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Reforming Affirmative Action for the Future: A Constitutional and Consequentialist Approach

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CLAREMONT McKENNA COLLEGE
REFORMING AFFIRMATIVE ACTION FOR THE FUTURE: A CONSTITUTIONAL
AND CONSEQUENTIALIST APPROACH

SUBMITTED TO
PROFESSOR GEORGE THOMAS

AND
DEAN GREGORY HESS

BY
QUINN CHASAN

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I would like to thank Professor Thomas for his enduring patience with my slow progress, invaluable advice, and innumerable suggestions and edits to guide me throughout this process. I would also like to thank my parents for their never-ending support throughout my entire college experience, with the hope that this thesis shows some return on their investment.

Introduction:

In the Fall of 2012, the Supreme Court re-opened national discussion on affirmative action by accepting *Fisher v. University of Texas*, a case in which the petitioners ask the Court to rule on the constitutionality of race-based preferences used at the University of Texas. The case is the first major examination of affirmative action policy since the Michigan cases in 2003. Throughout the previous decade, the public's opinion of both the constitutional and political aspects of affirmative action has shifted. The general public, while recognizing that inequality still exists in our education system, has become skeptical of affirmative action in its current form. The public's modern conception has arguably been shaped by the previous generation of the Court, who were unsympathetic to aggressive affirmative action policies. However with several new members on the Court, as well as an evolution of research surrounding the modern effects of affirmative action policy, the Court is primed to revisit the issue.

I began this thesis with the intention of defending affirmative action in its current form from a philosophical and constitutional perspective. However, throughout my analysis I was swayed by compelling data-driven evidence that I believe undermine the efficacy of modern affirmative action policy, bringing with it strong moral and constitutional considerations. Over the last several decades, the debate surrounding affirmative action's legitimacy has largely presupposed the importance of the policy in the pursuit of underrepresented minority's upward social and economic mobility. But what if that underlying assumption was patently untrue? Recently, a theory was developed outlining how, in its actual effect, affirmative action may actually be hurting those it is supposed to help. This theory is called the *mismatch hypothesis*, and it

stipulates that “affirmative action in admissions leads to underrepresented minorities being admitted to colleges with entering credentials that are significantly lower than their non-minority counterparts resulting in the minority students not being competitive.”¹ This paper carefully examines the mismatch hypothesis, as well as the constitutional question of what it would mean to change affirmative action policy.

Chapter 1 serves as a lengthy primer on affirmative action policy, detailing the complicated social and political history of affirmative action throughout the last 70 years and bringing the debate to the modern day. In order to fully understand affirmative action today, it is imperative to understand how it has effectively changed throughout Presidents, eras of the Supreme Court, and in the eyes of the public so that any policy change does not have to start from scratch or apply already-failed tactics as a remedy. This understanding will also serve to inform the sort of changes to the policy that will pass constitutional scrutiny to ensure the perpetuity of the system as long as it is necessary. Chapter 2 delves into the political philosophy of affirmative action, looking at works from the Federalist Papers to modern scholars of constitutional and political theory, advocating the necessity of affirmative action policy (at least in some form) if we are to stay true to our civil values as Americans. This interpretation also deals with core constitutional arguments, as constitutional interpretation of the 14th Amendment’s Equal Protection Clause – the part most often cited in lawsuits against affirmative action’s implementation – often rest on top of American political theory, and an analysis of that

¹ Peter Arcidiacono, et al. “Affirmative Action And University Fit: Evidence From Proposition 209.” *National Bureau of Economic Research*. Working Paper. Cambridge, Massachusetts. November 2012.

same theory can illuminate the ‘correct’ theories to apply, or at least inform our understanding of them.

Chapters 3 and 4 cut to the heart of the constitutional challenge to affirmative action policy. I take the stance that while affirmative action is not only constitutional but should be allowed to function more broadly than the Court allows, the reality of the present day situation is that the changes to the policy over the last twenty-odd years have put it on an unsustainable path, both in its effect and in its constitutional survival under the scrutinizing eyes of the Supreme Court. Therefore, Chapter 3 ends with arguing for the necessity of change from a purely race-based system to a class-based system with a focus on race when possible. Chapter 4 continues this class-based line of reasoning, arguing its constitutional merits and outlining how a class-based system of affirmative action policy would pass legal muster where a race-based system would not. I also take the stance that despite the ideological qualms that accompany such a claim, it is vital to reinvigorate the effectiveness that affirmative action policy saw in its early days. I would rather see goals of the program achieved through sustainable means than unsustainable – yet noble – means that scuttle effective change.

Chapter 5 deals with the core argument of the mismatch hypothesis, weighing the arguments for and against the theory, and finally advocating in favor of the hypothesis, addressing the claims against it one by one. Chapter 5 is data-driven, with the Part I creating a narrative through piecemeal juxtapositions of a plethora of studies on affirmative action in education from World Bank studies in Kenya to top-tier American law-school analysis. Part II looks at California’s Proposition 209 as a comprehensive case study in affirmative action policy’s effectiveness when race-based preferences are

dropped in lieu of more class-based ones, as the modern policy essentially centers on higher education. In this part especially, the case for a class-based system is given significant empirical backing. Finally, the conclusion ties together Chapters 1-5 and lays out this paper's overall claim.

In my analysis of affirmative action policy, I began the search without having formed any opinion whatsoever. The topic was interesting to me, and after reading a mass of news editorials and their op-eds, I decided to take up the argument for myself. Other than the fact that I am a student, I have no stake in affirmative action policy. This paper relies primarily on the foremost half-dozen or so notable mismatch theory scholars, a close reading of an innumerable number of Supreme Court opinions, affirmative action-related studies from higher education academics and policy institutes, and how historical executive actions in particular have shaped the past, present, and now the future of affirmative action policy. So, it is with the past that we begin.

Chapter 1: A Historical Primer on Affirmative Action

Part I: The Creation & Peak of Affirmative Action

In 1935, New York Senator Robert Wagner sponsored the National Labor Relations Act. It was a landmark piece of legislation that allowed workers to organize unions, collectively bargain, and prevent ‘unfair labor practices.’ The Wagner Act, as it came to be called, also gave upper management the ability to take “affirmative action” to promote victims of discrimination to a level that they estimated the workers would reach had that discrimination not hindered their advancement.² Six years later, on June 18th, 1941 Roosevelt signed Executive Order 8802 at the behest Black community leaders who threatened to march on Washington with over a hundred thousand Black followers, causing inevitable clashes on the steps of the White House and Capitol building.³ Roosevelt’s executive order declared that there would henceforth be “no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin,” adding that it was the primary duty of government to provide for “the full and equitable participation of all workers” in its society.⁴ The executive order was eventually expanded two years later using Presidential wartime powers to eliminate discrimination in a broad array of war industries (including union membership) while simultaneously authorizing the formation of the Fair Employment Practices Committee (FEPC) to enforce these provisions.

