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# A CARBOLIC SMOKE BALL FOR THE NINETIES:\* CLASS-BASED AFFIRMATIVE ACTION

Tung Yin\*\*

Reviewing: RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996)

## I. INTRODUCTION

Affirmative action is in trouble. Recent onslaughts against it have succeeded in a number of forums. The Supreme Court has decreed that race-based affirmative action, whether by the federal government or by the states, will be subject to strict scrutiny,<sup>1</sup> a standard described as “‘strict’ in theory and fatal in fact.”<sup>2</sup> A federal appeals court has struck down the use of race as a factor in academic admissions in Texas, Louisiana, and Mississippi.<sup>3</sup> Voters in California have amended the state constitution to forbid discrimination in favor of or against persons due to race or gender.<sup>4</sup>

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\* See *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256, 257 (1893) (U.K.) (“During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventatives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.”).

\*\* Law Clerk to the Honorable J. Clifford Wallace, U.S. Court of Appeals for the Ninth Circuit. J.D. 1995, University of California, Berkeley (Boalt Hall). e-mail: TungYin@aol.com. I would like to extend sincere thanks and gratitude to OCU Law Professor Dennis Arrow, Bob Schaeffer of FairTest, Vince Farhat, Kevin Lysowski, Jerry Stephens, Jay Walters, and the editors and staff of the *Loyola of Los Angeles Law Review*. I also owe special thanks to Professor Paul Mishkin, who graciously allowed me the use of research I had originally performed at his behest. The views and opinions expressed here should not be imputed to any of the above-mentioned persons and all mistakes are mine.

1. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

2. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

3. See *Hopwood v. Texas*, 78 F.3d 932, 935 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). *But see* Jayne Noble, *Education Board Weighs Effort to Enroll Minorities*, DALLAS MORNING NEWS, Jan. 18, 1997, at 35A (noting the intention of the dean of St. Mary’s University law school to continue to use race-based preferences, who stated “I don’t think Hopwood is the law at all”).

4. See generally *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th

Nevertheless, a number of people who favor ending race-based affirmative action acknowledge that an alternative to race-based preferences is necessary and desirable. One current trend is to shift from race-based preferences to class-based ones—giving a “plus” during admissions consideration to students from lower-class families.<sup>5</sup> This proposal dates back at least to Justice William O. Douglas,<sup>6</sup> and has resurged in the 1990s<sup>7</sup> after drawing intermittent support, including from Justices Antonin Scalia and Clarence Thomas before they were named to the United States Supreme Court.<sup>8</sup> One commentator in particular, Richard Kahlenberg, is a prolific proponent of the approach.<sup>9</sup> His latest book, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION*, provides a comprehensive and coherent approach for implementing affirmative action programs at both the

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Cir.) (discussing California’s Proposition 209 and vacating a preliminary injunction to enjoin its implementation), *cert. denied*, 66 U.S.L.W. 3316 (U.S. Nov. 3, 1997) (No. 97-396).

5. See, e.g., Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1913-14 (1996); Lincoln Caplan et al., *The Hopwood Effect Kicks in on Campus*, U.S. NEWS & WORLD REP., Dec. 23, 1996, at 26, 28; Nathan Glazer, *Race, Not Class*, WALL ST. J., Apr. 5, 1995, at A12.

6. See *DeFunis v. Odegaard*, 416 U.S. 312, 331, 337 (1974) (Douglas, J., dissenting) (arguing that while applications for admission should be considered in a “racially neutral manner,” the Equal Protection Clause could allow consideration of “barriers that [the applicant] had to overcome”).

7. See, e.g., DINESH D’SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 251-53 (1991); Mickey Kaus, *Class is In*, THE NEW REPUBLIC, Mar. 27, 1995, at 6, 6; David K. Shipler, *My Equal Opportunity, Your Free Lunch*, N.Y. TIMES, Mar. 5, 1995, § 4, at 1.

8. See Antonin Scalia, *THE DISEASE AS CURE: “In Order to Get Beyond Racism, We Must First Take Account of Race.”*, 1979 WASH. U. L.Q. 147, 156 (“I strongly favor . . . what might be called . . . ‘affirmative action programs’ of many types of help for the poor and disadvantaged.”); Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL’Y REV. 402, 410-11 (1987) (“Any preferences given should be directly related to the obstacles that have been unfairly placed in those individuals’ paths, rather than on the basis of race or gender . . . .”); see also WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 144-54, 154 (1980) (arguing that class is more important than race because “[t]he situation of marginality and redundancy created by the modern industrial society deleteriously affects all the poor, regardless of race”).

9. See RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) [hereinafter KAHLENBERG, *THE REMEDY*]; see also Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037 (1996) [hereinafter Kahlenberg, *Class-Based*]; Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 AM. U. L. REV. 721 (1996); Richard Kahlenberg, *Class, Not Race: An Affirmative Action That Works*, THE NEW REPUBLIC, Apr. 3, 1995, at 21 [hereinafter Kahlenberg, *Class, Not Race*].

undergraduate and graduate school admissions level, as well as for entry-level employment.

In this Book Review I use Kahlenberg's framework to argue that class-based affirmative action, while theoretically justifiable, is empirically doomed and should be rejected *regardless of how one feels about race-based affirmative action*. This directly contrasts with Kahlenberg, who states, "[s]witching to class from race would be a grand bargain that satisfies both liberals and conservatives."<sup>10</sup> Supporters of race-based affirmative action may see class-based affirmative action as a second-best alternative;<sup>11</sup> however, the available demographic, statistical, and anecdotal evidence suggests that class-based affirmative action will not benefit racial minorities to any significant degree.<sup>12</sup> Opponents of race-based affirmative action may view class-based affirmative action as an acceptable compromise,<sup>13</sup> yet, virtually every argument against race-based affirmative action is applicable to class-based preferences. Thus, class-based affirmative action is actually worse than the alternatives: keeping race-based affirmative action or eliminating such preferences altogether.

Preliminarily, note that I will analyze race- and class-based affirmative action only insofar as it affects whites and blacks. This focus is consistent with the majority of scholarship on affirmative action.<sup>14</sup> The advantage of this approach is that the reader can see the

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10. G. Pascal Zachary, *Class Action: Need, as a Substitute for Race Preferences, Is Just as Hot an Issue*, WALL ST. J., Apr. 10, 1997, at A1.

11. See Fallon, Jr., *supra* note 5, at 1914.

12. See, e.g., Chris Klein, *Law School Diversity Hinges on Race Policy*, NAT'L L.J., Jan. 27, 1997, at A1 (discussing a study by Linda Wightman finding that minority enrollment would drop significantly under class-based affirmative action); Caplan, *supra* note 5, at 28 (noting that the University of California at Berkeley concluded that class-based affirmative action would decrease the percentage of Latinos and blacks in its incoming 1996 class).

13. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 897 (1995).

14. See, e.g., Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 507 (1982) ("The discussion exemplifies its general points by reference to a specific minority group: blacks."); Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 888 (1996) ("When one examines how race is constructed and defined in society, it is startling to note that racial categories traditionally have been divided into camps: white and black."); Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1158 ("I propose to elide all these issues by confining my attention to blacks."). But see Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1 (1996) (examining interaction of preferential treatment for non-Asian minorities and ceilings on admissions for Asians); Alexandra Natapoff,

general effects of racial and socioeconomic preferences without having to confront the related issue of whether Asians and Latinos are as equally disadvantaged as blacks.<sup>15</sup>

## II. RACE-BASED AFFIRMATIVE ACTION

Race-based "affirmative action" is actually a catch-all phrase for a number of programs that select people on the basis of racial identity.<sup>16</sup> Begun a little over thirty years ago,<sup>17</sup> affirmative action has spawned a tremendous amount of writing by both proponents and opponents.<sup>18</sup>

### A. What is Affirmative Action?

Generally speaking, affirmative action refers to any system of selection that deviates from the normal procedures to address perceived deficiencies in those procedures.<sup>19</sup> In the context of academic admissions, the "normal" selection criteria might include standardized test scores, high school grades, and letters of recommendation.<sup>20</sup> The admission of exceptionally talented athletes whose academic performances are far below that of nonathletes is a form of affirmative action.<sup>21</sup> The admission of children of wealthy alumni is

Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059 (1995) (suggesting an alternative to the traditional black-white model).

15. See, e.g., Brest & Oshige, *supra* note 13, at 900 ("[N]o other group compares to African Americans in the confluence of the characteristics that argue for inclusion in affirmative action programs."); Roy L. Brooks, *Race as an Under-Inclusive and Over-Inclusive Concept*, 1 AFR.-AM. L. & POL'Y REP. 9, 15 (1994) ("African Americans . . . are the only social group, racial or nonracial, that did not come to this country of their own free will."); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1071-73 (arguing that quotas are acceptable for blacks because their experience has been different from all other minorities); Posner, *supra* note 14, at 1157-58.

16. See, e.g., James Q. Wilson, *Sins of Admission: Good Affirmative Action and Bad*, THE NEW REPUBLIC, July 8, 1996, at 12, 12.

17. See Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963) (establishing the President's Committee on Equal Employment Opportunity which was to recommend affirmative steps for furthering the national policy of nondiscrimination). *But see* DARIEN A. MCWHIRTER, THE END OF AFFIRMATIVE ACTION 30 (1996) (suggesting that affirmative action dates back to a 1941 secret agreement between President Roosevelt and a black union leader).

18. See KAHLBERG, THE REMEDY, *supra* note 9, at 322-38, and MCWHIRTER, *supra* note 17, at 177-80, for extensive bibliographies.

19. See Brest & Oshige, *supra* note 13, at 856.

20. See ROBERT KLITGAARD, CHOOSING ELITES 10 (1985).

21. For example, in 1989, the University of California at Berkeley—a top uni-

another.<sup>22</sup>

Indeed, a broad reading of affirmative action includes outreach programs designed to encourage minorities and women to apply for positions they might not otherwise seek. For example, “[a] college might send students or professors into an inner-city neighborhood to help high school students understand what college is all about and gain the confidence needed to apply.”<sup>23</sup> These programs are designed to address the so-called “pool” problem commonly used to explain why minorities are systematically underrepresented in higher education and professional careers.<sup>24</sup> The pool explanation posits that there is an insufficient number of qualified minorities to select from; hence, minorities are not underrepresented when the racial composition of the eligible pool is considered.<sup>25</sup> However, outreach programs

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versity routinely rejecting students with straight-A averages—admitted Russell White, a star high school football player who failed to score over 700 out of a possible 1600 on the Scholastic Aptitude Test in four tries and who compiled a C-average in high school. See Gene Wojciechowski, *He Became Student of the Game*, L.A. TIMES, Sept. 26, 1990, at C1. White was later diagnosed with dyslexia, which perhaps accounts for his relatively poor academic performance. See *id.* However, it is doubtful that an undiagnosed non-athlete would have been given the chance to enter the university.

22. Preferences for the children of alumni, often described as “legacies,” have been called a “dirty little secret.” Elaine Woo, *Belief in Meritocracy an Equal-Opportunity Myth*, L.A. TIMES, Apr. 30, 1995, at A1. In 1988, for example, Harvard University’s legacy preference led to the admission of almost 200 students who arguably would have been rejected otherwise. See *id.*

Those supporting the legacy preference typically defend it by suggesting that alumni tend to donate money to the school if their children are more likely to be admitted, and that this money can be used to fund scholarships for poor students. See *id.* A full-scale critique of this policy is beyond the scope of this Book Review, but this justification is particularly weak. Although it is entirely rational for institutions to give preferences to legacies, the fact that the money can be used for positive ends cannot by itself be a justification for granting special preferences to the wealthy. Kahlenberg and I agree on this point. See KAHLENBERG, *THE REMEDY*, *supra* note 9, at 124.

23. MCWHIRTER, *supra* note 17, at 5.

24. For a description of the pool problem, see Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 918-24 (1994).

25. See *id.* Professor Farber notes that Critical Race Theorists (CRTs) often charge that the pool problem can be solved by changing the hiring or admissions criteria, which they see as exhibiting biases against minorities. See *id.* at 918. While agreeing that this charge has some accuracy, Farber responds that CRTs tend to view the pool problem in the context of academic hiring and, in particular, law school hiring. See *id.* at 919. When the context shifts to scientific disciplines, Farber believes that it is considerably more difficult to alter the standards so as to increase the pool of minority applicants. See *id.* at 919-21. But see Richard Delgado, *Rodrigo’s Chronicle*, 101 YALE L.J. 1357, 1363-64 (1992) (explaining that there is an adequate number of qualified minorities to choose from, but racial biases prevent minorities from being better represented in higher

do not appear controversial<sup>26</sup> and, therefore, I will not devote further analysis to them.<sup>27</sup>

Most people probably associate affirmative action with race-conscious preferences—deviations made from “standard” selection procedures on the basis of an applicant’s racial or ethnic identity.<sup>28</sup> At various times, institutions have used different systems or approaches:

- In the early 1970s, the University of California at Davis’ medical school had incoming classes of one hundred students, but reserved sixteen spots for minorities;<sup>29</sup>

- The Public Works Employment Act of 1977 set aside 10% of federal funds for public facility projects for minority-owned businesses;<sup>30</sup>

- In laying off its teachers, a school board released the least senior teachers, except it retained minority teachers to ensure that the percentage of minorities laid off would not exceed the percentage of minorities employed prior to the layoffs;<sup>31</sup>

- Another school board, faced with laying off one of two equally qualified teachers with equal seniority, invoked an affirmative action plan to discharge the white teacher rather than make a random selection,

education and professional careers).

