eight University of California campuses run their Early

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224. *Id.*

225. *Id.*

226. *See supra* notes 46-48.

227. Hoxby & Avery, *supra* note 3, at 18.

228. *Id.*

Academic Outreach Programs (EAOP) programs reveals a focus on racial and ethnic diversity, with no corresponding attention to socioeconomic diversity when it does not overlap with the former.<sup>229</sup> Further, while the University of California is doing a far better job of achieving economic diversity than, for example, the University of Michigan,<sup>230</sup> the UC system admits relatively few low-income, non-Hispanic Whites. The vast majority of low-income students admitted to the University of California are racial and ethnic minorities, including Asians,<sup>231</sup> who are typically not considered an

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229. See *UC Berkeley EAOP Partner Schools: Locations and Demographics*, GOOGLE MAPS, <https://maps.google.com/maps/ms?msid=203886124127662167600.0004e48d6db08b01c9735&msa=0&dg=feature> (last updated Sep. 10, 2013); *UC Davis EAOP Partner Schools: Locations and Demographics*, GOOGLE MAPS, <https://maps.google.com/maps/ms?msid=203886124127662167600.0004e48db8d654978b28e&msa=0&dg=feature> (last updated Sep. 10, 2013); *UC Irvine EAOP Partner Schools: Locations and Demographics*, GOOGLE MAPS, <https://maps.google.com/maps/ms?msid=203886124127662167600.0004e48e300c6c4441cb1&msa=0&dg=feature> (last updated Sep. 10, 2013); *UC Los Angeles EAOP Partner Schools: Locations and Demographics*, GOOGLE MAPS, <https://maps.google.com/maps/ms?msid=203886124127662167600.0004e48e6628a2ec16e08&msa=0&dg=feature> (last updated Sep. 10, 2013); *UC Merced EAOP Partner Schools: Locations and Demographics*, GOOGLE MAPS, <https://maps.google.com/maps/ms?msid=203886124127662167600.0004e48f6f0609f0b6baa&msa=0&dg=feature> (last updated Sep. 10, 2013); *UC San Diego EAOP Partner Schools: Locations and Demographics*, GOOGLE MAPS, <https://maps.google.com/maps/ms?msid=203886124127662167600.0004e48fb7b6da3fbb6a5&msa=0&dg=feature> (last updated Sep. 11, 2013); *UC Santa Barbara EAOP Partner Schools: Locations and Demographics*, GOOGLE MAPS, <https://maps.google.com/maps/ms?msid=203886124127662167600.0004e4900801927211a79&msa=0&dg=feature> (last updated Sep. 11, 2013); *UC Santa Cruz EAOP Partner Schools: Locations and Demographics*, GOOGLE MAPS, <https://maps.google.com/maps/ms?msid=203886124127662167600.0004e4900f5f32bc81b78&msa=0&dg=feature> (last updated Sep. 11, 2013).

230. See Pérez-Peña, *supra* note 44 (providing details of the percentage of students receiving Pell Grants at the University of California, 40%, and the University of Michigan, 16%); David Leonhardt, *Top Colleges Doing the Most for Low-Income Students*, N.Y. TIMES (Sept. 16, 2015), <http://www.nytimes.com/interactive/2015/09/17/upshot/top-colleges-doing-the-most-for-low-income-students.html>; see also David Leonhardt, *California's Upward-Mobility Machine*, N.Y. TIMES (Sept. 16, 2015), <http://www.nytimes.com/interactive/2015/09/17/upshot/top-colleges-doing-the-most-for-low-income-students.html>.