² National Labor Relations Act. Senator Robert Wagner. 29 U.S.C. §§ 151-169. 1935.

³ Terry H. Anderson. *The Pursuit of Fairness: A History of Affirmative Action*. Oxford: Oxford UP, 2004.

⁴ Exec. Order No. 8802, 3 C.F.R. 1941.

Only a short time after the term ‘affirmative action’ was coined, the conversation surrounding its use became the center of national attention, and it would not be the only time. *The Crisis* magazine, an NAACP-affiliated publication, asked the practical question of “whether there is a great deal of difference between the code for Negroes under Hitler and the code for Negroes under the United States of America?” The point was well taken, and was not restricted to the Black community. *The Nation* magazine saw the hypocrisy as well, editorializing that “Americans infected with the spirit of fascism have attacked our fighting forces in the rear. We cannot fight fascism abroad while turning a blind eye to fascism at home,” speaking to the disparaging treatment of Black Americans during WWII.⁵ The time was ripe for civil rights leaders to aggressively push these policies from the national discussion into codified law. The United States was lending incredible financial and personnel aid to the Allied powers during WWII for (at least to many) largely moral reasons against an openly bigoted and racist Axis, and it would be too ironic and hypocritical if the same issues were not addressed domestically.

Though they were implemented with varying levels of effectiveness, codified changes to race relations came from all branches of government. In the Court, an 8-1 majority ruled in *Smith v. Allwright* that all-white primaries were unconstitutional, even though a private body held the primary. Writing for the majority, Justice Stanley Reed stated that a political party could not be fully private, as it was an agent to elect state officials and therefore the system in place in Texas (and in all other similarly situated

⁵ Anderson, Terry H. *The Pursuit of Fairness*. p. 26.

states) violated the 15th amendment.⁶ In the Senate, New Mexico Senator Chavez introduced and passed a bill that took the wartime-only Fair Employment Practices Commission (FEPC) and made it permanent. Historian Robert Bailey said that this bill became a

“symbol for the two philosophies of government and life. Chavez represented liberals who felt the federal government could, and should, legislate to end inequality and correct social injustice. Bilbo represented conservatives who felt that Jim Crow was a fact of life and that the federal government should not legislate against local traditions.”⁷

The ideological clash we have come to appreciate as a common one today was even more vitriolic and partisan than any of our modern disputes, as Chavez and his liberal base had to pit this message against southern Senators, led by Mississippi Senator Bilbo, who derided the FEPC for attempting to “break down the color line to aid the day of miscegenation and mongrelization between the races,” and accused his colleagues of “sacrificing their white blood and white race.”⁸

Despite its vigilance, the opposition voices to the FEPC and other established equalization bodies were drowned out by the war experience of Black soldiers and white America’s experience with them and the war itself. With Hitler defeated, the idea of racial superiority was extraordinarily stunted, with the empathy of Americans who saw publicized photography of emaciated Jews and other concentration camp prisoners abroad now turned against Jim Crow laws at home.

⁶ *Smith v. Allwright*. 321 U.S. 649 (1944). Iconically, the case was argued by Thurgood Marshall, who a little over a decade later would become the Court’s first Black justice.

⁷ Robert Bailey. “Theodore G. Bilbo and the Fair Employment Practices Controversy: A Southern Senator’s Reaction to a Changing World.” *Journal of Mississippi History*. P. 42 (February 1980).

⁸ Anderson, Terry H. *The Pursuit of Fairness*. p. 36.

The Truman administration took affirmative action to the next level. Soon after he was elected, President Truman became the first of his office to address the NAACP, saying in front of the Lincoln Memorial that America had changed, and now had to “guarantee freedom and equality to all our citizens...each man must be guaranteed equality of opportunity.”⁹ Holding true to his work, on July 26th, 1948, President Truman expanded Roosevelt’s executive actions to pertain to all parts of the federal government, further directing the military to pursue the “equality of treatment and opportunity without regard to race, color, religion, or national origin” as well, and established the President’s Committee on Equality of Treatment and Opportunity in the Armed services (commonly called the Fahy Committee) to ensure that it was done.¹⁰

World War II served the spark that Black groups needed to achieve significant steps in achieving equal opportunity that had seemed impossible only a few decades earlier. In *Plessy v. Ferguson*, Justice Brown’s majority opinion had a piece in it that scolded the government’s hand in social affairs, saying that civil laws were “powerless to eradicate social instincts or to abolish distinctions based upon physical differences.”¹¹ While scholars have argued whether it was the World War that changed this ‘social instinct,’ or it was some sort of government intervention, or simply the evolution of moral thought largely separate from either, polls found a significant change in the public’s ideology favoring these government actions. Throughout the development of the mid-20th century, public opinion changed from viewing government as simply a protector of negative rights to an enforcer of positive ones, but in years after the war the measures of

⁹ *Id.* p. 44.

¹⁰ Executive Order 9981. *Harry S. Truman Library and Museum*. July 26th, 1948.

¹¹ *Plessy v. Ferguson*. 163 U.S. 537. 1896.

the Truman administration served more as tokens than effective tools of social change. Half a decade later in 1955, *Time* magazine praised the “flowering of American capitalism” while lamenting the severe disconnect in this wealth explosion across racial lines. Employers still openly discriminated against minorities of all kinds and poverty was rampant. In response, across the next decade thirteen state commissions arose under the model of the FECP, with New York receiving over 9,000 complaints in its first 20 years and finding over 20% of those cases deserving of some level of state action.¹² While the FECP itself was relatively ineffective, overseeing over 19,400 complaints with 99.7% of them never seeing trial, the State commissions were steadily improving.¹³ With Congress unwilling to intervene and the federal government floundering in its mission, President Kennedy issued yet another Executive Order (10925) which mandated government to:

“Consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination...the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”¹⁴

While very similar to Truman’s executive order, this was the first that explicitly mentioned race and affirmative action together, as opposed to simple nondiscrimination that the previous orders outlined. President Kennedy actually superseded this executive order with another one¹⁵ later in 1963 that made affirmative action the official policy of the United States government, and extended its reach from pure federal employment to “grants, loans and other forms of financial assistance” to state and local governments, as

¹² Anderson, Terry H. *The Pursuit of Fairness*. p. 55.

¹³ *Id.* p. 56.

¹⁴ Executive Order 10925. *EEOC Historical Documents*. March 6, 1961.