26. See MCWHIRTER, *supra* note 17, at 5. But see *Monterey Mechanical Co. v. Wilson*, 97 Daily Journal D.A.R. 11464, 11468 (9th Cir. Sept. 3, 1997) (“We are not faced with a non-discriminatory outreach program, requiring that advertisements for bids be distributed in such a manner as to assure that all persons . . . have a fair opportunity to bid . . . . The outreach the statute requires is not from all equally, or to all equally.”); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1353 (1997) (contending outreach programs where “[a] university sends additional recruiters to particular schools precisely because those schools have more students of a particular group” are “clearly discriminatory”).

27. One reason outreach programs are noncontroversial may be that they are perceived as nonthreatening. Beneficiaries of outreach programs do not receive any advantage in admissions or hiring, and are merely seen as having an equal opportunity to compete for such spots. See MCWHIRTER, *supra* note 17, at 5-6 (contrasting affirmative recruitment with affirmative preference).

28. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 170 (1980) (“But no matter what we call it—a preference, a quota, a quest for diversity—weighing, say, blackness affirmatively necessarily means that others are going to be denied the opportunities in question because they were not born black.”); PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 112 (1993) (“Affirmative action allocates jobs and the means to obtain them on the basis of race . . .”).

29. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 275 (1978).

30. See *Public Works Employment Act of 1977*, 42 U.S.C. § 6705(f)(1)(B)(2) (1994); *Fullilove v. Klutznick*, 448 U.S. 448, 453 (1980).

31. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 270-71 (1986).

as would have been done had both been the same race.<sup>32</sup>

The affirmative action in these cases varied from quotas to goals.<sup>33</sup> With a quota, “[a] rigid formula is applied to determine how many minority group members ought to be admitted to an institution,”<sup>34</sup> whereas a goal is a “target[] reasonably attainable by means of applying every good faith effort.”<sup>35</sup> Some observers contend the difference between goals and quotas is illusory, as goals are typically reached by “reverse engineering” the bonus given to underrepresented minorities to account for the difference in test scores and grades.<sup>36</sup> In other words, the organization sets a goal and then determines the size of the bonus likely to achieve the goal.<sup>37</sup> Thus, according to these observers, institutions that set goals are reaching the same result as if they had used quotas, but through subterfuge.<sup>38</sup> Others believe the distinction is significant, particularly because quotas may present the only effective approach for remedying the underrepresentation of minorities.<sup>39</sup>

### B. Rationales for Affirmative Action

A number of different rationales have developed to justify the use of race-based preferences in admissions, employment, and contracting. The major justifications are: (1) ensuring racial diversity; (2) compensating minorities, particularly blacks, for societal discrimination; and (3) offsetting biases in the traditional evaluation criteria.

#### 1. Diversity

One justification for race-based affirmative action is that it promotes racial diversity in areas where minorities would otherwise be

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32. See *Taxman v. Board of Educ.*, 91 F.3d 1547, 1551 (3d Cir. 1996) (en banc), cert. granted, 117 S. Ct. 2506 (1997).

33. See Duncan, *supra* note 14, at 507.

34. *Id.*

35. *Id.* at 508 (quoting 41 C.F.R. § 60-2.12(e) (1980)).

36. See Richard A. Epstein, *Affirmative Action in Law Schools: The Uneasy Truce*, 2 KAN. J.L. & PUB. POL'Y 33, 38 (1992).

37. See *id.* at 37-38.

38. See, e.g., KAHLENBERG, *THE REMEDY*, *supra* note 9, at xi (“Harvard’s ‘plus system’ . . . managed to come up with a remarkably consistent percentage of black students year after year.”); Robert D. Alt, *Toward Equal Protection: A Review of Affirmative Action*, 36 WASHBURN L.J. 179, 181 n.14 (1997) (“While it may be true that in theory quotas are rigid and goals are more flexible, the degeneration from goals to quotas is virtually inevitable.”).

39. See Duncan, *supra* note 14, at 509.



underrepresented. For example, racial diversity in universities benefits everyone. It places students into contact with persons of vastly different life experiences and cultures.<sup>40</sup> This interaction is important "because race itself is socially significant[;] students need knowledge of the attitudes, views, and backgrounds of racial minorities."<sup>41</sup>

Theoretically, whites will not only benefit from exposure to different ethnic cultures, but also develop positive feelings toward minorities who prove competent and able. A California Parks and Recreation Department study concluded that "bringing women and people of color into workplaces through affirmative action policies reduced white men's belief in the 'inferiority of nonwhites and women.'"<sup>42</sup> Advocates of the diversity theory also contend that increasing the racial diversity of universities and graduate schools will benefit impoverished minority communities, because minority students are more likely to serve their own communities.<sup>43</sup> In a legal context, these minority students may be able to serve their communities more effectively than non-minorities because "[t]he ability to 'speak the language' of the client, to understand his perception of his problem, and to deal with others in the community on his behalf are qualities essential to being a 'good lawyer.'"<sup>44</sup> Also, increasing minority participation through diversity provides role models whose visible success encourages others to follow in their footsteps.<sup>45</sup>

Until recently, many believed that racial diversity was a sufficiently compelling justification for the use of racial preferences in education,<sup>46</sup> based on Justice Powell's opinion in *Regents of the University of California v. Bakke*.<sup>47</sup> *Hopwood v. Texas*<sup>48</sup> recently called

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40. See Brest & Oshige, *supra* note 13, at 862.

41. Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 686 (1975).

42. Brest & Oshige, *supra* note 13, at 871 (quoting BRON RAYMOND TAYLOR, *AFFIRMATIVE ACTION AT WORK* 196 (1991)).

43. See Terrance Sandalow, *Minority Preferences in Law School Admissions*, in *CONSTITUTIONAL GOVERNMENT IN AMERICA* 277, 283-84 (1980).

44. *Id.* at 282.

45. See Brest & Oshige, *supra* note 13, at 869.

46. See Leland Ware, *Tales from the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action in Higher Education?*, 23 J.C. & U.L. 43, 47-48 (1996) ("A majority did not agree to the relevant level of review, but in what became the most frequently cited opinion, Justice Powell argued that strict scrutiny should be applied."); Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 933 (1995) ("All conversations on the constitutional doctrine of affirmative action begin with Justice Powell's solo opinion announcing the judgment of the Court in [*Bakke*].").

47. 438 U.S. 265, 269-324 (1978).

this assumption into doubt. The Fifth Circuit concluded that Justice Powell's opinion was no longer good law, and that remedying specific past discrimination was the only compelling interest justifying racial preferences.<sup>49</sup> The Supreme Court denied *certiorari* in the case; therefore, *Bakke* apparently remains the law outside of the Fifth Circuit. However, *Hopwood* may be a harbinger for the future.<sup>50</sup>

## 2. Remedying past discrimination

A second justification for race-based affirmative action is that it functions as a remedy for past and present societal discrimination. As Professors Brest and Oshige note, "[i]t aims to make victims whole, to place them in the position they would have occupied absent the injustice."<sup>51</sup> This justification postulates that, but for the lingering effects of slavery and discrimination, blacks would not be disproportionately poor and less educated compared to whites.<sup>52</sup> Thus, students benefitting from affirmative action are admitted despite their lower test scores and grades because, it is assumed, without societal discrimination these students would have performed better than they did.<sup>53</sup> The remedy justification also responds to charges that affirmative action discriminates against whites.<sup>54</sup> Those whites losing out on admissions to minorities might not have outperformed those minorities had there not been societal discrimination.<sup>55</sup>

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48. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

49. *See id.* at 944.

50. Professor Mishkin speculates that "the likely source of the *Hopwood* denial is that (at least) one 'centrist' member of the Court was not ready to resolve the affirmative action question on the merits at this point. In that circumstance, no four Justices were willing to force the issue." Paul J. Mishkin, *Foreword: The Making of a Turning Point—Metro and Adarand*, 84 CAL. L. REV. 875, 886 (1996).

Professor Mishkin's observation probably remains valid despite the Court's recent grant of *certiorari* in another affirmative action case. *See Taxman v. Board of Educ.*, 91 F.3d 1547, 1551 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997). *Taxman*, unlike *Hopwood*, involved layoffs, not admissions or hiring, a distinction the United States Supreme Court has found significant. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

51. Brest & Oshige, *supra* note 13, at 865.

52. *See, e.g.*, Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 582-83 (1975).

53. *See Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1002 (1996).

54. *See Duncan, supra* note 14, at 533-39.

55. *See id.* at 534.

### 3. Merit is biased

A third justification for race-based affirmative action is that it partially ameliorates the unfair bias created by "merit."<sup>56</sup> Under this theory, the concept of merit is itself biased, "neither fair nor democratic, neither genuinely predictive nor functionally meritocratic."<sup>57</sup>

One target of this attack is standardized tests such as the Scholastic Aptitude Test (SAT) or the Law School Admissions Test (LSAT).<sup>58</sup> Because boys consistently outscore girls, and whites consistently outscore blacks on the SAT, critics contend these tests exhibit gender and racial biases.<sup>59</sup>

In addition to these alleged biases, or perhaps because of them, performance on standardized tests does not accurately predict first-year law school or college performance.<sup>60</sup> Professors Sturm and Guinier note that studies show the correlation<sup>61</sup> between SAT scores and first-year college grades is about .32 to .36, accounting for approximately 10% to 12% of the variance in performance.<sup>62</sup> This correlation is consistent with the .3 correlation observed by Professor Selmi.<sup>63</sup>

A common criticism of the studies showing this small correlation is that they fail to take into account the restriction on range. The correlation between test scores and college performance is weakened because the sample population of students in the university does not

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56. See Sturm & Guinier, *supra* note 53, at 968.

57. *Id.*

58. See *id.* at 969-70.

59. See, e.g., *id.* at 982 (arguing that standardized exams test applicants on the assumption that there is only one way to do a job, thus excluding those applying different approaches, like women and people of color); Katharine Q. Seelye, *Group Seeks to Alter S.A.T. to Raise Girls' Scores*, N.Y. TIMES, Mar. 14, 1997, at A25. But see Daniel Seligman, *Brains in the Office*, FORTUNE, Jan. 13, 1997, at 38, 38 (discussing the strong predictive performance of the United States Department of Labor's General Aptitude Test Battery).

60. See Sturm & Guinier, *supra* note 53, at 971-74.

61. The correlation between variables is roughly speaking, "an absolute measure of the relationship between two variables . . . . If large values of X tend to be accompanied by large values of Y and vice versa, then . . . their correlation coefficients will be positive." M.G. BULMER, PRINCIPLES OF STATISTICS 74 (1979).

62. See Sturm & Guinier, *supra* note 53, at 971. "The square of the correlation coefficient can therefore be interpreted as the proportion of the total variation in the one variable explained by the other." Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1263 n.37 (1995) (quoting HUBERT M. BLALOCK, JR., SOCIAL STATISTICS 409 (Rev. 2d ed. 1979)).

63. See Selmi, *supra* note 62, at 1264-65.

include students who did worse on the tests and were denied admission.<sup>64</sup> Nevertheless, even if this range restriction problem is compensated for mathematically, at best the correlation rises to .5, explaining only 25% of the variance in performance.<sup>65</sup>

Moreover, standardized tests typically exhibit an income bias, meaning that average test scores rise with family income. This income bias skews admissions in favor of the wealthy at the expense of the poor, while providing little meaningful predictive value.<sup>66</sup> To some extent, race-based affirmative action counteracts this bias by including more candidates within the pool of those considered for admission.<sup>67</sup>

The merit theory has also drawn criticism as being biased against minorities in the "write-on" selection process for a number of law reviews. Since whites have dominated law reviews, minority students complain they "are forced to disguise their true voices and write like white males."<sup>68</sup> Racial preferences can offset this bias to some extent by ensuring minorities who do not mimic the writing styles of white males will still have an opportunity to write on to law review.

### III. CLASS-BASED AFFIRMATIVE ACTION: THE REMEDY

#### A. Kahlenberg's Critique of Affirmative Action

Richard Kahlenberg opens *The Remedy* with a survey of the history of affirmative action. He notes that after a hundred years of segregation—and hundreds more of slavery prior to that—anti-discrimination laws proved insufficient to eradicate the continuing disadvantages blacks faced in society.<sup>69</sup> He contends the Civil Rights Movement of the 1960s sought to overcome these structural obstacles in a class-conscious manner, rather than a race-conscious one.<sup>70</sup> Kahlenberg reinforces this point by referring to noted civil rights leader Dr. Martin Luther King, who "never endorsed racial preferences, arguing instead that there were nonracial ways to remedy past

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64. See *id.* at 1266-70.

65. See *id.* at 1268-70.

66. See Sturm & Guinier, *supra* note 53, at 987-92. "[I]t is incontestable that the existing meritocracy excludes people based on their race, gender, and class status." *Id.* at 996.

67. See, e.g., *id.* at 998.

68. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 26 (1991).