231. See INST. RES. UNIT, UNIV. CAL., ANNUAL ACCOUNTABILITY REPORT 23 (2013), available at <http://accountability.universityofcalifornia.edu/documents/accountabilityreport13.pdf>. Low-income, non-Hispanic Whites constituted 4.4% of total freshman admissions to the University of California for Fall 2012. *Id.* Low-

underrepresented minority.<sup>232</sup> This failure to admit robust numbers of low-income whites may be a function of California's racial and ethnic composition: Non-Hispanic whites are already a minority in California,<sup>233</sup> as they are projected to become in the United States as a whole by 2043.<sup>234</sup> But it is also surely a function of *where* UC campuses invest their outreach efforts: in communities of color.<sup>235</sup> This UC effort to foster a pipeline of low-income, high achieving students is laudable, but it appears to largely overlook the non-Hispanic whites who also fall into that category.

#### CONCLUSION:

#### THE BENEFITS OF A RETURN TO *BAKKE* AND THE EARLY CONCEPTION OF DIVERSITY

Justice Sandra Day O'Connor wrote more than a decade ago in *Grutter v. Bollinger*:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and

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income Asians constituted 13.6%, and all other low-income minorities made up 15%. *Id.*

232. Gaertner & Hart, *supra* note 57, at 388 n.75.

233. *State and County QuickFacts: California*, U.S. CENSUS BUREAU (Mar. 31, 2014, 3:14 PM), <http://quickfacts.census.gov/qfd/states/06000.html>.

234. Press Release, U.S. Census Bureau, U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now (Dec. 12, 2012), *available at* <http://www.census.gov/newsroom/releases/archives/population/cb12-243.html>.

235. *See supra* note 196. The locations where UC campuses invest their EAOP efforts may, in turn, be a function of where the campuses are located. Most schools to which any given UC campus reaches out are in relatively close proximity to that campus. *See INST. RES. UNIT, UNIV. CAL.*, *supra* note 231, at 7. There may be few schools with concentrations of low-income non-Hispanic white students in those areas. Low-income whites are often not as spatially concentrated as low-income blacks. *See CASHIN, supra* note 26, at 49. When low-income white students are spatially concentrated, it is typically in a rural area, and all eight UC campuses are in metropolitan counties, the least populous being Yolo County. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2014*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP\\_2014\\_PEPANNRES&src=pt#none](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPANNRES&src=pt#none) (last visited Sept. 14, 2015).

ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.<sup>236</sup>

Just as the path to leadership must be open to talented and qualified individuals of every race and ethnicity, that path should also be visibly open to talented and qualified individuals from every socioeconomic background.<sup>237</sup> Currently it is not, and we can see the consequences of this, among other places, in the highest levels of government,<sup>238</sup> including in our federal judiciary. Indeed, Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit lamented in a 2010 opinion the lack of socioeconomic diversity in the judiciary. He also observed the judicial blind spot that results:

There's been much talk about diversity on the bench, but there's one kind of diversity that doesn't exist: No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don't live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live.<sup>239</sup>

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236. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

237. Others have emphasized the symbolic importance of admissions decisions. Lani Guinier, for example, uses the term "civic pedagogy" to refer to the "high-stakes exercise" by which young people are selected "to enter prestigious educational institutions." Guinier, *Admissions Rituals*, *supra* note 11, at 114 n.3 (quoting Glenn C. Loury, *Forward to WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS*, at xxi-xxii (2d prtg. 2000)). Guinier has also linked such decisions to the "historical guiding principle of both public and private universities . . . to educate people who would serve society as workers, citizens, and leaders." *Id.* at 126-27.

238. See Barton, *supra* note 13, at 1169-70 (2012) (documenting the overwhelmingly elite credentials of U.S. Supreme Court Justices); Pruitt, *Class Culture Wars*, *supra* note 13, at 780-82 (documenting and commenting upon the elite credentials of members of Obama's cabinet).

239. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissenting).

Not only do poor people as such not become judges, the judge who is a class migrant is increasingly rare.<sup>240</sup> Similarly, the only people in President Obama's inner circle who have any claim to poor or working class origins are the president himself and Michelle Obama.<sup>241</sup> More recently, Loretta Lynch—another African-American and the administration's second Attorney General—has been added to that list.<sup>242</sup> By the same token, the person who grew up poor or working

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240. See Barton, *supra* note 13, at 1169-70 (2012) (documenting the overwhelmingly elite credentials of U.S. Supreme Court Justices). One notable and high-profile exception to this rule is Justice Sonia Sotomayor. SOTOMAYOR, *supra* note 202, at 136 (detailing her childhood, raised by a single mother in the Bronx after her father died when she was very young; at one point, Justice Sotomayor recounts that her mother, who worked as a Licensed Practical Nurse when she was a child, never earned more than \$5000 a year).