¹⁵ Executive Order 11114. *EEOC Historical Documents*. June 22, 1963.

well as to most unions and employers, mandating nondiscrimination in their hiring practices in regard to race, creed, color, and national origin as well as folding affirmative action into US policy.¹⁶ For President Kennedy, this was as far as he was willing to go on affirmative action policies, saying that assigning quotas (as had begun to be discussed at the time) was “a mistake,” thinking that in doing so, the United States would “get into a good deal of trouble.”¹⁷

While Kennedy may have been uncomfortable going any further, his successor was not. With the administration of President Lyndon Johnson came the idea of racial ‘preferences’ to serve as a catalyst for improved race relations after the civil rights acts were passed, using Title II and Title VII of the 1964 civil rights act as a basis for his system. The idea of preferences for a specific class of citizens was not a new one. The 1789 version of the constitution favored the gentry class based solely on race and status. Later, after slavery ended Congress passed the Freedman’s bureau act to help former slaves receive land, education, funding, and support similar to Medicaid. The Social Security act of 1935 was a clear, nationalized, economic preference to help the poor more than the wealthy. In 1944, the G.I. bill of rights applied only to World War II veterans, but not necessarily to civilians at all.¹⁸ These acts outline federally discriminatory acts hardly contested in their time, and President Johnson used them as legal basis for institutionalized racial preferences. Famously, he gave a speech to Howard University in June of 1965 that outlined the government’s overt position on affirmative action policy:

¹⁶ Anderson, Terry H. *The Pursuit of Fairness*. p. 72.

¹⁷ *Id.* p. 78.

¹⁸ *Id.* p. 80.

“You do not wipe away the scars of the centuries by saying, “Now you are free to go where you want, and do as you desire... You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “You are free to compete with all the others.” And still justly believe you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through the gates. This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.”¹⁹

Before his term ended, President Johnson reinforced these powerful words with the establishment of the Equal Employment Opportunity Commission (EEOC). The EEOC used a carrot-and-stick approach in conjunction with the Department of Justice to prosecute unions and employers who blocked Black members and employees, while simultaneously offering federal grants for the specific recruitment and training of potential Black employees.²⁰ The Lyndon Johnson presidency saw the peak of a new wave of affirmative action policies that were ardently enforced. Over the course of the subsequent several decades, the United States saw a slow drawback of the various affirmative action policies put in place from 1941 through 1970, but have not been able to completely overturn the policy. Though preferences had been used sparingly throughout history to aid one group or another, the United States had never attempted such a comprehensive and widespread approach to any racial issue. Affirmative action was an experiment, and interestingly while there was relatively broad consensus that the policy was effectively working, it was on constitutional and ideological merits that the policy saw a steady decline in its scope throughout the next several decades.

¹⁹ President Lyndon Johnson. “The United States Since 1940 – The Rise and Fall of New Deal Liberalism.” Howard University Address. June, 1965.

²⁰ Anderson, Terry H. *The Pursuit of Fairness*. p. 103.

Part II: Chipping Away at Change

In the early 1970s, numerous lawsuits began to spring up surrounding the constitutionality of affirmative action's forced governmental implementation in many areas, and the allowance of the use of the 'quota' system in others.²¹ While the Nixon administration, which was in power at the time, did not overtly condone these lawsuits, they took a rather laissez-faire approach compared to the previous several administrations. In his private memoirs from 1972, Nixon wrote that while he supported "numerical goals...as tools to measure progress which remedies the effect of past discrimination," he did not believe that these remedies should be "applied in such a fashion as to, in fact, result in the imposition of quotas."²² Despite these personal misgivings, the Nixon administration was relatively quiet on the affirmative action question, maintaining the status quo throughout much of the 1970s. In fact, a director of personnel management at the large defense contractor Lockheed, which was one of the first companies mandated to use and sanctioned for not properly implementing affirmative action said during the same time period, "face it, affirmative action as done its job. Without government surveillance we certainly wouldn't have gone this much out of our way."²³ Studies showed that "substantial employment gains" in women and minority groups, especially in the 77,000 businesses and unions that held federal government

²¹ The quota system mandated that a certain number of seats or positions within a school or company under the purview of affirmative action policy had to be set-aside for underrepresented racial groups, the definition of which changed slightly from industry to industry or state to state. See *Id.* p. 126 for a more in-depth description of these cases.

²² Hugh David Graham. "Richard Nixon and Civil Rights: Explaining an Enigma." *Presidential Studies Quarterly*, Vol. 26, No. 1. p. 422-46.

²³ "Lockheed." *Businessweek*, January 27th, 1975.

contracts. Furthermore, there was double the percentage of black union workers and apprentices for skilled jobs, and black officials, managers, professionals, and skilled workers saw a 70% increase during this time. Gains were similarly seen in employment at universities, graduate schools, and high-skilled professions. The effect on white women's opportunities was often even more dramatic than those of minority groups.²⁴ President Nixon – always a shrewd politician focused always on popular opinion – undoubtedly saw these figures and let affirmative action run its course.

The 'Reagan Revolution' saw a change from the tacit approval of the Nixon Administration to an intentional federal push to disassemble the mass of affirmative action policies and social institutions constructed in the previous four decades. While the new administration's stance was clear from the outset, some wondered how effective any president could be. *Fortune* magazine wrote that while President Reagan was trying to find a means to phase out the policy, that it was be very difficult to do as "affirmative action is here to stay...[it] has a lot of momentum, and it is plainly easier to make speeches assailing preference than it is to slow down that locomotive."²⁵ However, President Reagan came into office just as national conversations about affirmative action policies were beginning to flare, as the Supreme Court had just handed down their opinion in *Regents of California v. Bakke* a little over a year earlier, which played a significant part in Reagan's campaign.

Following the precedent set by previous administrations, the Medical School at the University of California at Davis had a policy of setting aside 16 of their 100 seats for

²⁴ Anderson, Terry H. *The Pursuit of Fairness*. p. 159.

²⁵ Daniel Seligman. *Fortune* magazine Op-Ed on affirmative action. April 19th, 1982. In: Anderson, Terry H. *The Pursuit of Fairness*. p. 175.

their annual incoming freshman class for “Blacks, Chicanos, Asians and American Indian” applicants, further establishing a separate admissions process for those places. The Court was not wholly persuaded by the argument put forth by UC system that “diversity in the classroom” justified intentional discriminatory action in their admissions process, and four justices voted to rule their actions unconstitutional. However, the Court was extremely divided, with five justices joining the majority opinion generally regarding the admissions practice unconstitutional on the basis of the 14th amendment’s equal protection clause (but not on the specific grounds the Justice Powell put forth²⁶), and four justices seeing the admissions process as illegal under Title VI of the Civil Rights Act.²⁷ While these questions would be answered several decades later by the Court, the *Bakke* case created confusion as to what the binding precedent was, an opportunity which the Reagan Administration promptly pounced on.