69. See KAHLENBERG, THE REMEDY, *supra* note 9, at 3-4.

70. See *id.* at 8-10.

racial wrongs.”<sup>71</sup>

Ironically, the shift or emphasis from class to race in the early 1970s occurred at the behest of Republican President Richard Nixon, who may have initially proposed the use of racial preferences as a wedge issue to split the labor base and the racial minorities in the Democratic party.<sup>72</sup> Although President Nixon ultimately ran against quotas in 1972, the Democrats picked up preferences as a party platform.<sup>73</sup> The initial justification for preferences was compensation; however, beginning in the late 1970s, the justification switched to diversity.<sup>74</sup> Thus, where the old view presented race as superficial, the new vision embraced “race as culture.”<sup>75</sup>

Kahlenberg identifies four reasons for the emergence of diversity as the primary rationale for affirmative action. First, a plan based on diversity is more likely to pass constitutional muster because there is no need for extensive fact-finding.<sup>76</sup> On the other hand, a plan based on the compensation rationale must satisfy fairly stringent fact-finding requirements by identifying specific past discrimination based on more than anecdotal evidence.<sup>77</sup>

Second, because diversity is forward-looking,<sup>78</sup> it does not require a sunset provision. In other words, with diversity as the justification, proponents of racial preferences do not have to wrestle with the difficult issue of whether preferences should end, and if so, when.<sup>79</sup>

Third, diversity does not involve charges of past injustice and does not require children to pay for the sins of their parents.<sup>80</sup> It therefore avoids the difficulty of showing a causal relationship between past discrimination and today’s minorities. Finally, diversity

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71. *Id.* at 10.

72. *See id.* at 21-23.

73. *See id.* at 24.

74. *See id.* at 27-29.

75. *Id.* at 33.

76. *See id.* at 38-39.

77. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that all federal affirmative action programs must be analyzed under a strict scrutiny standard); *see also City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989) (holding that a city affirmative action program could not satisfy strict scrutiny since the record did not reveal any prior racial discrimination in awarding contracts).

78. *See Eugene Volokh, Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2060 (1996).

79. *See KAHLENBERG, THE REMEDY*, *supra* note 9, at 39-40.

80. *See id.* at 40.

makes allies of other minority groups, such as women, gays, and lesbians.<sup>81</sup>

Kahlenberg then considers whether affirmative action has accomplished its intended goals. He gives it a grade of "B-" for genuine equality of opportunity.<sup>82</sup> Acknowledging that blacks have been making economic progress,<sup>83</sup> he contends racial preferences are nevertheless both underinclusive and overinclusive.<sup>84</sup> Rich minorities benefit even though, in Kahlenberg's view, they should not.<sup>85</sup> Conversely, poor whites do not benefit even though, in Kahlenberg's view, they should.<sup>86</sup>

With respect to color-blindness, Kahlenberg gives affirmative action a grade of "F."<sup>87</sup> This grade is based on his belief that immutable characteristics should not be used as a basis for affirmative action unless absolutely necessary.<sup>88</sup> For example, the prevalence of diversity as a justification for racial preferences leads Kahlenberg to question whether there is a black viewpoint.<sup>89</sup> Such questions invariably pigeonhole minorities and increase, rather than reduce, the role of race in society.<sup>90</sup>

Kahlenberg also gives affirmative action an "F" for reducing prejudice.<sup>91</sup> He notes that racial preferences imply that blacks and other favored minorities need help to achieve the same level of success as whites.<sup>92</sup> This perception is sometimes bolstered by the fact that minorities admitted through affirmative action have higher dropout rates, lower bar passage rates, and lower scores on teaching competency exams.<sup>93</sup> Finally, "[w]hile affirmative action did not, as some claim, create David Duke, it does seem to rile whites who would otherwise take a more positive view of racial progress."<sup>94</sup>

Lastly, Kahlenberg gives affirmative action a "C" for compensating

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81. *See id.* at 41.

82. *See id.* at 42-52.

83. *See id.* at 45.

84. *See id.* at 44 (citing Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379, 416 n.114 (1979)).

85. *See id.*

86. *See id.*

87. *See id.* at 52-64.

88. *See id.* at 53-54.

89. *See id.* at 55.

90. *See id.* at 58.

91. *See id.* at 64-74.

92. *See id.* at 65.

93. *See id.* at 66-68.

94. *Id.* at 73.

for past discrimination.<sup>95</sup> Diversity, the primary current rationale for affirmative action, does not even purport to address the problem of past discrimination; if anything, it is disadvantageous toward certain minority groups, such as Asians.<sup>96</sup>

Having catalogued the weaknesses and problems of racial preferences, Kahlenberg proposes a shift from race-based to class-based affirmative action.

### B. Theoretical Justifications

According to Kahlenberg, class-based affirmative action is superior to race-based affirmative action because it directly compensates those who have had to overcome financial obstacles.<sup>97</sup> He notes that "class preferences are actually meant to perfect the meritocracy rather than subvert it. Whereas a racial preference will unfairly benefit Bill Cosby's offspring over the son of a white sanitation worker, class preferences help those who need it."<sup>98</sup> This justification rests on the concept of equal opportunity. Kahlenberg argues that the poor face real impediments to achievement, impediments that are not addressed through existing antidiscrimination laws.<sup>99</sup> He cites an impressive array of statistical and sociological evidence demonstrating that Americans born into the lower classes are significantly less likely to move into higher social classes than those initially born into the higher classes.<sup>100</sup>

Thus, while affirmative action currently benefits affluent blacks,<sup>101</sup> class-based affirmative action would benefit both poor blacks and poor whites. Because blacks are disproportionately poor compared to whites, they would benefit disproportionately from class-based affirmative action.<sup>102</sup> Kahlenberg contends that "by

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95. *See id.* at 74-79.

96. *See id.* at 75-78.

97. *See* Kahlenberg, *Class-Based*, *supra* note 9, at 1060-61.

98. *Id.* at 1061.

99. *See* KAHLENBERG, *THE REMEDY*, *supra* note 9, at 84-85 ("As long as antidiscrimination laws work, race and gender are not impediments per se, but class differences . . . remain . . .").

100. *See id.* at 88-89 (citing PETER M. BLAU & OTIS DUDLEY DUNCAN, *THE AMERICAN OCCUPATIONAL STRUCTURE* 28 (1967); JOHN A. BRITTAIN, *THE INHERITANCE OF ECONOMIC STATUS* 16 (1977); CHRISTOPHER JENCKS, ET AL., *WHO GETS AHEAD? THE DETERMINANTS OF ECONOMIC SUCCESS IN AMERICA* 81-83 (1979)).

101. *See id.* at 104; Peter Passell, *Surprises for Everyone in a New Analysis of Affirmative Action*, *N.Y. TIMES*, Feb. 27, 1997, at D2 ("[M]any of the minority students attending highly selective colleges are from the middle class.").

102. *See* KAHLENBERG, *THE REMEDY*, *supra* note 9, at ix-x.

helping the most disadvantaged blacks, class-based affirmative action arguably does a *better* job of compensation for past discrimination than race-based affirmative action does."<sup>103</sup> Although class-based preferences will not lead to the same level of racial diversity that race-based affirmative action does, they should avoid causing the racial hostility and resentment of the latter.<sup>104</sup>

Unlike race-based affirmative action programs, class-based affirmative action probably does not trigger strict scrutiny because poverty is not a suspect classification.<sup>105</sup> Indeed, a number of the current Supreme Court Justices seem considerably more willing to uphold class-based affirmative action plans than race-based ones.<sup>106</sup>

### C. Mechanics of Class-Based Affirmative Action

Like race-based affirmative action, class-based affirmative action can take a number of different forms. A school could use class as a "plus" factor,<sup>107</sup> in the same way Justice Powell suggested in *Bakke* that race could be used.<sup>108</sup> Alternatively, a school could set aside a designated number of admissions slots solely for lower-income applicants, operating, in effect, two tracks. The University of Texas School of Law used this approach with race-based, rather than class-based, plus factors, resulting in the court's decision in *Hopwood v.*

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103. *Id.* at 104.

104. *See id.* at 105.

105. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 26 (1973).

106. *See supra* note 8 and accompanying text (noting that Justice Scalia and Justice Thomas favor affirmative action programs based on class); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 509-10 (1989) (Justice O'Connor writing for herself, Chief Justice Rehnquist, Justice White, and Justice Kennedy).

107. A plus factor has been defined as a factor that tips the balance in the minority's favor, because that person "can usually bring something that a white person cannot offer." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-17 (1978) (quoting Appendix to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae 2-3); *see also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (paraphrasing Justice Powell's use of the word "plus" in *Bakke* by instead using the term "racial considerations"); Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1772 (1996) (equating pluses to considerations).

108. *See Bakke*, 438 U.S. at 317 ("[R]ace or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."). *See also* Jeff Ristine & Ed Mendel, *UC Drops Race-Based Admissions*, SAN DIEGO UNION-TRIB., Nov. 7, 1996, at A1 (describing the University of California at San Diego's admissions "bonus" points for the underprivileged).



Texas.<sup>109</sup>

The plus factor approach seems especially well suited to class-based affirmative action. Unlike race, which is a discrete trait in the sense that one is either a minority or not,<sup>110</sup> economic disadvantage encompasses a continuous spectrum. One can be anything from mildly to severely disadvantaged economically. A plus system takes relative economic disadvantage into consideration by awarding more points to applicants from lower income levels.

Conversely, the set-aside approach is probably less well suited to class-based rather than race-based affirmative action. The set-aside approach requires a bright-line definition to sort applicants into those eligible for inclusion and those who are not. An applicant whose family income is one dollar over the definition receives absolutely no class-based affirmative action, while another applicant whose family income is one dollar less receives the full affirmative action benefit—the same benefit as a third applicant whose family income is only one-tenth that of the second applicant.

Either way, a key starting point for implementing class-based affirmative action is to define and rank economic disadvantage. Kahlenberg proposes three methods for doing so: (1) the simple definition; (2) the moderately sophisticated definition; and (3) the sophisticated definition.<sup>111</sup>

The simple definition of class-based economic disadvantage considers only family income, as measured by income tax returns.<sup>112</sup> The moderately sophisticated definition looks to the parents' income, education, and occupation, because these factors all affect a student's academic performance.<sup>113</sup> As to the perceived difficulty of ranking occupations, Kahlenberg notes that "attempts to objectively rank

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109. 78 F.3d 932, 936-37 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996); *see also* Caplan, *supra* note 5, at 26.

110. Actually, with the increase in interracial marriages and mixed ethnicity offspring, the discreteness of race is blurring. *See* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1204 (1997) (describing the effects of the "one drop" rule); Kenneth E. Payson, Comment, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1257 (1996) (describing the difficulty facing persons of mixed racial backgrounds in responding to federal surveys); M. Elaine Mar, *The Multiracial Option*, HARV. MAG., May-June 1997, at 19, 19 (discussing how one sister received mail from the Black Students Association while her twin received mail from the Native American Students Association).

111. *See* KAHLBERG, *THE REMEDY*, *supra* note 9, at 128-29.

112. *See id.*

113. *See id.* at 129.

occupations have been remarkably consistent over time.”<sup>114</sup> The sophisticated definition considers “wealth, schooling opportunities, neighborhood influences, and family structure” in addition to the three factors from the moderately sophisticated definition.<sup>115</sup> Kahlenberg suggests that the sophisticated method should be used where practical, particularly for academic admissions.<sup>116</sup>

To his credit, Kahlenberg recognizes his proposal cannot be limited to university admissions.<sup>117</sup> He suggests employers use class-based preferences for entry-level positions so as to benefit the vast number of Americans “who go straight from high school to the job market.”<sup>118</sup> Because employers are less likely to have access to the information needed to implement the sophisticated method, Kahlenberg advocates using the simple method of defining class.<sup>119</sup> However, he opposes the use of preferences for promotions because that would be the equivalent of giving race-based preferences for grading in the academic context.<sup>120</sup>

#### IV. WHY CLASS-BASED AFFIRMATIVE ACTION WILL NOT WORK

Having set forth Kahlenberg’s proposal, I now argue that class-based affirmative action will not satisfy either proponents or opponents of racial preferences. I assume, as Kahlenberg proposes, that class-based affirmative action is designed to *supplant*, not *supplement*, racial preferences.<sup>121</sup> Subsection A is aimed at race-based affirmative action supporters. Using the available demographic data, I show that very few black students will benefit from Kahlenberg’s proposal. Subsection B is aimed at race-based affirmative action opponents and class-based affirmative action advocates. In Subsection B, I show that class-based affirmative action suffers from the same general shortcomings as race-based affirmative action.

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114. *Id.* at 130.

115. *Id.* at 132.

116. *See id.* at 136.

117. *See id.* at 125.

118. *Id.*

119. *See id.* at 136.