241. I consider President Obama to be from a working-class background based on his descriptions of his upbringing—largely by his maternal grandparents—in Hawaii. BARACK OBAMA, DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE (1995); see also Policar, *Shadow of the American Dream*, *supra* note 154. But see WILLIAMS, *supra* note 200, at 191 (discussing Maureen Dowd's assertion that Obama is out of touch with the working class because his mother had a Ph.D. in anthropology). At the very least, the various influences in Obama's upbringing illustrate the slipperiness of class. Although his working-class, maternal grandparents did his day-to-day raising, his mother no doubt exposed him to the "life of the mind." See BAGEANT, *supra* note 202, at 10, 70 (discussing the luxury of time for the working class, who see liberals with time to read—and even be in book clubs—as suspect). As for Michelle Obama, the *New York Times* published her family tree. Gabriel Dance & Elisabeth Goodridge, *The Family Tree of Michelle Obama, The First Lady*, N.Y. TIMES (Oct. 7, 2009), <http://www.nytimes.com/interactive/2009/10/08/us/politics/20091008-obama-family-tree.html?scp=17&sq=swarns%20obama&st=cse>. But see CARNES, *supra* note 13, at 5 & 153 n.1 (noting that President Obama's "parents and maternal grandparents were not employed in manual labor or service work during his childhood" and so categorizing him as not from a working class family).

242. See Stephanie Clifford, *Loretta Lynch, a Nominee for Attorney General, is Praised for Substance, Not Flash*, N.Y. TIMES (Nov. 8 2014), [http://www.nytimes.com/2014/11/09/us/politics/in-line-to-be-attorney-general-loretta-lynch-at-home-in-glare.html?\\_r=0](http://www.nytimes.com/2014/11/09/us/politics/in-line-to-be-attorney-general-loretta-lynch-at-home-in-glare.html?_r=0). That story includes this description:

Her grandfather was a sharecropper and a pastor who helped black people who had been falsely accused escape the Jim Crow South. And her father, also a pastor, held civil-rights meetings in his church. She remembered quizzing her mother about why she had picked cotton in high school. "And she looked at me and said, 'So that you never have to,'" Ms. Lynch said.

*Id.*

class but who rises to the top echelons of other branches of government service or corporate power is also increasingly exceptional.<sup>243</sup>

The interest public—those “who write the books and do the social analysis”<sup>244</sup>—cares deeply about race-based affirmative action, as well we should. We and the media have more recently awakened to the impact of our nation’s inequality crisis on access to higher education and upward mobility. We are perhaps more concerned than ever about how socioeconomic barriers hinder the educational advancement of low-income students of all colors. Yet little of our burgeoning awareness of those problems gets actualized in elite university admissions, including among prestigious public universities. Further, this awareness is not reflected in many indicators of what constitutes the much-vaunted “diversity” in higher education settings.

We claim to value “diversity,” but it is “not a self-interpreting word.”<sup>245</sup> While Justice Powell interpreted diversity to include socioeconomic disadvantage back in 1978, we see few prestigious institutions of higher education embracing that interpretation now. Further, we see evidence of the erasure of class difference and class disadvantage in many aspects of the public face of higher education.

By excluding would-be class migrants from conceptions of “diversity” and that which is valued in higher education, prestigious educational institutions and the associated “diversity public relations complex” devalue the experiences and perspectives of low-income students as low-income students—that is, if those students are not also underrepresented minorities. In so doing, these educational institutions risk contributing to the wider social and political

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243. See CARNES, *supra* note 13, at 5.

244. Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1667 (1995). I use this term to mean what others might refer to as the “chattering classes” or, to some extent, “liberal elites.” While those other terms might be more familiar to readers and also more descriptively straightforward, I eschew them because of their negative connotations, particularly the latter as associated with Bill O’Reilly and Fox News.

245. Levinson, *supra* note 115, at 578; see also Bartlett, *supra* note 164, at 1058.

alienation of poor and working-class whites.<sup>246</sup> This phenomenon aggravates fracturing along class lines, which prominent sociologists now argue is the source of the most acute fragmentation in twenty-first century American society.<sup>247</sup>

As a related matter, many have suggested that affirmative action for racial and ethnic minorities is not sustainable because political support for it has waned dramatically over the years.<sup>248</sup> A 2013 survey found that only 29% of respondents thought “blacks and other minorities should receive preference in college admissions to make up for past inequalities,” although 68% of respondents favored programs that otherwise aim “to help blacks and other minorities get ahead, to make up for past discrimination.”<sup>249</sup>

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246. When we fail to value the perspectives of marginal whites by excluding them from elite higher education, we increase the likelihood of their alienation from the mainstream and from progressive causes—including support for higher education. In fact, this is probably just what Ross Douthat sought to achieve in his column about Espenshade & Radford’s book by calling attention in the mainstream media to findings suggesting bias against poor and rural whites. See *supra* notes 191-96 and accompanying text. See generally Dagmar Rita Myslinksa, *Contemporary First-Generation European-Americans: The Unbearable “Whiteness” of Being*, 88 TULANE L. REV. 559 (2013) (asserting that European-born Americans do not consistently benefit from white privilege, though such benefits are often presumed); Dagmar Rita Myslinksa, *Intra-group Diversity in Education: What if Abigail Fisher were an Immigrant . . .*, 34 PACE L. REV. 736 (2014) (calling for the recognition of diversity among whites in higher education admissions). As a related matter, Camille Gear Rich has observed that “when scholars talk about white privilege in the abstract, without discussing the host of competing identity variables that complicate white privilege, they risk increasing the salience of whiteness for less race-identified whites in a context that gives whites an incentive to cling to a white identity.” Rich, *supra* note 19, at 1565.

247. See Claude S. Fischer & Greggor Mattson, *Is America Fragmenting?*, 35 ANN. REV. SOC. 435, 443 (2009).

248. See CASHIN, *supra* note 26, at 6-7 (“Race-based affirmative action is also increasingly untenable because of politics. . . . Opposing affirmative action has been a venerable plank in Republican politics for three decades.”); Liptak, *Diversity Nears Its Last Stand*, *supra* note 57; see also, e.g., Leonhardt, *The Liberals Against Affirmative Action*, *supra* note 59; sources cited, *infra* notes 249-51.

249. *Principle and Practice on Affirmative Action and College Admissions*, PUB. RELIGION RES. INST. (May 30, 2013), <http://publicreligion.org/research/graphic-of-the-week/affirmative-action-may-2013>.

Seven states have entirely banned race-based affirmative action, and two others do not employ race-based affirmative action at their public universities.<sup>250</sup> One commentator has predicted that such race-based programs are “[h]ealed for the [d]ustbin of [h]istory.”<sup>251</sup> Recall that Justice O’Connor in *Grutter* gave affirmative action a life expectancy of only a quarter century,<sup>252</sup> and more than a decade of that has now ticked past.

In light of this political landscape, it seems that a return to *Bakke*’s broader definition of diversity as articulated by Justice Powell—a definition that clearly included socioeconomic diversity—might salve some wounds. Instead of digging in their heels about race-based affirmative action precluding class-based affirmative action, those supporting race-based admissions preferences might be better off making allies of those who have been depicted as the enemy—or at least the competition. If poor and working class constituencies perceived that their life experiences—and their futures—were valued in the way we value nonwhite perspectives, we might be able to build the sort of political coalitions that Lani Guinier and Gerald Torres called for in *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy*.<sup>253</sup> Guinier and Torres illustrate by reference to the cross-race political coalition that brought about the Texas 10% plan. Because of the state’s racial segregation and the presence of poor rural school districts, the 10% admissions scheme amounted to a set aside of slots at the flagship University of Texas at Austin campus for Latina/os, African-Americans, and poor rural whites.<sup>254</sup> The

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250. KAHLLENBERG, *supra* note 55, at 4 (“Racial preferences in higher education remain highly unpopular among voters . . . [and] seven states have entirely banned racial affirmative action by public institutions, and two others have no affirmative action at leading public universities.”).