Arguing that quota-based affirmative action policies created “a new class of victims” by denying majority groups equal rights, President Reagan quickly directed the U.S. Commission on Civil Rights to cut EEOC and OFCCP staffs by 12% and 34% respectively. Furthermore, the EEOC no longer sought out to remedy systemic cases of workplace discrimination, but instead handled cases of individual acts of discrimination, which decreased petitions for the former and increased petitions for the latter, which were harder to prove.²⁸ While a survey of 120 of the largest corporations in the United States found that more than 95% of their CEOs agreed to the benefits of affirmative action and

²⁶ Which said that race could be used as a plus-factor but not use ex-ante set asides, a point that no other justice joined in their opinion.

²⁷ *Regents of the University of California v. Bakke*. 438 U.S. 265 (1978).

²⁸ Federal Enforcement of Equal Employment Requirements, p. 20-24. In: Anderson, Terry H. *The Pursuit of Fairness*. p. 178.

would nevertheless continue to use “numerical objectives to track the progress of women and minorities”²⁹ in the workplace, the Reagan administration refused to yield, and began to shape the future of affirmative action policy in the Court with the successful nominations of Chief Justice William Rehnquist, Sandra Day O’Conner, Antonin Scalia, and Anthony Kennedy after the failed nomination of Robert Bork.

Reagan’s appointments to the Supreme Court spent the next decade narrowly shaping affirmative action policy, and were especially busy with affirmative action cases beginning in the late 1980s. In the *City of Richmond v. J.A. Croson*, the Court was asked to examine the city of Richmond’s municipal quota policy of favoring minority-run businesses for government contracts when they saw less than 30% of the contract work being done without minority leadership. Writing for the majority, Justice O’Connor said that the 14th equal protection clause protects *all* citizens, and that the “only legitimate reason to use racial preference is to remedy past discrimination,” chastising the City of Richmond for putting forth “no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimos, or Aleut persons” in the city’s construction industry.³⁰ This ruling led to a series of cases challenging other affirmative action policies, bringing a slew of reverse-discrimination cases to the Court. In *Martin v. Wilks*, the Court ruled that white firefighters in Jefferson County, Alabama should not have been excluded ex-ante from the hiring process that was aimed at purely black firefighters to promote racial balancing. In *Patterson v. McLean Credit Union*, the Court upheld an 1866 law that allowed Brenda Patterson, a black woman, to sue and collect damages for general

²⁹ *Id.* p. 187.

³⁰ *City of Richmond v. J.A. Croson*. 488 U.S. 469. (1989).

harassment, but not for racial harassment, reversing the 1976 case of *Runyon v. McCrary*.³¹ Along the same lines, in *Wards Cove Packing Co. v. Antonio*, fifteen Filipino and Native American workers at a salmon cannery claimed that the businesses segregated mess halls and bunkhouses kept them on cannery lines and away from possible promotions, arguing a significant ‘disparate impact’ treatment of racial discrimination that had to be undone as per Title VII of the Civil Rights Act of 1964. While it was a 5-4 split decision, Justice White said in his majority opinion that “if the absence of minorities holding such skilled positions is due to a dearth [of qualified applicants, as it seems here],” then the company’s “selection methods or employment practices cannot be said to have had a ‘disparate impact’ on minorities.”³² In true legacy of the Reagan administration, all of his appointees lined up against the workers claim.

The relatively quick change in the way the executive and judicial branches thought about affirmative action created a confusing national atmosphere. People were generally in favor of affirmative action policies, but were uncomfortable with the quota system. A pollster who had worked on the affirmative action question for much of the 1980s and 1990s mused that his work showed that “if civil rights is defined as quotas, it’s a losing hand. If it’s defined as protections against discrimination and efforts to promote opportunity, then it will remain a mainstream value in American life,” further noting that a 1992 poll found that while 10% of the American public were in favor of quotas, only

³¹ *Patterson v. McLean Credit Union*. 491 U.S. 164 (1989). And *Runyon v. McCrary*. 427 U.S. 160 (1976).

³² *Wards Cove Packing Co. v. Antonio*. 490 U.S. 642 (1989).

10% were against civil rights policies generally.³³ The political tactics of the Democratic Party captured the ideological irony that defined the 1990s. Trying to take back control of the national government, Democrats tread a fine line. They supported diversity but were careful not to overtly endorse affirmative action policies as they stood at the time, which proved to be a highly successful tactic. By 1995, 70% of the Fortune 50 companies had institutionalized diversity programs, with another 12% of them actively putting them in place. The government would give out over 50,000 permanent residency visas a year in a diversity-based lottery focused on education, work experience, and country of origin, bringing in immigrants from over 150 countries.³⁴

By this time, the President Clinton had been sworn into the oval office and, like Nixon, essentially aligned his opinion on affirmative action with the public. In a speech in 1994 he rebuffed “unjustified prejudice of...the unqualified over [the] qualified...” leading him to fight against “numerical quotas...[and] reverse discrimination,” while simultaneously noting that while “affirmative action hasn’t always been perfect, and it should not go on forever...the evidence suggests, indeed screams, that that day has not come. The job of ending discrimination in this country is not over.” In that same speech, Clinton coined the term that would become synonymous with his administration – “mend it, don’t end it.” In line with this rhetoric, he directed all government offices under his authority to subject affirmative action policies to a four-step test. Essentially, the various programs were acceptable as long as they did not include quotas, reverse discrimination,

³³ Howard Schuman, et al. “Racial Attitudes in America: Trends and Interpretations.” *Harvard University Press*. 1997. In: Anderson, Terry H. *The Pursuit of Fairness*. p. 216.

³⁴ *Id.* p. 221.

preferences for unqualified individuals, and could only be continued as long as there was a need for the policy generally.³⁵

Meanwhile, the Supreme Court continued to strike down affirmative action cases, sometimes speaking loudest when they did not take cases at all. That was the case in *Hopwood v. Texas*, the first case to overturn a schools admissions policy since *Bakke* nearly twenty years earlier. Cheryl Hopwood, after being rejected from the University of Texas law school, found that she had much stronger academic credentials than several minority peers. She sued for discrimination on 14th amendment equal protection grounds and the case reached the Fifth Circuit Court of Appeals. When the University was found to be using different admissions standards for different races, several more white applicants joined the case and Hopwood prevailed. However, the Supreme Court decided not to take the case, as by the time it reached them the University of Texas had changed the admissions policy for their law school. Oddly, the effect of *Hopwood v. Texas*, as it did not reach the Supreme Court, was to bind universities only within the Fifth Circuits jurisdiction – that is to say to bind admissions practices in Louisiana, Mississippi, and Texas.³⁶ The law of the land regarding affirmative action policy was becoming increasingly confusing with each notable case. So far, the modern court had chipped away at affirmative action policy by handing down opinions saying what was *not* constitutional in a piecemeal case-by-case fashion, but had not directly addressed the question of what *was* constitutionally valid. In rejecting to hear *Hopwood*, the Court created more confusion as different parts of the country had to adhere to fairly disparate

³⁵ President Bill Clinton. "Clinton in California." *New York Times*. April 9th, 1994. In: *Id.* p. 244.