120. *See id.* at 125. Preferential grading does not occur at universities; once the university admits students through some preference, the students are on their own to prove themselves by achieving high grades. *See id.*

121. *See id.* at 151. However, Kahlenberg does note that race-based affirmative action may still be necessary in some limited circumstances, such as a narrow remedy for documented discrimination. *See id.*

### A. No Aid to Minorities

Supporters of race-based affirmative action are generally wary, if not outright skeptical, of class-based affirmative action as a "second-best" substitute for racial preferences.<sup>122</sup> This wariness stems from a number of potential problems with such a system. A recent study by Linda F. Wightman concluded that abandoning race-based affirmative action would drastically reduce the number of minority students offered admission to American Bar Association-approved law schools.<sup>123</sup> Using data from the 1991 pool of applicants, the Wightman study found that without race-based preferences the percentage of black applicants admitted to law schools would have dropped from 26% to 3%.<sup>124</sup> Furthermore, the study noted that giving an advantage to applicants with a lower socioeconomic status would produce a corresponding drop in admitted black students.<sup>125</sup>

The University of California's ban on affirmative action took effect for graduate students entering in the fall of 1997.<sup>126</sup> According to the university's own analysis, a switch from race-based to class-based affirmative action would have reduced the percentage of blacks in Berkeley's incoming 1996 undergraduate class from 6.5% to 3%.<sup>127</sup> Indeed, the percentage of black students offered admission at Berkeley's

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122. See Fallon, Jr., *supra* note 5, at 1947 ("[I]f economically based affirmative action is supported as a 'second-best' substitute for race-based affirmative action, it is likely to be a distant second-best."); see also Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1894 (1996) (expressing pessimism "about the operationalization of economic inequality for purposes of class-based affirmative action"); Frederick A. Morton, Jr., Note, *Class-Based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089, 1114 (1993) (stating that "proposals to shift the emphasis of race-based affirmative action from race to class should be met with extreme skepticism, . . . particularly when . . . advocates [of class-based affirmative action] historically have not been interested in either race or class equality"); Glazer, *supra* note 5, at A12 ("But class-based affirmative action is a bad idea, whose weaknesses become apparent when we review the areas in which affirmative action operates.").

123. See Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 13-14 & t.1 (1997). See also Klein, *supra* note 12, at A1 (reviewing Wightman's empirical analysis).

124. See Wightman, *supra* note 123, at 14 t.1.

125. See *id.* at 40-45.

126. See Ristine & Mendel, *supra* note 108, at A1. While admissions offices were informed in November 1996 that affirmative action would no longer apply, university president Richard C. Atkinson delayed the changes for undergraduate admissions to spring 1998 in order to assure a smoother transition. See *id.*

127. See Caplan, *supra* note 5, at 28.

law school dropped from 9.5% to 1.8% for the 1997 entering class.<sup>128</sup> An unpublished analysis by a Harvard economist concluded that “to replicate the current level of nonwhite admissions, elite colleges would have to grant preferences to six times as many low-income students.”<sup>129</sup> Doing so would “sharply lower[] average test scores and displac[e] huge numbers of high-scoring middle-income whites.”<sup>130</sup>

If blacks are disproportionately poor compared to whites, why does class-based affirmative action result in so little diversity?

### 1. Income distribution by race

To begin, the statement that blacks are disproportionately poor may be somewhat misleading. Although a higher percentage of blacks than whites are “poor”—meaning that a randomly selected black person is more likely to be poor than a randomly selected white person—there are a greater number of poor whites than poor blacks at every income level.<sup>131</sup> This means that a randomly selected poor person is more likely to be white than black. In particular, the nationwide numbers for 1995 are as follows:

Table 1: Income Distribution

Family Income (1994 dollars)	White Families (in thousands)	Black Families (in thousands)
< \$5K	1344 (2.3%)	664 (8.2%)
\$5K-\$10K	2630 (4.5%)	1036 (12.8%)
\$10K-\$15K	3624 (6.2%)	906 (11.2%)
\$15K-\$25K	8533 (14.6%)	1489 (18.4%)
\$25K-\$35K	8474 (14.5%)	1093 (13.5%)
\$35K-\$50K	10,812 (18.5%)	1198 (14.8%)
> \$50K	23,027 (39.4%)	1716 (21.2%) <sup>132</sup>

128. See Kenneth R. Weiss, *UC Law Schools' New Rules Cost Minorities Spots*, L.A. TIMES, May 15, 1997, at A1 (noting that of the 792 students accepted, only 14 were black, down from 75 the previous year).

129. Passell, *supra* note 101, at D2 (discussing the findings of Professor Thomas Kane).

130. *Id.*

131. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 48 tbl.49 (116th ed. 1996) [hereinafter STATISTICAL ABSTRACT].

132. See *id.* The number in parenthesis represents the percentage of the total number of white and black families within each income category.

Table 1 shows that 21% of black families have family incomes less than \$10,000, compared to 6.8% of white families. Nevertheless, there are more than twice as many white families in this income category. At higher income levels, white families outnumber black families by even higher margins.

Based on the income distribution alone, a school could maintain some racial diversity by setting aside spots for students coming from those income levels where whites do not greatly outnumber blacks. For example, among all families earning less than \$10,000, whites outnumber blacks by approximately two to one. Thus, a school could conceivably set aside 30% of its admission offers for applicants from that income level, with the assumption that 10% of its class would be comprised of black students from the lowest income level.<sup>133</sup> As the number of blacks gaining admission through the non-set-aside portion increases, the target percentage of poor blacks decreases.<sup>134</sup>

## 2. Test scores by race and income

There are a number of hidden assumptions in analyzing test scores by race and income. The major problem with such an approach is that it assumes the academic profiles of all low-income students are comparable. Empirical evidence belies this assumption.<sup>135</sup> At every income level, whites outscore blacks on standardized tests

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133. The 30% set-aside would be divided into 20% for poor whites and 10% for poor blacks. The set-aside would actually be even greater, since the example given in the text does not take into account Asians and Latinos. However, as most of the literature tends to discuss affirmative action issues in white/black terms, I do so as well. See *supra* note 14 and accompanying text.

134. Mathematically, the formula would work as follows:

$$S = [(W + B) / B] \times T$$

where:

*W* = the total number of white families in the income level(s) considered for preferential treatment;

*B* = the total number of black families in the same income level(s);

*T* = the target percentage of black students among the general population; and

*S* = the necessary percentage of spots to be set aside for class-based admissions.

For example, where a school seeks 10% black students through a set-aside and the school selects \$10,000 to be the class-based admissions limit, using the census statistics yields: *T* = .10, *W* = 3,974,000, *B* = 1,700,000, and *S* = 33.4%.

135. See Sturm & Guinier, *supra* note 53, at 989 (showing that the combined SAT score of the lowest-income whites is 869 compared to 675 for blacks in the same income bracket).

such as the SAT.<sup>136</sup>

Table 2: 1996 Mean SAT Scores by Race and Family Income

Family Income	White	Black	Difference
< \$10K	977	788	189
\$10K-\$20K	985	817	168
\$20K-\$30K	1004	848	156
\$30K-\$40K	1014	868	146
\$40K-\$50K	1030	888	142
\$50K-\$60K	1042	907	135
\$60K-\$70K	1059	913	146
\$70K-\$80K	1072	927	145
\$80K-\$100K	1090	950	140
> \$100K	1129	1007	122 <sup>137</sup>

According to Table 2, the smallest difference in SAT scores between whites and blacks at the same income level is 122 points, and that is for students from families with incomes of \$100,000 or more. At the income levels more likely to qualify as disadvantaged under Kahlenberg's proposal—for example, under \$40,000 per year—the differential ranges from 146 points to 189 points. Note that the disparity in scores between whites and blacks is so severe that only blacks in the annual income level exceeding \$100,000 attain an average SAT score—1007—that is greater than that of whites in the very poorest

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136. This is not a particularly new insight. *See id.* The existence of the disparity in test score performance is an extremely controversial and complex issue. A minority of scholars contend that the disparity simply reflects differences in cognitive ability among the various races. *See* RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 269-340 (1994). Professors Herrnstein and Murray note that blacks and whites of equal age and intelligence quotient (IQ) earn approximately the same annual income. *See id.* at 323. Also, they assert that blacks of average IQ are actually more likely to earn college degrees than whites of the same IQ. *See id.* at 320.

This incendiary work has been carefully dissected. *THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS* (Russell Jacoby & Naomi Glauberman eds., 1995) contains a number of good critiques and criticisms of its shortcomings.

137. *See* COLLEGE ENTRANCE EXAMINATION BOARD & EDUCATIONAL TESTING SERVICE, 1996 COLLEGE SENIORS: A PROFILE OF SAT PROGRAM TEST TAKERS, at tbl.4-2 (1996) [hereinafter SAT PROFILE] (on file with *Loyola of Los Angeles Law Review*). The score range for the SAT is 400 to 1600.

category—977.

The impact of the disparity in scores is even greater when one examines the data more carefully. For example, at the annual income level of less than \$10,000 the standard deviation for white students is 104 for verbal and 107 for math, while the mean scores for white students are 487 for verbal and 490 for math.<sup>138</sup> Since the mean verbal and math scores for blacks at this income level are 398 and 390 respectively, blacks at the same income level are almost a full standard deviation below whites.<sup>139</sup> The standard deviation is best described as the spread in data points such that 68% of all data points will fall within one standard deviation of the mean.<sup>140</sup> Thus, 68% of black students in the lowest income level scored between 304 points and 492 points on the verbal portion of the test; only about one-sixth of black students scored above the mean verbal score for white students in the same income range. Similarly, 68% of black students in that income category scored between 302 and 478 on the math portion of the test; less than one-sixth scored above the mean math score for whites. Alternatively, approximately one-fifth of white students in this income range scored below the mean score for black students.

These disparities also exist in the annual income levels between \$10,000 and \$30,000. Between \$10,000 and \$20,000 per year, the standard deviation for blacks was 94 in verbal and 89 in math. This barely surpasses the 83 point gap between mean scores of whites and blacks in verbal, and the 85 point gap in math.<sup>141</sup> Between annual income levels of \$20,000 and \$30,000 per year, the standard deviation for blacks was again 94 in verbal and 89 in math, compared to a gap in mean score between whites and blacks of 74 points and 82 points in verbal and math respectively.<sup>142</sup>

Actually, the picture is even bleaker. I have presented the data in a way that implies a one-to-one correspondence between whites and blacks. However, at less than \$10,000 per year, white families outnumber black families 2.34 to 1.<sup>143</sup> This factor must be adjusted by

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138. *See id.*

139. *See id.*

140. *See* SAM KASH KACHIGAN, MULTIVARIATE STATISTICAL ANALYSIS 47 (1982).

141. *See* SAT PROFILE, *supra* note 137, at tbl.4-2.

142. *See id.*

143. *See* STATISTICAL ABSTRACT, *supra* note 131, at 48 tbl.49 (illustrating that in 1995 the number of white families with an annual income less than \$10,000 was 3,974,000 while the number of black families in the same income bracket was 1,700,000).

the fact that at this income level black families appear to be larger than white families, resulting in a ratio of white to black children of 1.70 to 1.<sup>144</sup> Thus, in a sample population of 170 whites and 100 blacks in this income level, the statistics suggest only 16 black students would score above the mean math and verbal scores for white students, while approximately 85 white students would score above 977 points.<sup>145</sup> In other words, black students would make up roughly 15% of the applicant pool scoring above 977 points.

Assuming that admissions programs continue to use high school grades and standardized test scores as the primary admission criteria, the beneficiaries of a race-blind, class-based affirmative action program are likely to be overwhelmingly white.

### 3. Test scores by parental education and race

Kahlenberg's moderately sophisticated and sophisticated methods both incorporate parental education into the calculation.<sup>146</sup> His theory is that parental education is strongly indicative of the level of obstacles faced by students.<sup>147</sup>

Table 3: Education Distribution by Race (in thousands)

Parents' Education	Whites	Blacks
Less Than 9th Grade	3283	280
Some High School	5239	2108
High School Degree	17,164	3841
Some College	14,414	2862
College Degree	8570	758
Graduate Degree	4995	236 <sup>148</sup>

Note that, as a group, blacks have less education than whites,<sup>149</sup>

144. *See id.* at 66 tbl.82.

145. I say "approximately" because 977 is the mean score for white students, representing the average score and not the median score, which would correspond to the score received by the person at the 50th percentile. However, for a normal distribution the mean and median are the same. *See* EDWIN L. CROW ET AL., STATISTICS MANUAL 11 (1960).

146. *See* KAHLENBERG, THE REMEDY, *supra* note 9, at 128.

147. *See id.* at 129.

148. *See* STATISTICAL ABSTRACT, *supra* note 131, at 66 tbl.82. The educational level is for the head of the household in married situations.

149. For example, 52% of whites have some college education while only 38% of blacks have the same amount of education. *See id.*



suggesting that blacks may benefit disproportionately from Kahlenberg's definition of disadvantage. On closer examination, the numbers are less favorable to blacks than Kahlenberg implies. Blacks are disproportionately overrepresented only in the groups with some high school education, or a high school diploma but no college education. However, they are *not* overrepresented in the group with the very least amount of education—no high school. Unless this group is ignored, blacks will not be significantly overrepresented among the less educated.

Worse yet, as shown in Table 4, whites outscore blacks at every educational level.

Table 4: 1996 Mean SAT Scores by Parents' Education and Race

Parents' Education	Whites	Blacks	Difference
No High School Diploma	908	767	141
High School Degree	981	825	156
Some College	1003	853	150
College Degree	1073	900	173
Graduate Degree	1128	950	178 <sup>150</sup>

The score disparity among less-educated families is not as severe as when family income is considered alone.<sup>151</sup> However, it is still large enough to expect that the overwhelming majority of beneficiaries of class-based affirmative action would be white students from less educated families.