251. See Nelson, *supra* note 58.

252. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

253. GUINIER & TORRES, *supra* note 16.

254. *Id.* at 68 (noting that the University of Texas had typically excluded not only “blacks and Mexican Americans” but “poor and rural whites as well”); *id.* at 72-73 (acknowledging that some rural counties in West Texas had never sent a

authors point out the possibility and promise of “mov[ing] the political debate and the grounds for political action from race to class without pretending that race does not have a role.”<sup>255</sup> We need to aim for the same in the broader national context of selective college admissions.

In a sense, Guinier and Torres were reprising what Derrick Bell had written twenty years earlier when he coined the phrase “interest convergence.” Bell opined that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”<sup>256</sup> In fact, the interests of high-achieving, low-income students of all colors do converge in relation to access to higher education—including selective college admissions. The real problem is that many affluent whites cannot see past their own short-term interests—specifically their concern for the educational opportunities of their own children and, more broadly, their own ilk.

Instead of pitting blacks against low-income whites, we need to recognize the claims of both groups on this sector and the particular opportunity it represents. Finding collaborative solutions based on this interest convergence will serve not only individual strivers, it will serve the collective national interest in developing our raw human capital in more optimal ways. A wide swath of academic disciplines are attending to these very challenges, while legal scholars generally lag behind, seemingly hoodwinked by Kahlenberg and Sander into thinking we cannot have it both

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graduate to the University of Texas at Austin, which prompted conservative legislators from those districts to vote for the 10% plan because they “recognize[ed] that the systemic class bias in the traditional admissions procedure had harmed their white constituents[;]” the populist measure passed the Texas legislature by a single vote); *id.* at 94-95 (describing how “blacks” and “Mexican-Americans,” who were “conscious of the unfair effect of admissions criteria on [their communities] . . . engaged with social and not just racial justice critiques as they discovered that rural white students had also effectively been raced black or brown and thus excluded from the flagship schools”); *id.* at 251 (calling the Texas 10% coalition a “political race project” that took seriously the interests of “black, Latino, and poor white rural students who had been traditionally excluded from the flagship campuses”).

255. *Id.* at 251.

256. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

ways, that we cannot accommodate both low-income whites and racial and ethnic minorities in elite higher education.

Lack of socioeconomic diversity in higher education—particularly in the elite sector—is fueling our national trend toward a narrowing and incestuous plutocracy. That trend—which data show is already firmly entrenched—is increasingly making a pipe dream of the oft-touted American dream. It is undermining our democracy. If this trend continues apace, even fewer among the next generation of our nation’s top leadership will know how the other 99% live, and there is increasingly little reason to believe that many of them will care.

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As this Article goes to press, the U.S. Supreme Court has again granted certiorari in *Fisher v. University of Texas at Austin*.<sup>257</sup> Progressives are once again anxious—and with good reason—that the U.S. Supreme Court might do away with affirmative action. Such a decision would be a devastating blow to the cause of educational opportunity in our nation, and we should do whatever we can to sustain and support race-based affirmative action. But whatever happens in *Fisher*, we must remember that low-income whites are not “the problem.” We cannot fairly blame them for this moment. People like Abigail Fisher and the wealthy, conservative forces for whom she is a puppet are the problems. The blame rests squarely with those who are already enjoying the spoils of our nation’s accelerating class warfare.

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257. See Liptak, *Supreme Court to Weigh*, *supra* note 1.