³⁶ *Hopwood v. Texas*. 78 F.3d 932 (5th Circuit. 1998).

laws regarding just how far affirmative action could go. While they had avoided a comprehensive ruling for the better part of a decade, the Court was setting the stage for a landmark opinion.

Over the course of the next several years, dichotomous reactions to the Court's silence on the affirmative action continued to build. The University of Texas system put in a program that gave automatic admission to any high school student in the top 10% of their class. The UC system put in place a similar policy but only for the top 4% of their student body, but it excluded Berkley and UCLA. On the other hand, the University of Virginia stopped using their point-based system, making race a vague and qualitative factor instead of a hard quantitative one, and the University of Massachusetts simply reduced the impact of race and ethnicity in their admissions decisions altogether. Meanwhile, many organizations, government agencies, and schools were adding sexual orientation to their policy. Culturally, the United States was seeing what experts called a racial 'blurring' as ethnicities mixed across generations and became less distinct from one another.³⁷ As one of the catalysts of this national confusion, the Court needed an opportunity to bring solidity to the affirmative action question, which they got in the Michigan cases – *Grutter v. Bollinger* and *Gratz v. Bollinger*.

The two cases, heard together, concerned the admissions criterion at the University of Michigan and its law school. In *Gratz v. Bollinger* Jennifer Gratz and Patrick Hamacher, both white, were rejected from the undergraduate college of Literature, Science and the Arts at the University of Michigan. The school had a policy of

³⁷ Anderson, Terry H. *The Pursuit of Fairness*. p. 257-60.

using a 150-point scale to rank applicant, with 100 points being needed to guarantee ones admission to the University. Gratz and Hammacher sued together when they discovered that the University gave underrepresented minority groups an automatic 20-point bonus in their internal scale, almost twice as much as a perfect SAT or ACT score would receive, and six times better than an ‘outstanding essay.’ The Court was not favorable to this policy in oral arguments, but was relatively sympathetic to the underlying argument for the policy, with Justice Ginsburg saying that the “constitution doesn’t implicate” the underlying qualitative standards by which preferences are granted, just *how* they were implemented in this case. In his majority opinion, Chief Justice Rehnquist clarified the Court’s opinion for the first time, saying that “all racial classification... must be strictly scrutinized” and that race could be a “‘plus’ in an application” but it had to be “flexible enough to consider all pertinent points of diversity,” such as artistic ability, athletic ability, personality, etc. Using this framework, the Court held the undergraduate admissions program at the University of Michigan unconstitutional.³⁸

Despite this clarification, the more impactful opinion came with the *Grutter* case, heard concurrently with *Gratz* as mentioned above. Unlike the undergraduate system, the law school used a qualitative system of racial preferences in their admissions practices. Barbara Grutter, a well-qualified applicant to the law school was denied admission and sued on 14th Amendment equal protection clause, as well as under Title VI of the Civil Rights Act of 1964, believing that she was denied admission based on her (white) race. The law schools explicit policy was that they used race as a ‘predominant’ factor in admissions decisions, and in their defense in oral arguments the law school argued that

³⁸ *Gratz v. Bollinger*. 539 U.S. 244 (2003).

this policy was in line with other decisions, citing a compelling state interest to pursue this policy until they achieved a ‘critical mass’ of students from minority groups.³⁹ In *Gratz*, this ‘critical mass’ argument was brought up as well, which Kolbo – arguing for the petitioners – called “too amorphous, too ill-defined, [and] too indefinite to be a basis for racial preference” in his closing arguments. When pressed on this point, Payton – arguing on behalf of the University of Michigan – argued that the question brought with it “a false precision that everybody wants...and I don’t think it exactly works like that...we have a lot of experience as...an educational institution about what has happened on our campus and what has worked.”⁴⁰ Similar arguments were made in *Grutter*, and the Court agreed in a close 5-4 split with the law school’s interpretation. Justice O’Connor, writing for the majority, said that the ‘critical mass’ policy was not the same as the quota system used by the undergraduate college, and that all evidence pointed to the law school using a “highly individualistic [and] holistic review” of each applicant with “no mechanical, predetermined diversity bonuses based on race or ethnicity.” But the most stirring and controversial part of her opinion was in addressing the timeline of affirmative action policy, as theoretically it would not always be necessary if equality of opportunity were to make significant gains along ethnic and racial lines:

“It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity...since that time, the number of minority applicant with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”⁴¹

³⁹ *Grutter v. Bollinger*. 539 U.S. 306 (2003).

⁴⁰ *Gratz v. Bollinger*. 539 U.S. 244 (2003).

⁴¹ *Grutter v. Bollinger*. 539 U.S. 306 (2003).

While Justice O'Connor's opinion did not solve the affirmative action question indefinitely, it gave a solid opinion from the Court for the rest of the country to follow, importantly finding that diversity in higher education *was* definitely a compelling state interest that passed strict scrutiny. Therefore, a narrowly tailored and holistic approach to race and ethnicity in college admissions practices following the University of Michigan law school system would inevitably hold up against all complaints. For the time being, the affirmative action question seemed to be settled, and despite the complicated case of *Parents Involved in Community Schools v. Seattle School District No. 1* in 1997⁴², affirmative action policy has essentially stayed the same and gone unchallenged for nearly a decade.

That is to say, until the Fall of 2012, when Abigail Fisher brought suit against the University of Texas for violating the precedent set out in the Michigan cases in *Fisher v. University of Texas*. Throughout the previous decade, the research on affirmative action policy has developed with more hard data revealing some unsettling truths about the policy, necessitating another Supreme Court intervention. This research has drawn out proofs supporting a part of Justice Thomas' dissent in *Grutter*, where he pointed to Proposition 209 that barred the UC school system from granting preferential treatment on

⁴² *Parents v. Community Schools* was a case where the policy of assigning students to school districts based in part on race for the purpose of desegregation and integration in Seattle, WA and Louisville, KY were challenged. The Court handed down a 4-1-4 opinion striking down the policies, finding them not narrowly tailored enough to stay standing. However, Justice Roberts' majority opinion still upheld the core opinion in the Michigan cases stating that racial diversity continued to be a compelling state interest, and therefore ruling narrowly in this case. *Parents Involved in Community Schools v. Seattle School District No. 1*. 551 U.S. 701 (2007).

the basis of race, but saw diversity and academic achievements nonetheless, a topic which will be discussed in significant detail in Chapter 5.