As with the breakdown for race and income, class-based affirmative action based on this criteria is likely to benefit whites from less educated families, rather than blacks from such families.

#### 4. Constitutionality of a targeted program

I have suggested above why class-based affirmative action is extremely unlikely to create any sort of racial diversity. Admittedly, Kahlenberg, and probably other proponents of class-based affirmative action, are not primarily concerned with racial diversity as a

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150. See SAT PROFILE, *supra* note 137, at tbl.4-2.

151. Compare Table 2, *supra* text accompanying note 137, with Table 4, *supra* text accompanying note 148. This assumes that the least-educated will also be earning in the lowest income bracket, which may not always be true.

goal.<sup>152</sup> Nevertheless, those favoring race-based affirmative action may seek to overcome race disparity in test scores by choosing the factors defining economic disadvantage in such a way that applicants qualifying for the class-based affirmative action are overwhelmingly minorities. Texas legislators “openly talk about trying to craft an admissions formula that will ‘zero out’ the effect of the legal ban on race preferences.”<sup>153</sup>

For example, blacks are overrepresented in a number of occupations.

Table 5: Black Representation in the Workforce

Occupation	Percentage of Workforce
Nursing Aides & Orderlies	30.7
Taxicab Drivers	25.5
Postal Clerks	25.1
Hotel Maids & Housemen	24.8
Bus Drivers	23.4
Vehicle Washers	23.0
Correctional Officers	22.8
Janitors & Cleaners	21.8
Social Workers	21.8
Security Guards	21.2
Telephone Operators	19.7
Data Entry Keyers	19.5 <sup>154</sup>

Nationwide, blacks represent about 10.1% of the workforce.<sup>155</sup> Acting on this information, a school could, consistent with Kahlenberg’s moderately sophisticated definition of economic disadvantage, consider those occupations listed in Table 5, and perhaps only those, to

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152. See, e.g., Stephen R. Shalom, *Rectifying Policies*, THE PROGRESSIVE, Nov. 1996, at 41, 43 (reviewing KAHLENBERG, *THE REMEDY*, *supra* note 9).

153. Zachary, *supra* note 10, at A1. Texas state legislators have a bill pending that would require all public universities to admit students in the top 10% of their high school classes. See *id.* Theoretically, this should increase racial diversity because some high school student bodies are predominantly minority, meaning that the top 10% of those classes will be predominantly minority as well. See Jayne Noble Suhler, *Educators Say Cash, Not Law, Needed to Diversify Colleges*, DALLAS MORNING NEWS, May 10, 1997, at 1A.

154. See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992).

155. See *id.*

indicate poverty.<sup>156</sup>

If successful, such an approach disparately impacts white applicants. However, disparate impact does not form the basis for an Equal Protection violation.<sup>157</sup> In *Washington v. Davis*, the Court upheld the District of Columbia's use of a verbal skills test for police applicants despite the fact that four times as many blacks as whites failed the test.<sup>158</sup> The Court noted that the verbal skills test was "neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue."<sup>159</sup> Although in some instances a disparate impact could be so practically impossible to explain on non-racial grounds, and although impact is not irrelevant, "[s]tanding alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny."<sup>160</sup> Even a showing that a school is aware that its choice of factors for class-based preferences will have a disparate impact on white applicants may not be sufficient to establish an Equal Protection violation.<sup>161</sup> Thus, in *Personnel Administrator v. Feeney*, the Court upheld an employment preference granted to military veterans despite the fact that 98.2% of then-veterans were male.<sup>162</sup> However, there would be a different result if a plaintiff could show "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."<sup>163</sup>

It is questionable whether an admissions plan focusing on these factors would survive judicial review. At a basic level, it is apparent that the hypothetical school would implement such a plan "because of" and not "in spite of" the effect it would have on minority admissions. In *Feeney*, the fact that most veterans were males did not necessarily mean that Massachusetts had merely come across an extraordinarily effective way of discriminating against women. The state could have deemed veterans worthy of special treatment because of gratitude for their service to the country. However, the use of the above factors does not lend easily to such reasoning. For example, why would hotel maids count as low-income wage earners, but

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156. See KAHLBERG, *THE REMEDY*, *supra* note 9, at 129.

157. See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

158. See *id.* at 237-38.

159. *Id.* at 246.

160. *Id.* at 242 (citation omitted).

161. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

162. See *id.* at 270, 281.

163. *Id.*

not waitresses? Indeed, a primary reason the verbal skills test in *Davis* was upheld was because it assessed communication skills, which were a desired component of the job.<sup>164</sup>

This is where *Hopwood v. Texas*<sup>165</sup> assumes center stage. In *Hopwood*, the Fifth Circuit shocked the academic and legal communities when it struck down the use of race-based affirmative action in the University of Texas' law school, after concluding that "Justice Powell's view in *Bakke* is not binding precedent."<sup>166</sup>

The law school at the University of Texas essentially employed a three-tier admissions policy.<sup>167</sup> For the middle discretionary group, the school used a two-track evaluation system, one for whites and non-preferred minorities, and another for blacks and Latinos.<sup>168</sup> The university defended its race-conscious admissions policy on the ground that it was necessary to achieve racial diversity in the law school, and that *Bakke*, which held diversity was a compelling education interest,<sup>169</sup> was law and controlling "at least in the context of higher education."<sup>170</sup> The Fifth Circuit rejected this argument. First it noted that no other Justice joined Justice Powell's opinion in *Bakke*, and subsequent cases questioned the continued viability of that understanding of *Bakke*.<sup>171</sup> The initial blow was *Wygant v. Jackson Board of Education*<sup>172</sup> in which another fractured Court held that racial preferences in layoffs were not narrowly tailored to a means of achieving racial equality.<sup>173</sup> Next, in *City of Richmond v. J. A. Croson*

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164. See *Davis*, 426 U.S. at 246.

165. 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

166. *Id.* at 944. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a divided court upheld affirmative action plans in general, while striking down the particular "quota" system in effect at the University of California at Davis. See *id.* at 271-72. Four Justices thought benign race-based preferences were absolutely constitutional. See *id.* at 368-69 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Four others—Burger, Stewart, Rehnquist, and Stevens—thought they violated Title VI. See *id.* at 408-09 (Stevens, J., concurring in the judgment in part and dissenting in part). That left Justice Powell in the middle, with his opinion that rigid quotas were unconstitutional, but flexible "plusses" were acceptable. See *id.* at 317-19.

167. See *Hopwood*, 78 F.3d at 935. The three tiers were presumptive admit, presumptive denial, and a middle discretionary group. See *id.*

168. See *id.* at 936-37.

169. See *id.* at 944.

170. *Id.*

171. See *id.*

172. 476 U.S. 267 (1986).

173. See *id.* at 283-84.

Co.,<sup>174</sup> the Court held that all state and municipal-based affirmative action programs should be subjected to strict scrutiny.<sup>175</sup> Moreover, the Court seemed to suggest that, at least for contracting set-asides, the only compelling justification for racial preferences was remedying specifically identified past discrimination.<sup>176</sup>

The Fifth Circuit recognized that *Metro Broadcasting, Inc. v. FCC*<sup>177</sup> held that diversity in broadcasting sufficed as an important federal government interest for intermediate scrutiny;<sup>178</sup> however, *Adarand Constructors, Inc. v. Peña*<sup>179</sup> overruled *Metro Broadcasting* on the use of intermediate scrutiny, holding that federal affirmative action programs would be subjected to strict scrutiny as well.<sup>180</sup> Hence, diversity could not be considered a compelling interest, even under *Metro Broadcasting*.<sup>181</sup>

Although *Hopwood* remains controlling only in the Fifth Circuit, it nevertheless does not bode well for race-conscious programs. At the very minimum it suggests that a targeted program of the sort discussed above may be scrutinized carefully.

### 5. Abandon test scores?

Considering the disparity in test scores between whites and blacks of the same income level, it is apparent that Kahlenberg's proposal for class-based affirmative action would result in very few blacks, rich or poor, benefitting from his preferential treatment.

One solution is to abandon the use of test scores for admissions. However, few commentators, even those favoring racial preferences, have advocated doing so.<sup>182</sup> As Professor Epstein notes, "[i]f one really thinks that these traditional standards are misguided or worse, then they should be abandoned across the board."<sup>183</sup> Yet, current

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174. 488 U.S. 469 (1989).

175. *See id.* at 509.

176. *See id.* at 488.

177. 497 U.S. 547 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

178. *See id.* at 567-68.

179. 515 U.S. 200, 227 (1995).

180. *See id.*

181. *See Hopwood*, 78 F.3d at 944.

182. *But see Sturm & Guinier*, *supra* note 53, at 1012. Similarly, a task force at the University of California recently recommended abandoning the SAT as an admission criteria on the ground that doing so would increase the number of Latinos admitted. *See Randal C. Archibold & Richard Lee Colvman, UC Urged to Drop SATs as Admission Criteria*, L.A. TIMES, Sept. 19, 1997, at A1.

183. Epstein, *supra* note 36, at 39.

racial preferences still use test scores as a basis for differentiating among applicants of the same race.

If a university were to abandon the use of test scores for class-based affirmative action candidates, it should abandon them for regular admissions as well, for the reason noted by Epstein. Although a number of small colleges have done so,<sup>184</sup> the vast majority of major universities still retain the SAT.

Perhaps one obstacle to discarding test scores is a belief that, despite their imperfect correlation<sup>185</sup> to future performance, these tests still add predictive value when combined with high school grades. For example, Professor Klitgaard has noted the following correlation between future performance and prior grades, and prior grades and test scores:

Table 6: Performance Correlation

Setting	Previous Grades Only	Previous Grades & Scores	Increase in Correlation Due to Test Scores
College	0.55 (30%)	0.62 (38%)	26%
Medical School	0.41 (17%)	0.52 (27%)	59%
Law School	0.30 (9%)	0.50 (25%)	178%
Graduate School	0.30 (9%)	0.45 (20%)	122%
Business School	0.25 (6%)	0.40 (16%)	167% <sup>186</sup>

Table 6 shows that the addition of test scores increases the correlation coefficient with respect to future performance. In the case of

184. According to the National Center for Fair & Open Testing, approximately 250 universities do not require the SAT for admission applications. See *Muhlenberg Drops SAT Requirement*, FAIRTEST EXAMINER (National Center for Fair & Open Testing, Cambridge, Mass.), Summer 1996, at 1, 12 (on file with *Loyola of Los Angeles Law Review*).

185. "[I]n highly selective admissions processes, a predictor may have a 'low' correlation coefficient and still be very useful. On the other hand, if two out of every three applicants are being selected, a predictor with [a low correlation coefficient] may be of little value." KLITGAARD, *supra* note 20, at 96.

186. See *id.* at 97. The numbers in parentheses represent the percentage of students with performance correlating with the selection criteria. See *supra* note 62 and accompanying text. The percentage increase in correlation due to test scores is calculated by subtracting the correlation without test scores from the correlation with test scores, then dividing by the correlation without test scores.

law school, the correlation coefficient rises from 0.3 to 0.5, meaning that the percentage of difference in performance attributable to the selection criteria rises from 9% to 25%, representing a 178% increase in correlation. Thus, considering test scores with prior grades can lead to a significant increase in the ability to predict future performance, particularly for graduate schools.

Also, universities may be reluctant to abandon test scores because of the impression that they are not subject to grade inflation. High school grades have been creeping upward. In 1969, only 12.5% of first year high school students earned A averages, whereas 31.5% did so in 1996.<sup>187</sup> College grades "have become so suspect that graduate schools now give more weight to applicants' standardized-test scores and personal recommendations."<sup>188</sup> The director of admissions at the University of California at Berkeley agrees that the SAT serves as an objective counterweight against grade inflation.<sup>189</sup>

If anything, standardized tests appear to be gaining support among secondary school educators.<sup>190</sup> Chicago recently instituted a requirement that students "pass standardized tests in core courses to get credit for each year's work, regardless of grades awarded by teachers."<sup>191</sup> Similarly, California Governor Pete Wilson threatened to veto the 1997-1998 state budget unless legislators agreed to implement standardized testing of all public school students.<sup>192</sup>

#### 6. Class as a second-best alternative for race

In the beginning of this subsection, I noted that proponents of race-based affirmative action viewed class-based affirmative action skeptically, as nothing more than a second-best alternative.<sup>193</sup> In other words, if racial preferences are going to be eliminated altogether, class-based preferences may preserve some modest amount of racial diversity.

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187. See Kenneth R. Weiss, *Survey Finds Record Stress in Class of 2000*, L.A. TIMES, Jan. 13, 1997, at A1.

188. William M. Bulkeley, *Would Tax Plan Further Inflate College Grades?*, WALL ST. J., Apr. 22, 1997, at B1; see also KLITGAARD, *supra* note 20, at 11 (noting grade inflation in the late 1960s and early 1970s).