As mentioned above, in the confusion of affirmative action politics post-*Hopwood* but pre-*Grutter* and *Gratz*, the University of Texas put in place a plan that gave automatic admission to one of the UT-system schools to any student in the top 10% of their graduating high school class. While this policy was implemented with racial benefits specifically in mind, as many students in the top 10% of predominantly Black or Latino schools often times could not compete with better, predominantly White public high schools, it was applied to all students regardless of race. The policy was extremely successful, dramatically increasing the number of underrepresented minorities in the UT system. However, the students who attended UT systems schools as automatic admits from this top 10% plan take up around 81% of the annual incoming student body. For the rest of the incoming class, the University of Texas at Austin also uses the qualitative race-based metrics outlined in the Michigan cases to promote diversity within their student body. Abigail Fisher, who was rejected from the University of Texas, sued on 14th Amendment Equal Protection grounds, saying that the top 10% plan had ‘done its job’ and that the seemingly ‘extra’ help that underrepresented minorities get in the few remaining spots in the UT system goes beyond *Grutter*’s constitutional understanding. Fisher’s case made similar arguments to the petitioners in the Michigan cases, saying that the UT school system admissions policy was “tailoring to the unknown,” calling for more concrete metrics, an argument that Justice Scalia was sympathetic to, saying that the critical mass doctrine was misleading because “it assumes numbers. Call it [instead] a

cloud, or something.”⁴³ Fisher’s case did not necessarily call for *Grutter* to be overturned, but it presented arguments very similar to those used against the University of Michigan in the original oral arguments. The case is made even more interesting due to the fact that Justice Kagan recused herself from hearing the case, as she was serving as Solicitor General making arguments on behalf of this specific case before she was nominated and eventually confirmed to the Supreme Court.

As the introduction discussed, over the course of the last few years there has been another question raised – is affirmative action actually effective? As noted in the introduction, the debate of the last several decades has largely presupposed the importance of affirmative action policy in the pursuit of underrepresented minority’s upward social and economic mobility. Recently, the development of the mismatch hypothesis has challenged that claim. While *Fisher v. University of Texas* did not explicitly address the mismatch hypothesis, the Court is not ignorant of such arguments, and can analyze those argument’s merits while judging the best way to decide the most recent challenge to affirmative action.

⁴³ *Fisher v. University of Texas*. Docket No. 11-345. Opinion has yet to be handed down.

Chapter 2: The American Philosophy

One of the main reasons that affirmative action policies are so interesting to me is that the debate surrounding them are, in my view, essentially a debate about our political values as Americans. While I think the distinction is inherently flawed, the affirmative action debate has largely been framed as a clash between our civic values of liberty and equality. The affirmative action question is hard to answer when put in these terms, starting with questions arising from the very preamble to our Constitution. Does the systematic aiding of one racial group serve to “promote the general welfare” because they were institutionally disadvantaged and disenfranchised for centuries, or do these tactics correct discrimination with discrimination, trodding on our civic promise to uphold “blessings of liberty” that our founders fought so hard to achieve?⁴⁴ Regardless of what side of the argument one ascribes to, both those favoring some constriction of liberty to promote equality or those unwilling to help the pursuit of equality by surrendering some basic liberty will agree that the main goal of the Constitution was to ensure the posterity of our nation. With that view in mind, I take the position that affirmative action policies can be argued from both the side of liberty as well as equality without sacrificing the core characteristics of either. I also advocate the view that if the original framer’s intention, as well as the intention of the framer’s of the relevant amendments, was to ‘freeze’ their morals in the text of the constitution, affirmative action policies reflect those moral values regardless of the lens through which one views them.

The experience of Black Americans throughout our history has been the experience of citizens struggling to achieve both liberty and equality. The struggle for

⁴⁴ Preamble to the U.S. Constitution.

equality is the easier one to describe. From overt racism as slaves, 3/5^{ths} of other citizens, and a segregated class of citizens, Black Americans have only very recently been allowed to function with equal civic rights on a national level. This is not to say that equality has been achieved by any means – there was a news story that grabbed national attention in early April about a high school prom being de-segregated for the first time ever⁴⁵ – but rather that most obvious forms of racial discrimination have been removed from society. Still, there are examples of implicit inequality subtler than forced segregation, yet equally as alarming. The American Journal of Public Health estimates that over 886,000 deaths could have been prevented from 1991 to 2000 if Black Americans had received the same level of care as Whites.⁴⁶ Blacks are 10.1 times more likely than Whites to enter prison for drug offenses.⁴⁷ As of 2001, Blacks and Hispanics are three times as likely as Whites to be poor.⁴⁸ Furthermore, around 24% of Blacks and 20% of Hispanics experience housing difficulty, compared to only 10% of Whites.⁴⁹ This snapshot of American society today goes on and on. Perhaps most shockingly is to contrast our racial inequities with those of significantly less prosperous nations around the world, as studies have shown that “Black immigrants from regions of the world where their race is in the majority report better health than other Black Americans,” even in relatively poor areas like central and South

⁴⁵ Valerie Strauss. “Georgia Students Fight Segregated Proms.” *Washington Post*. April 5th, 2013.

⁴⁶ January W. Payne. “Dying for Basic Care.” *Washington Post*. December 21st, 2004.

⁴⁷ “Targeting Blacks: Drug Law Enforcement and Race in the United States.” *Human Rights Watch*. May, 2008.

⁴⁸ Kenneth Feingold & Laura Wherry. “Race, Ethnicity, and Economic Well-Being.” *Urban Institute*. March 18th, 2004.

⁴⁹ *Id.*

Africa, the West Indies, & central America, not to mention Europe.⁵⁰ Black Americans have not had an equitable experience in America by any means, but in their fight for true equality they have to convince political and legal scholars that correcting these past and present injustices through policies like affirmative action would not fundamentally come in conflict with our American civic values. Regardless of how judicious or fair you find that requirements to be, it is a reality that the underrepresented minorities of America must face to effect real, lasting change.

The three prongs of American civil right are liberty, property, and equality. However, these rights often come in conflict with each other. The struggle to promote equality to the same level as liberty and property has been a difficult one for Black Americans to accomplish, and is still in progress today. In the mid-19th century, President Polk declared, “All distinctions of birth or rank have been abolished. All are entitled to equal rights and equal protection,”⁵¹ but he referred only to American citizens, which did not include Blacks at the time. However, the extension of our civic values to all Americans (regardless of race) is a topic that was hotly debated and voted upon as a core factor of the election of 1860 – the election of Abraham Lincoln. In the first presidential debate between Lincoln and Stephen A. Douglas, Lincoln espoused his understanding of our inherent rights under the Constitution: “...there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of

⁵⁰ “Study Suggests Racial Discrimination Harms Health.” Science Daily News. *U.C. Irvine department of sociology*. September 9th, 2005.