189. See Elaine Woo, *Debating the Inflation Situation*, L.A. TIMES, Sept. 3, 1997, at B2.

190. See, e.g., Sturm & Guinier, *supra* note 53, at 978-79.

191. Rosalind Rossi, *Board OKs New Tests to Strengthen High Schools*, CHI. SUN TIMES, Mar. 27, 1997, at 14.

192. See Dan Morain & Max Vanci, *Wilson, Legislators Near Deal on School Testing*, L.A. TIMES, Aug. 13, 1997, at A1.

193. See *supra* Part IV.A.

I have already demonstrated that class is a very poor substitute for race.<sup>194</sup> The number of blacks that must be admitted through class-based preferences depends, of course, on how many will be admitted without any preferences. This number, or rather percentage, will vary from school to school, but at highly competitive schools it appears to be about 1%.<sup>195</sup> Thus, to produce a class with 6% blacks, a school would have to admit 5% through a class-based affirmative action program. To do so, it would have to designate approximately 35% of its slots for the program!<sup>196</sup> Such a large designation is extremely unlikely. In 1994, only 20% of the students in the University of California system were admitted through affirmative action.<sup>197</sup> Using this figure for class-based affirmative action, we would expect blacks, in a black-white model, to comprise only about 4% of the class.<sup>198</sup>

It is worth asking whether 4% is better than 0%. Proponents of racial preferences often speak of the concept of "critical mass":

A minority group (especially one that has traditionally been discriminated against) is easily marginalized when it maintains only a small presence in a larger population; its continued presence and survival is in constant jeopardy, requiring outside intervention and assistance to prevent extinction. As the group's presence and level of participation grows, at a particular point the perspective of members of the minority group and the character of relations between minority and majority changes qualitatively.<sup>199</sup>

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194. See *supra* Part IV.A.1-3.

195. See CARTER, *supra* note 68, at 11 (projecting that only 1% of Harvard's entering class would be black); Peter Applebome, *In Shift, U.S. Tells Texas to Obey Court in Barring Bias in College Admissions*, N.Y. TIMES, Apr. 15, 1997, at A9 (noting that approximately less than 1% of the University of Texas law school's offers of admission in the fall of 1997 would go to blacks).

196. I reach this conclusion because roughly 15% of the applicant pool scoring above the mean for lower-income white students will be black. Fifteen percent of 35% is approximately 5%. See *supra* Part IV.A.2.

197. See Cathleen Decker, *Affirmative Action is Under Fire*, L.A. TIMES, Feb. 19, 1995, at A1. Note that this figure represents admissions based on all categories of affirmative action, not just affirmative action for blacks.

198. This approximation is as follows: as noted earlier, about 1% of those admitted without preferences will be black students. Of the 20% admitted through class-based preferences perhaps 15% will be black students based on the earlier analysis. Fifteen percent of 20% is 3%.

199. Henry Etkowitz et al., *The Paradox of Critical Mass for Women in Science*, SCIENCE, Oct. 7, 1994, at 51, 51; see also Brest & Oshige, *supra* note 13, at 856 n.4; Fallon, Jr., *supra* note 5, at 1930; see generally Amar & Katyal, *supra*



Critical mass is the point at which the minority-majority group interactions change.<sup>200</sup> It appears that the critical mass for a minority group is at least 15%,<sup>201</sup> a figure that class-based affirmative action will not come close to producing.<sup>202</sup> Therefore, the few black students who do gain admission will likely feel marginalized.

Moreover, the assumption is that every black student admitted to a particular institution will choose to attend that institution. In reality, this is far from likely to occur, simply because no school will be able to enroll every student who is admitted, as those students will have been admitted to other schools as well.<sup>203</sup> With respect to racial diversity, however, institutions that have minority populations far below critical mass are likely to have difficulty persuading those minority students who are admitted to enroll.

For example, only 11 black students were admitted after the *Hopwood* decision eliminated race-based affirmative action at the University of Texas' law school.<sup>204</sup> Even if all 11 had chosen to attend, they would have comprised just over 2% of the 500 student class,<sup>205</sup> a number far below the critical mass threshold. Perhaps as a result, only 3 of the 11 chose to attend.<sup>206</sup> One of the 11 originally committed to the University of Texas, but after learning that he had been the only one to do so at the time, changed his mind and decided to go to Cornell University.<sup>207</sup> Another black student, currently enrolled at Texas as an undergraduate, expressed regret over his choice and stated that given the expected dearth of black students at Texas, "[he] probably would have gone to a predominantly black or a smaller university."<sup>208</sup>

Similarly, even with a ban on racial preferences in place, the

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note 107, at 1777 ("A critical mass of students of a particular group may be needed so that other students become aware of the group . . .").

200. See Etkowitz, *supra* note 199, at 51.

201. See *id.*

202. See *supra* note 196 and accompanying text.

203. See, e.g., Amy Wallace, *UC Law School Class May Have Only 1 Black*, L.A. TIMES, June 27, 1997, at A1 (noting that UCLA's law school admitted 21 blacks and 74 Latinos, but only 10 blacks and 41 Latinos accepted the offers of admission).

204. See S.C. Gwynne & Julie Grace, *BACK TO THE FUTURE*, TIME, June 2, 1997, at 48, 48.

205. See Peter Applebome, *Affirmative Action Bar Transforms Law School*, N.Y. TIMES, July 2, 1997, at A10.

206. See *id.*

207. See *id.*

208. Peter Applebome, *Universities Report Less Minority Interest After Action to Ban Preferences*, N.Y. TIMES, Mar. 19, 1997, at B12.

University of California at Berkeley's law school—Boalt Hall—admitted 14 black students for the fall 1997 entering class.<sup>209</sup> All 14 opted for other schools because, according to current minority students who spoke with them, “[e]very one wanted to know how many other black students had been admitted. They were concerned they were going to come and be the only [black] person.”<sup>210</sup> Of the 48 Latinos admitted, only 18 chose Berkeley.<sup>211</sup> One student who turned Berkeley down stated that at the “Admitted Students Day” reception, he saw “just a big room full of white people” and that the affirmative action ban definitely affected his decision.<sup>212</sup>

Moreover, minority students may choose not even to *apply* to schools that eliminate race-based preferences. One student's mother forbade her from applying to the University of Texas' law school “because of the Hopwood decision” and because “[s]he didn't think [her daughter] would get fair treatment there.”<sup>213</sup> University of California officials also noted “that some of the best prepared, most competitive students of all ethnicities are opting not to attend UC at all.”<sup>214</sup>

Thus, the anticipated presence, or lack of presence, of minorities at an institution can itself have a significant effect on the yield rate.<sup>215</sup> Based on the experiences of the University of Texas and the University of California, schools that replace race-based affirmative action with class-based affirmative action run a significant risk of losing minority students to schools that have retained traditional affirmative action. The end result of class-based affirmative action would be to depress the yield rate lower—to zero in some instances—thereby further decreasing or eliminating racial diversity.

### B. Meritocratic Principles

The previous subsection demonstrated that class-based affirmative action would be a disaster for those who favor race-based preferences. In this subsection, I argue that those who oppose race-based preferences should also oppose class-based preferences because the

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209. See Amy Wallace, *Fallout From UC Preferences Ban*, L.A. TIMES, June 28, 1997, at A1.

210. *Id.* (alteration in original).

211. *See id.*

212. *Id.*

213. Applebome, *supra* note 208, at B12.

214. Wallace, *supra* note 203, at A1.

215. The yield rate refers to the percentage of admitted students choosing to attend that institution.

arguments commonly advanced against race-based preferences also apply to class-based preferences.

### 1. Overcoming obstacles

Recall that supporters of class-based affirmative action argue that their approach is superior to race-based affirmative action because it targets those who are truly disadvantaged.<sup>216</sup> Essentially, class-based affirmative action proponents focus on who faces greater obstacles to meritorious achievement, rich blacks or poor whites.<sup>217</sup> Their answer, of course, is the latter.

Is this a plausible assumption? Consider that in response to a survey by Professor Andrew Hacker, "white college students regularly report that if they were suddenly to become outwardly black while they inwardly remain who they were, reasonable compensation would be one million dollars a year for life!"<sup>218</sup> It is difficult to imagine that the obstacles faced by being poor, putting aside the relative nature of poverty, are so severe that the typical college student would ask for one million dollars a year to endure them. Indeed, one million dollars alone, in the first year, would seem to erase the obstacle of poverty completely.

I should point out that this one million dollars a year demand is exaggerated. Professor Hacker's question is phrased in such a way that it does not elicit the actual indifference point from the subject. This is because the subject can demand any amount of money in response.<sup>219</sup> The question should be rephrased as follows to determine

216. See *supra* Part III.B.

217. See KAHLBERG, *THE REMEDY*, *supra* note 9, at 44.

218. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 769 (1995) (citing HACKER, *supra* note 154, at 32); see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1759 (1993) ("Whiteness, the characteristic that distinguishes them from blacks, serves as compensation even to those who lack material wealth."); Johnson, Jr., *supra* note 14, at 920 (noting that the "one drop" rule preserves the "trademark" of whiteness).

219. The question Hacker put to students has a fairly detailed background:

You will be visited tonight by an official you have never met. He begins by telling you that he is extremely embarrassed. The organization he represents has made a mistake, something that hardly ever happens.

According to their records . . . you were to have been born black: to another set of parents, far from where you were raised.

However, the rules being what they are, this error must be rectified, and as soon as possible. So at midnight tonight, you will become black. And this will mean not simply a darker skin, but the bodily and facial features associated with African ancestry. However, inside you will be the person you always were. Your knowledge and ideas will remain intact. But outwardly you will not be recogniz-

the proper indifference point:

You stand before two doors, one marked "white" and one marked "black." If you choose the first door, you will remain Caucasian when you step through. If you choose the second door, you will become African-American in physical appearance, though you will remain the same person inwardly. Would you go through the door marked "black" if you were paid \$1000 a year? \$10,000 a year? \$50,000 a year? \$1 million a year?

The point is that one must admit, in the face of such sociological evidence, that rich blacks still face greater obstacles in life than poor whites.<sup>220</sup> Presumably, opponents of racial preferences are unconvinced that the obstacles faced by minorities make them worthy of preferential treatment. Therefore, due to the transitive property,<sup>221</sup> such persons must also conclude that the obstacles faced by the poor are not worthy of preferential treatment.

Kahlenberg's response to the Hacker survey, relegated to a single endnote,<sup>222</sup> is largely unsatisfying. He challenges Hacker's conclusion—that the one million dollars a year is necessary "to buy protections from the discriminations and dangers white people know they would face once they were perceived to be black"<sup>223</sup>—as untested because Hacker failed to ask black students how much they would be willing to pay to become white. Kahlenberg suggests that some blacks might be sufficiently proud of their ethnic heritage that they would *demand* to be paid one million dollars a year to become white: "surely that would not 'prove' that whites are discriminated

able to anyone you now know.

Your visitor emphasizes that being born to the wrong parents was in no way your fault. Consequently, his organization is prepared to offer you some reasonable recompense. Would you, he asks, care to name a sum of money you might consider appropriate? . . . [The] records show you are scheduled to live another fifty years—as a black man or woman in America.

How much financial recompense would you request?

HACKER, *supra* note 154, at 31-32.

220. In 1959 a white novelist named John Howard Griffin essentially performed Hacker's experiment by darkening his skin through oral medications until he looked African-American. In all other respects, he remained as he had been before: diction, social class, education, even his name. His experience, as one might expect, was quite different after his transformation. See JOHN HOWARD GRIFFIN, *BLACK LIKE ME* (1961).

221. The transitive property is a basic axiom of mathematics that if  $A > B$ , and  $B > C$ , then  $A > C$ .

222. See KAHLENBERG, *THE REMEDY*, *supra* note 9, at 296 n.54.

223. HACKER, *supra* note 154, at 32.

against more than blacks."<sup>224</sup>

In answering Hacker's question, Kahlenberg's analysis conflates two separate motivations into one. Unfortunately, Hacker's question does not distinguish between internal, subjective feelings and external, objective evaluations of societal discrimination. White people might demand tremendous amounts of money in response to Hacker's inquiry because they are racists who feel great personal revulsion at the thought of being black, or because they are so attuned to the discrimination that blacks suffer. With Kahlenberg's reverse question, though, it seems apparent that a black student who would demand money to become white would be doing so out of internal feelings, and not a belief that society discriminated against whites.

Moreover, Kahlenberg's thesis may not be true. A black newspaper editor has suggested that if two doors were set up, with the right door "list[ing] all the advantages of being white in America" and the left door "list[ing] all the disadvantages of being black in America" but with a sign reading "AFFIRMATIVE ACTION," "[e]verybody would be taking that door on the right . . . [i]ncluding me."<sup>225</sup>

There is also a second severe problem with the "true obstacle" justification. Even if one remains unconvinced that the obstacles faced by rich blacks do not exceed those faced by poor whites, there remains the additional question of whether *poor* blacks face greater obstacles than poor whites. Since Kahlenberg admits that he believes blacks face greater discrimination than whites,<sup>226</sup> it follows that the playing field would not be leveled unless poor blacks received the *highest* level of preferential treatment. Yet, this conclusion undermines Kahlenberg's original assumption that race-based preferences can be replaced completely by class-based preferences.

## 2. Lowering of standards

One of the strongest arguments against race-based affirmative action is that it is subversive to the notion of a meritocracy. Conservative Senator Jesse Helms contends that affirmative action "flies in the face of the merit-based society [envisioned by] the Founding Fathers."<sup>227</sup> Similarly, Glynn Custred, co-author of California's

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224. KAHLENBERG, *THE REMEDY*, *supra* note 9, at 296 n.54.