⁵¹ Celeste Michelle Condit & John Louis Lucaites. *Crafting Equality: America’s Anglo-African World*. University of Chicago Press. 1993. p. 78-9.

Independence, the right to life, liberty and the pursuit of happiness.”⁵² However, so Black Americans had to desperately fight for these core civic values of liberty, equality, happiness, etc. in a way that white Americans were already intimately familiar with. They first had to start from the premise that “all men are created equally free” universally, as Lincoln argued. We take that for granted today, but at the time it was harder to push.

As our nation’s founders were influenced by political theorists musing on man’s exit from the state of nature (and Locke especially), we can apply equality *to* liberty to strengthen its argument. Rather than liberty and equality coming into conflict with each other, the American system has promoted the idea that “equal liberty was originally the position, and is still the birthright of all men,”⁵³ meaning to Black Americans that if this natural right was to serve as a foundational value, then it had to include the right to “appropriate my own body to my use.”⁵⁴ Coming at the point from the other side, the Descartes idea that simple ability to reason is what makes man unique also must then give man the ability “to use what is respectively theirs,”⁵⁵ thus deriving human equality from its liberty.

If our liberty underlines our equality, then granting equal opportunity therefore becomes a function of granting equal liberty. This argument sounds like an indictment of affirmative action policies, as critics would argue that programs that explicitly favor one race do not conform to the idea of ‘equal liberty.’ That argument is weak and naïve. In

⁵² Abraham Lincoln. “The Lincoln-Douglas Debates, First Debate.” *Teaching American History*. TeachingAmericanHistory.org. August 21, 1858. Ottawa, Illinois. Accessed April 19, 2013.

⁵³ Words from *The North Star*, September 29th 1848. In: Condit & Lucaites: *Crafting Equality*. p. 80.

⁵⁴ Frederick Douglass. *The Liberator*: Letter to Thomas Auld. September 3rd, 1848.

⁵⁵ Frederick Douglass. Personal Papers. May 12th 1854.

the previous chapter I quoted the famous line from President Lyndon Johnson outlining the weakness of the foregoing argument, stating simply that that “You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “You are free to compete with all the others.” And still justly believe you have been completely fair.”⁵⁶ Recently losing ground in the House and Senate, the conservative party (the modern political party pushing against affirmative action policies) implicitly recognized the weakness of this argument in their annual conference. Jeb Bush, the Governor of Florida and a notable conservative leader, addressed the difficulty of securing equal liberty in modern America:

"It is not a validation of our conservative principles if we can only point to the increasingly rare individual who overcomes adversity and succeeds in America. Here's reality: if you're fortunate enough to count yourself among the privileged, much of the rest of the nation is drowning...In our country today, if you're born poor, if your parents didn't go to college, if you don't know your father, if English isn't spoken at home, then the odds are stacked against you. You are more likely to stay poor today than at any other time since World War II.”⁵⁷

If scholars from President Johnson, who presided over the peak of affirmative action, to Governor Jeb Bush, who has seen the least effective form of affirmative action, can both agree on the necessity not simply of liberty but of *equal* liberty, then the argument becomes more convincing. Today, we do not speak of liberty as absolutely as our founding father did, but rather of the ‘equal opportunity’ as the modern substitute. With drastic disparities in wealth and opportunity between full citizens, this distinction

⁵⁶ President Lyndon Johnson. “The United States Since 1940 – The Rise and Fall of New Deal Liberalism.” Howard University Address. June, 1965.

⁵⁷ Jon Ward. “Jeb Bush CPAC Speech Says GOP Must Stop Being ‘Anti Everything’ Party.” *Huffington Post*. March 15th, 2013.

makes sense. I argue that the early concept of liberty and the debates surrounding it are akin to this modern understanding of equal liberty.

As a final point, Lincoln points out that the “abstract principle” of equality of citizens is core to the “original construction of society” which must be kept in view “as a great fundamental principle” of our civil system. With this knowledge, Lincoln remains practical, understanding the reality that “in no society that ever did exist, or ever shall be formed, was or can the equality asserted among the members of the human race, be practically enforced and carried out.”⁵⁸ Lincoln and affirmative action advocates understand this claim, but pursue equal liberty nonetheless. Much as the “city on a hill” ideology in Matthew 5:14⁵⁹ will never be perfectly attained neither will the perfect equality of liberty. However, the constant pursuit of this equality of liberty is exactly what affirmative action policies are trying to accomplish – a task that is distinctly American.

⁵⁸ Abraham Lincoln. “The Lincoln-Douglas Debates, 7th Debate, Part I.” *Teaching American History*. TeachingAmericanHistory.org. October 15, 1858. Alton, Illinois. Accessed April 19, 2013.

⁵⁹ 1 Matthew 5:14 ESV.

Chapter 3: The Constitutionality of Modern Affirmative Action

As Chapter 1, Part II explained, the Supreme Court has been instrumental in the systematic dismantling of affirmative action's scope over the last several decades. For those not familiar with constitutional interpretation, the jargon can get confusing. Essentially, citizens frequently sued in a myriad of cases against affirmative action policies on the basis that they violate the Constitution's 14th amendment, which stipulates that no state shall deprive a person of several rights, including the equal protection of the laws. The various affirmative action cases have most often asked the Supreme Court to explain what this clause means regarding affirmative action, and the answer has changed many times with the different ideologies of Justices in different eras. While some Justices believe that any form of affirmative action is justified as “we are not far distant from an overtly discriminatory past, [with] the effects of centuries of law-sanctioned inequality remain[ing] painfully evident in our communities and schools,”⁶⁰ others draw a more narrow line, calling broad affirmative action policies a constitutional violation of the Equal Protection Clause, as well as Title VI of the 1964 civil rights act.⁶¹ The later interpretation sees these Congressional acts as absolving any distinctions that explicitly favor race in any way, regardless of past injustices. Those who adhere to that narrow constitutional view of affirmative action argue that the 14th Amendment (and other similar laws) created a ‘colorblind’ constitution, and regardless of past injustices, we cannot use similarly unjust practices to correct them.

⁶⁰ Justice Ginsburg. *Gratz v. Bollinger*. Dissenting Opinion. 539 U.S. 244 (2003).

⁶¹ Justice Rehnquist. *Gratz v. Bollinger*. Majority Opinion. 539 U.S. 244 (2003).