225. Norman A. Lockman, *Lockman: 'Let's get color-blind'*, GANNETT NEWS SERVICE, Aug. 17, 1995, at 1, available in 1995 WL 2904062.

226. See KAHLENBERG, *THE REMEDY*, *supra* note 9, at 296 n.54.

227. Woo, *supra* note 22, at A1 (quoting Senator Jesse Helms).

Proposition 209,<sup>228</sup> argues for ““advancement by merit”” and for people to ““get ahead by what they can do.””<sup>229</sup>

It is ironic that affirmative action opponents might support an affirmative action program that is equally subversive to a meritocracy as racial preferences. As noted by Professor Klitgaard, race-based preferences may have an unhealthy trickle-down effect.<sup>230</sup> By lowering their standards for minority applicants, top tier schools are admitting students who would be competitive at lower tier schools.<sup>231</sup> Consequently, the schools in the lower tiers must lower their standards to maintain racial diversity, thereby taking minority students away from the next lower tier.<sup>232</sup> As a result, “[b]lack students at each school might be a standard deviation below the white students and therefore might disproportionately occupy positions at the bottom of the class.”<sup>233</sup>

This trickle-down effect has the potential to plague class-based affirmative action as well. Like racial preferences, Kahlenberg’s class-based affirmative action creates two tracks for admissions, one for “standard” admissions and one for the “poor.” However, even within the poor track, admission is determined on the basis of relative objective merit; among those students who are deemed poor, the ones with the highest test scores and highest grades will be admitted. Thus, the relatively less disadvantaged will be the ones to benefit from the class-based preferences.

For example, suppose that every university implemented Kahlenberg’s proposal for class-based affirmative action with poor being defined, for the sake of simplicity, as family income of less than \$30,000 per year. From Table 2, note that, on average, SAT scores rise with increased family income. Therefore, poor students coming from families with the highest family income, though still under \$30,000 per year, will, as a group, achieve the highest scores among the poor. Therefore, they will be admitted to the top universities based on income level and merit.<sup>234</sup> Because these students are

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228. Proposition 209 sought to eliminate California’s race-and gender-based affirmative action programs in education and public employment. See CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 30 (Nov. 1996).

229. Woo, *supra* note 22, at A1 (quoting Glynn Custred).

230. See KLITGAARD, *supra* note 20, at 175.

231. See *id.* at 174.

232. See *id.* at 175.

233. *Id.*

234. This phenomenon occurs with black high school students who achieve scores that would rank as good, though not spectacular, for white students. For example, a black student who was valedictorian of his class and scored 1200 on

admitted through class-based preferences, their test scores and high school grades suggest that they are less qualified than students admitted without preferences, and will do worse in school. While the first group of economically disadvantaged students will be struggling at the highest tier schools, the next group of disadvantaged students will be admitted to lower tier schools—the level at which the first group of students might have been competitive. This second group of economically disadvantaged students might have been competitive at the third highest tier of schools, but will struggle at the second tier, and so on. Thus, at every level, Kahlenberg's proposal admits socio-economically disadvantaged students to academic settings where their objective qualifications lead to the expectation that they will struggle.

This is the same "lowering of standards" objection to racial preferences, only in a different guise. Assuming that one believes in the ability of test scores and high school grades to predict college performance—and those who argue that affirmative action results in the admission of the less qualified do—Kahlenberg's class-based affirmative action simply lowers standards for a different group of applicants: the poor rather than minorities.

Kahlenberg admits that "[t]here is some truth to this criticism."<sup>235</sup> He responds very briefly by noting that preferences should apply to the working class in addition to the underclass.<sup>236</sup> He also recommends that "recipients of university preferences . . . be required to take a rigorous summer course (to be prepared)."<sup>237</sup> In addition, he suggests that "we should not underestimate the capacity of poor and working-class kids to do well."<sup>238</sup>

Because Kahlenberg does not provide anything more than a thumbnail response to this criticism, it is difficult to analyze it in any detail. However, it is doubtful that one rigorous summer course can offset twelve years—from first grade through high school—of educational disadvantage. If educational disadvantage was so easily

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the SAT received recruiting telephone calls every night from students and admissions officers from multiple Ivy League and elite private universities. See Brian McGrory, *Pathways to College*, BOSTON GLOBE, May 23, 1995, at 1; see also Tom Morganthau, *The University: Losing Ground in the Scramble for Qualified Black Applicants*, NEWSWEEK, Apr. 3, 1995, at 30, 31 (discussing the competition among university admissions officers to attract black students scoring over 1000 on the SAT).

235. KAHLENBERG, *THE REMEDY*, *supra* note 9, at 180.

236. *See id.*

237. *Id.*

238. *Id.*

remedied, one would expect that colleges and graduate schools that currently admit minority students through affirmative action would be implementing such "rigorous summer courses" with great success.<sup>239</sup>

I suggest that it would be highly *unlikely* that a single summer course could remedy so many years of disadvantage. Education builds on prior education. Thus, a weak foundation in early subjects affects the student's ability to learn future concepts. For example, a student who, due to poor facilities, subpar teaching, increased stress, and decreased study time because of poverty, is say, 20% disadvantaged in learning addition will be subsequently disadvantaged in math classes that build upon the rudimentary concepts of addition. Thus, the student is likely to have difficulty mastering multiplication due to the 20% disadvantage and the weak addition foundation. By the time the student moves up to algebra, the 20% disadvantage remains, but is compounded by the weakness in addition and multiplication. To repair the damage caused by the years of disadvantage in one summer would be a Herculean feat.

Moreover, Kahlenberg argues that a socioeconomically disadvantaged student who scores a 1000 on the SAT has more potential than a wealthy student who scores a 1050 with the aid of private tutors.<sup>240</sup> This is admittedly true, but not particularly relevant from the meritocratic perspective currently used to argue against race-based affirmative action.<sup>241</sup> Assuming that a 50 point difference on the SAT is statistically significant in predicting future academic performance,<sup>242</sup> the student from the upper-class family would still be expected to do better than the socioeconomically disadvantaged student, despite the latter's "greater" potential.

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239. Consider the situation of graduate school admissions. Even if Kahlenberg intended to have class-based preferences for graduate programs—it's not clear that he does—there is likely to be a severe shortage of "qualified" applicants from low socioeconomic classes. Over the past 25 years, persons in the poorest quarter and second poorest quarter have had respectively less than 10% and just over 10% chance of graduating from college by age 24. See Karen W. Arenson, *Aid Cuts Put College Beyond Reach of Poorest Students*, N.Y. TIMES, Jan. 27, 1997, at B1.

240. See KAHLENBERG, *THE REMEDY*, *supra* note 9, at 100.

241. It is possible that the wealthy student may have suffered from a learning disability such as dyslexia. However, in general, Kahlenberg's hypothesis is probably valid.

242. In reality, the SAT has an error measurement of about 30 points in either direction. See GEORGE H. HANFORD, *LIFE WITH THE SAT: ASSESSING OUR YOUNG PEOPLE AND OUR TIMES* 33 (1991). Therefore, a 50 point difference is probably not significant.



A meritocratic system of university admissions could be based on individual accomplishment, measured from his or her starting point. However, from a practical standpoint, determining one's starting point is likely to produce a significant margin of error. A formula for converting family income, parental education, geographic neighborhood, and other socioeconomic factors into an equivalent "baseline" SAT score would need to be constructed.<sup>243</sup> Additionally, a consistent application of such a meritocratic theory would actually result in the conclusion that "privileged" students who achieved high SAT scores had "accomplished" very little, since the baseline for all such students is likely to be high, given the statistical breakdown discussed in Table 2.

Finally, Kahlenberg fails to work through the implications of the "accomplishment" theory of merit. Consider his example of a poor student scoring 1000 on the SAT and a rich student scoring 1050. Essentially, Kahlenberg's argument is that a poor student's SAT score of 1000, given relative disadvantage, is a greater feat than the rich student's scoring of 1050, given relative advantage.<sup>244</sup> However, as noted earlier, socioeconomic status is not binary. A middle-class student is advantaged relative to a poor student, but disadvantaged relative to a rich one.<sup>245</sup> Thus, a score of 1050 achieved by a middle-class student would represent a greater accomplishment than a score of 1050 by a rich student, and perhaps a greater feat than the score of 1000 by a poor student. Yet, Kahlenberg's proposal fails to take into account the relative differences in wealth between middle-class and upper-class students.

### 3. Stigma

Another common argument against race-based affirmative action is that it stigmatizes all minorities as unworthy beneficiaries, incapable of succeeding without preferential treatment.<sup>246</sup> This alleged

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243. One possible method is to average the SAT scores for all students within the same categories.

244. See *supra* note 240 and accompanying text.

245. For example, a middle-class student may not have been able to afford private tutoring.

246. See CARTER, *supra* note 68, at 50-52 (discussing how affirmative action adds to the stereotype that blacks are unable to compete with whites in academia); Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1903 (1996) ("[R]ace based affirmative action stamps even its worthiest beneficiaries with an indelible stigma."); Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 42 (1992) ("Under affirmative action the quality that earns us preferential treatment is an implied inferiority."). (quoting *Shelby Steele, The*

stigma affects minorities in two ways, internally and externally. The internal stigma wreaks havoc on the self-confidence of the beneficiaries. Professor Shelby Steele notes:

Under affirmative action the quality that earns us preferential treatment is an implied inferiority . . . . In integrated situations where blacks must compete with whites who may be better prepared, these explanations may quickly wear thin and expose the individual to racial as well as personal self-doubt.<sup>247</sup>

Sociological studies indicate that there is some merit to the contention that preferential treatment damages the self-esteem of those who benefit from it. One survey found that female managers who felt they had been hired or promoted because of their gender "had a low level of commitment to the company and experienced a great deal of conflict over their role in the company."<sup>248</sup>

Another experiment using both male and female student volunteers

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*Content of Our Character: A New Vision of Race in America* 116 (1990)) But see Rupert Barnes Nacoste, *Sources of Stigma: Analyzing the Psychology of Affirmative Action*, 12 LAW & POL'Y 175, 188 (1990) (noting that studies on responses to affirmative action produce dynamic results); Rodney A. Smolla, *The Ghosts of Homer Plessy*, 12 GA. ST. U. L. REV. 1037, 1087 (1996) (discussing how affirmative action emphasizes the value a university places in maintaining a culturally diverse environment).

247. STEELE, *supra* note 246, at 116-17 (1990). Professor Steele, an African-American who opposes race-based affirmative action, has been labeled "conservative." See, e.g., Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1549 (1991) (reviewing DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987), CARTER, *supra* note 68, STEELE, *supra*, and PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991)); Connie Leslie, *You Can't High-Jump if the Bar is Set Low*, NEWSWEEK, Nov. 6, 1995, at 82, 82. For what it is worth, I do not view Professor Steele as distinctly "conservative" or "liberal" on this issue. He is obviously acutely aware of the discrimination suffered by blacks in the United States. However, he sees affirmative action as a crude and imperfect method of addressing the problems faced by minorities. As he notes, it erodes the competitive desire of black students to excel, because they will be admitted even if they are outperformed by other races. See *Adding up the Negatives of Affirmative Action*, STAR TRIBUNE (Minneapolis), Dec. 16, 1996, at 13A ("Blacks can come into Berkeley with 900 [on the SAT]. Why is he going to develop merit? He'd be an idiot to develop merit. I wouldn't.").

248. MCWHIRTER, *supra* note 17, at 66 (citing Thomas Chacko, *Women and Equal Employment Opportunity: Some Unintended Effects*, 67 J. APPLIED PSYCHOL. 119-23 (1982)). In this survey, Chacko polled female managers in the Midwest and asked them if they felt they had been promoted based on merit or gender. He then asked them "about their satisfaction with work and their feelings about their coworkers." *Id.*

found that females who thought they had been selected on the basis of merit tended to rate their own performances higher than those who thought they had been selected because of their gender.<sup>249</sup> Each student was paired with a member of the opposite gender.<sup>250</sup> The person of the opposite gender pretended to be a student but was actually working for the experimenters.<sup>251</sup> The students were told that the experiment involved communication skills.<sup>252</sup> Although each student was designated a "leader," some were told they had been selected based on merit from a previously administered test, while others were told they had been picked so there would be enough women, or men.<sup>253</sup> Each leader was to look at a diagram and describe it to the follower, who was to draw it.<sup>254</sup> The drawings were then "graded" and each student was told that their group had scored either in the top or bottom quarter.<sup>255</sup> In reality the grading was random.<sup>256</sup> The leaders were then asked to rate their own performances and asked whether they wanted to continue as leaders.<sup>257</sup>

Whether they had succeeded or failed, the women who were told they were selected based on gender rated themselves lower than those who were told they were selected based on merit.<sup>258</sup> Moreover, those who were told they had been selected because of gender tended to not want to continue as a leader, while those who thought they were selected because of merit did.<sup>259</sup>

The stigma argument applies to class-based affirmative action as well. Since the beneficiaries of the proposal are in need of preferential treatment, their objective indicators—test scores and grades—are likely to be inferior to those of the regularly admitted students. This differential stigmatizes the beneficiaries of preferences. In addition, it is almost certain the beneficiaries of class-based preferences will know or suspect the standards were lowered for them, given the wide

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249. See *id.* at 67-68 (citing Madeline E. Heilman et al., *Intentionally Favored, Unintentionally Harmed?: Impact of Sex-Based Preferential Selection on Self-Perceptions and Self-Evaluations*, 72 J. APPLIED PSYCHOL. 62-68 (1987)).

250. See *id.*

251. See *id.*

252. See *id.*

253. See *id.*

254. See *id.*

255. See *id.*

256. See *id.*

257. See *id.*

258. See *id.*

259. See *id.* at 68-69.

availability of grade and test score information.<sup>260</sup> Thus, assuming the stigma argument is accurate, we can expect the beneficiaries of class-based preferences will have reason to question their own abilities, much the same way that racial minorities supposedly question themselves.

In addition to the internal stigma, preferences can cause an external stigma—that is, they lower the status of the beneficiaries in the eyes of others, including future decisionmakers. Professor Steele contends that:

[M]uch of the “subtle” discrimination that blacks talk about is often (not always) discrimination against the stigma of questionable competence that affirmative action delivers to blacks. In this sense, preferences scapegoat the very people they seek to help. And it may be that at a certain level employers impose a glass ceiling, but this may not be against the race so much as against the race’s reputation for having advanced by color as much as by competence. Affirmative action makes a glass ceiling virtually necessary as a protection against the corruptions of preferential treatment. This ceiling is the point at which corporations shift the emphasis from color to competency and stop playing the affirmative action game.<sup>261</sup>

Stephen Carter, a black Yale Law School professor, decries this effect of affirmative action as “The Best Black Syndrome,” meaning that “there’s Category A for the smart folks, and Category B for the best blacks.”<sup>262</sup>

Social science experiments validate the existence of this external stigma. In a 1977 experiment, psychologists found that men consistently rated the performance of women lower if they were told that the women had been chosen based on gender, not merit.<sup>263</sup> Other surveys have found that the mere mention of the term “affirmative

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260. See, e.g., JULIA CASS-LIEPMANN, CASS & BIRNBAUM’S GUIDE TO AMERICAN COLLEGES (17th ed. 1996) (SAT scores); EDWARD CUSTARD ET AL., STUDENT ADVANTAGE GUIDE TO THE BEST 310 COLLEGES (1997) (SAT scores); IAN VAN TUYL, STUDENT ACCESS GUIDE TO THE BEST LAW SCHOOLS (1996) (LSAT scores).

261. STEELE, *supra* note, 246, at 120-21.

262. CARTER, *supra* note 68, at 57-58.

263. See MCWHIRTER, *supra* note 17, at 65 (citing Marsha B. Jacobson & Walter Koch, *Women as Leaders: Performance Evaluation as a Function of Method of Leader Selection*, ORGANIZATIONAL BEHAV. AND HUM. PERFORMANCE 149-57 (1977)).

action" increases white hostility toward blacks.<sup>264</sup> For example, in another experiment, whites were asked if they thought blacks were irresponsible, and 26% said yes.<sup>265</sup> But when affirmative action was mentioned first, the number increased to 43%.<sup>266</sup>

This external stigma also has the effect of eventually eliminating any benefit that recipients of preferences receive because "[i]f it is widely known that at least some significant number of blacks have benefitted from affirmative action, employers will rationally discount any particular black candidate's credentials by the amount they think she has benefitted."<sup>267</sup> Affirmative action proponents respond to this stigma argument by arguing that "[t]he solution, however, is not to abandon voluntary affirmative action in hiring, but to extend it to decisions regarding [work projects] and other internal . . . decisions."<sup>268</sup> However, Kahlenberg's proposal does not recognize the use of preferences beyond entry-level hiring or admission decisions; in fact, he argues against the subsequent use of preferences.<sup>269</sup>

Race is generally easily identifiable, while socioeconomic status may not be. Students and employees who do not receive preferential treatment will not have any immediately apparent way of presuming whether a given person is "less qualified." On the other hand, with racial preferences, all minorities are stigmatized because they are easily identifiable as members of a minority group known to receive preferential treatment. However, this lack of external stigma for class-based preferences will last only so long as the information asymmetry exists. If the socioeconomic status of students becomes known, then the external stigma is likely to arise.

Beneficiaries of class-based preferences will be judged on their accomplishments if they choose to keep their socioeconomic status hidden, thus avoiding being stigmatized by classmates and employers. Admittedly, any given individual may excel in a particular environment. However, to the extent that test scores and grades bear a correlation to performance, students who are beneficiaries of class-based preferences begin with a disadvantage relative to their classmates.

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264. See SNIDERMAN & PIAZZA, *supra* note 28, at 102-03.

265. *See id.* at 103.

266. *See id.* at 102-03.

267. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CAL. L. REV. 493, 604 (1996).

268. *Id.* at 605.

269. See KAHLENBERG, *THE REMEDY*, *supra* note 9, at 125.

## 4. Is race different?

Ultimately, Kahlenberg's proposal for shifting affirmative action from race to class rests on the conclusion that class is materially different from race. In my view, Kahlenberg fails to provide enough support for this conclusion. Consider Quentin, Benjy, and Jason, three high school students applying to the same college. Jason is from a middle-class family and scored 1200 on the SAT. Quentin is from an upper-class family and scored 1400 on the SAT. Benjy is from a lower-class family and scored 1000 on the SAT. If Jason loses out to Quentin, Jason will be disappointed, but will have no basis for resentment under traditional "meritocratic" principles. Quentin "earned" his admission spot. However, if Jason loses out to Benjy, Jason would probably feel that Benjy did not "deserve" to get in with lower scores. In this regard, Jason's feelings would probably be the same whether Benjy got in because he came from a poor family or because he was black.<sup>270</sup>

Kahlenberg's response to this point consists solely of the following: "The difference, of course, is that class preferences go to the actual victims of class injury, mooted the whole question of intergenerational justice. In the racial context, this was the type of victim-specificity for which even the Reagan administration approved compensation."<sup>271</sup> This response is unsatisfying because it fails to explain why race is different. Kahlenberg himself concedes that blacks probably face more discrimination than whites. One could argue that a middle-class black student, *relative to Jason*, is an actual victim of race injury. Jason had nothing to do with that race injury, but then, we might ask, what did Jason have to do with Benjy's class injury?

Nor do I believe that Kahlenberg's assertion that "people should generally be judged by factors within their control"<sup>272</sup> is a sufficient justification. Race, of course, is an immutable characteristic. However, many other factors that Kahlenberg considers acceptable, such as intelligence, are largely beyond one's control as well.<sup>273</sup> Academic ability is not within one's control to the extent that there are objective differences in intellectual talent, which may or may not be measurable by IQ tests or the SAT; otherwise, we would be forced to conclude that any person who has not been "disadvantaged," could

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270. See Michael Kinsley, *Class, Not Race: It's a Poor Basis for Affirmative Action*, WASH. POST, Aug. 1, 1991, at A15.

271. KAHLBERG, *THE REMEDY*, *supra* note 9, at 178.

272. *Id.* at 53.

273. *See id.* at 54.

have, with enough effort, discovered the general theory of relativity.

Thus, it is not entirely accurate to say generally that we should not be judged based on factors beyond our control. Rather, the general principle probably is that we should not be judged by *irrelevant* factors beyond our control. After all, no one would suggest that the FBI could not choose from only white agents to infiltrate a white supremacist group.

In any event Kahlenberg avoids addressing the real inquiry, which is whether one's class is an irrelevant factor beyond one's control. As I noted earlier, Kahlenberg provides ample support for the conclusion that there is not a high degree of social mobility.<sup>274</sup> This suggests that class may be *somewhat* immutable.

An analogy to race-based preferences should make this argument clear. Since race is an irrelevant immutable characteristic,<sup>275</sup> the argument against affirmative action is that a black student should not be preferred over a white student because of the black student's race. In other words, a white student should not be unpreferred over a black student because of the white student's race. By analogy, Kahlenberg's class-based affirmative action would result in a middle-class student losing out in admissions to a lower-class student simply because of class. Was that middle-class student's class beyond his or her control? Probably yes.

However, if this is true then Kahlenberg's own criteria suggests that class, as well as race, is presumptively disfavored. Admittedly, there may be something more threatening about race than class. Race has fractured the country more than perhaps any other issue.

The *Taxman v. Board of Education*<sup>276</sup> case is an ideal example of the strong feelings that race-based decisions arouse. In *Taxman*, a local school board faced with budgetary pressure opted to lay off one teacher from the business department at Piscataway High School.<sup>277</sup> Under state law, nontenured teachers were laid off first, followed by tenured teachers in reverse order of seniority.<sup>278</sup> In this case, by coincidence, both candidates for lay off had the same seniority.<sup>279</sup> Rather than use a random selection process, as it would have in all other instances, the school board invoked its affirmative action plan

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

275. See KAHLBERG, *THE REMEDY*, *supra* note 9, at 53.

276. 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997).

277. See *id.* at 1551.

278. See *id.*

279. See *id.*

as the basis for laying off the white teacher.<sup>280</sup> The stated reason was to ensure racial diversity, as the black teacher was the only one in the business department.<sup>281</sup>

The Department of Justice brought the initial Title VII suit in the district court on behalf of the white teacher, Sharon Taxman, who joined the suit as an intervenor.<sup>282</sup> The district court concluded that the affirmative action plan violated Title VII.<sup>283</sup> The board appealed, and at about the same time, the Department of Justice reversed its position and supported the school board.<sup>284</sup> This change in position led to a firestorm of criticism.<sup>285</sup>

When one sorts through the rhetoric in *Taxman*, there is a significant issue raised by Chief Judge Sloviter in her dissent: “[I]t is questionable whether this case is about affirmative action at all, as that term has come to be generally understood—i.e. preference based on race or gender of one deemed ‘less qualified’ over one deemed ‘more qualified.’”<sup>286</sup> Taxman and the other teacher were in fact deemed equally qualified by the board.<sup>287</sup>

The Department of Justice’s revised position was reviled, despite the equal qualifications of Taxman and the other teacher. This suggests that race is so disfavored as a selection criteria that there is no longer broad support for it—if there ever really was—even as nothing more than a final tiebreaker. Based on this, Kahlenberg might respond that race is in fact more threatening than class.

Had the school board decided to lay off the *wealthier* of the two teachers, it is possible that there would have been less of an uproar. The board could have justified this hypothetical choice by noting that the richer teacher would be better able to bear the financial impact of being laid off. However, I doubt that such a decision would strike the

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280. *See id.*

281. *See id.*

282. *See United States v. Board of Educ.*, 832 F. Supp. 836, 837 (D.N.J. 1993).

283. *See id.* at 851.

284. *See David G. Savage & Ronald J. Ostrow, Layoffs Based on Race Only Are Backed by Justice Department*, L.A. TIMES, Sept. 7, 1994, at A4.

285. *See Charles Krauthammer, Dodging and Weaving on Affirmative Action*, WASH. POST, Mar. 3, 1995, at A25. In late 1997 the Justice Department reversed its position again, opting to support Taxman as it did before the District Court although on the narrow ground that this case was not the proper vehicle for revisiting the constitutionality of affirmative action. *See Brief for the United States as Amicus Curiae Supporting Affirmance at \*7, Taxman*, (No. 96-679), 1997 WL 523854 (Aug. 22, 1997).

286. *Taxman*, 91 F.3d at 1567 (Sloviter, C.J., dissenting).

287. *See id.* at 1551.



public as "fair." There seems to be an undeniable appeal to the use of lotteries as the method of choosing between outcomes.<sup>288</sup> Therefore, it is simply not reasonable to conclude that people will accept losing jobs or academic positions due to class more readily than to race.

## V. CONCLUSION

In reviewing Kahlenberg's book I did not intend to criticize him for proposing a class-based affirmative action approach. It is commendable that he has developed a plausible system for factoring in socioeconomic class in academic admissions and entry-level employment positions. Indeed, the comprehensiveness of Kahlenberg's approach suggests that if even it is subject to the flaws detailed above, the entire notion of class-based preferences is something that should be abandoned. We should strive to come up with new ideas for addressing the poverty-race conundrum.

Kahlenberg acknowledges that class-based preferences alone are insufficient to solve the problems of poverty.<sup>289</sup> However, he contends that class-based preferences will make it easier to implement more comprehensive funding for primary and secondary schools.<sup>290</sup> I am dubious of this conclusion. Apparently, thirty years of racial preferences have not made it easier to implement any significant improvement of poverty and crime in inner cities. Instead, I think it is likely that Kahlenberg's class-based affirmative action will sap the political will to take any further steps to address class and race problems, much as racial preferences appear to have done. In the end, despite its superficial appeal, class-based affirmative action is a path that we should not take.

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288. Similarly, in the infamous case of *United States v. Holmes*, the court actually suggested that where there were too many shipwreck survivors to fit into a lifeboat, a lottery would have been the appropriate way to decide who to throw overboard! See *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383); LEO KATZ, *BAD ACTS AND GUILTY MINDS* 20-21 (1987). But see SHIRLEY JACKSON, *The Lottery*, in *THE LOTTERY* 291 (Farrar, Straus & Co. 1949) (depicting a horrifying fictional lottery for determining which villager would be stoned to death).

289. See KAHLENBERG, *THE REMEDY*, *supra* note 9, at 178-79.

290. See *id.* at 180.