However, I argue that it is not perfectly clear that those who drafted and ratified the Fourteenth Amendment intended the clause to be ‘constitutionally colorblind,’ an argument often evoked by opponents of race-conscious admissions, and that those sorts of arguments came much later than 1868. As some critics of the foregoing view point out, the Equal Protection Clause can be read to require only that the States provide “the equal protection of laws,” not “the protection of equal laws,” meaning that while the laws had to be protected uniformly, they did not have to uniformly apply to each individual or group. In debating the 14th amendment, the 39th Congress actually considered and ultimately rejected a provision that would undeniably require a colorblind government.⁶² On March 9th, 1866 the Senate voted 7-38 to defeat the proposed amendment stating that “no State...shall recognize any distinction between citizens...on account of race or color or previous condition of slavery,” further stating that “all citizens, without distinction of race, color or previous condition of slavery, shall be protected in the full and equal enjoyment and exercise of all their civil and political rights.”⁶³ If this rejected provision became the codified text of the 14th Amendment, then affirmative action cases would fall apart, because the policy recognizes and allows codified differences among classes of citizens on account of race. While explicitly forbidden in the foregoing amendment, our Equal Protection Clause instead tones down that language, restricting the State’s authority in enacting provisions that deny the equal protection of laws, rather than restricting them from enacting laws that draw distinctions on race altogether. These arguments were highlighted in the Brief in Opposition in the case of *Fisher v. University*

⁶² John Harrison. *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1390 (1992).

⁶³ Congressional Globe. 39th Congress. 1st Session. 1287. March 9, 1866.

of *Texas* as examples of the legislative intent of the 14th amendment, showing (at least) the ambiguity of the Equal Protection Clause's purpose for future use and interpretation.⁶⁴

Other scholars see the 14th Amendment's Equal Protection Clause as more narrowly tailored than the foregoing interpretation. Political theorist Michael McConnell sees the most clear-cut purpose of the act as providing constitutional authority to the Civil Rights Act of 1866, which was shot down by President Johnson before Congress had a veto-proof majority, and thus served to outlaw 'Black Codes' which were beginning to arise at end of the Civil War.⁶⁵ Scholars such as Dworkin read broad framers intent into this action, seeing the move to protect the Civil Rights Act of 1866 as an example of the framers "declar[ing] a principle of quite breathtaking scope and power: the principle that government must treat everyone as of equal status and with equal concern."⁶⁶ McConnell rejects this expansive view, saying that there is no real historical basis for the notion of "equal concern," a phrase so "subjective and indeterminate that it is highly unlikely that the practical statesmen of the 39th Congress, who deeply distrusted the courts, would have employed it."⁶⁷ However, despite this disagreement with Dworkin's more expansive view of the 14th Amendment, McConnell's does find some other, broader readings of the Equal Protection Clause through the lens of originalist interpretation. As example, he

⁶⁴ Brief for University of Texas as Brief in Opposition for Writ of Certiorari Supporting Respondents, *Fisher v. University of Texas at Austin* 631 F.3d 213, 226 (5th Cir. 2011)

⁶⁵ Michael W. McConnell. "The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution." 65 *Fordham L. Rev.* 1269. (1997).

⁶⁶ Ronald Dworkin. *Freedom's Law: The Moral Reading of the American Constitution*. Harvard University Press. April, 1997. p. 10.

⁶⁷ Michael W. McConnell. "The Importance of Humility in Judicial Review." p. 1282.

points to congressional actions outlawing educational segregation that only failed due to an opposition filibuster (far more rare at the time than today).⁶⁸ McConnell says he believes that these attempts show congressional commitment to strict equality, without regard to arbitrary distinctions based on race “or other morally irrelevant distinctions.”⁶⁹ However he concedes that these action could also be argued to show the theory of ‘absolute limited equality,’ a concept that promotes equal civil rights but not equal social rights, meaning that if affirmative action policies were read with the later view of equality they could be justified using this wider concept of social rights which some scholars argue underlie our *de jure* civil rights.⁷⁰

However, opposed to all of the foregoing points of view are legal scholars who argue against these lines of reasoning by discounting the practice of using legislative intent as a method of interpreting both constitutional amendments and general passages of bills altogether. Advocates pushing against constitutional interpretation that uses legislative records as part of their inquiry into the case at hand call the “legislative power...the power to make laws, not the power to make legislators...” and that “whatever Congress has not *itself* prescribed is left to be resolved by the executive or (ultimately) judicial branch.”⁷¹ However, the major drawback to this argument is that it ignores what is intentionally left *out* of the lawmaking process. The gaps that Justice Scalia refers to in the quote above are especially important in a case like this, where

⁶⁸ See Michael W. McConnell, Originalism and the Desegregation Decisions, 81 *Va. L. Rev.* 947 (1995).

⁶⁹ Michael W. McConnell. “The Importance of Humility in Judicial Review.” p. 1283.

⁷⁰ For a lengthier discussion see: Earl M. Maltz. *Civil Rights, the Constitution, and Congress, 1863-1869*, at 68, 157-58 (1990).

⁷¹ Antonin Scalia. *A Matter of Interpretation, Federal Courts and the Law* Princeton University Press, 1992. P. 35.

judges ignoring legislative intent could look at only the letter of the law and infer that equal protection doctrine under the 14th amendment was meant to restrict acts pushing positive rights in the way that affirmative action attempts to do. This restrictive method dispenses of any gaps in legislation as being intentionally put there, and by filling these gaps with their own interpretation of the lawmakers meaning, Judges become an oligarchic lawmaking body far exceeding their separation of powers mandate that Justice Scalia accuses backers of legislative intent of doing in their framework. If the appellate courts of the judicial branch ignore the legislative history of a provision, then they can craft opinions that form policies that the legislature did not want, they go beyond deciding on the constitutional merits of a particular law and cross over into the realm of the political merits of the policy.

Furthermore, the secondary argument that legislative intent is flawed due to committee arguments being used by one side, weighed against House floor arguments used by the other side⁷² as evidence is somewhat stunted in this case as well, as the 39th Congress actually *voted* against the amendment 7-38. Whereas legislative intent may not be proper or its use perfect in many cases, in deciding the future of affirmative action policy it is vitally important to see the gaps that were intentionally left in of the 14th Amendment by looking at what was rejected in its crafting process, which will give judges the ability to get a greater understanding of the scope of the final amendment's control and use in our society.

As further evidence outlining the intent of the 14th Amendment as the 39th Congress envisioned it, that session of Congress (and its surrounding Congresses)

⁷² *Id.* p. 36

actually have rich histories of disparate treatment based on race. The strongest of these examples are the appropriations bills passed to fund the “National Association for the Relief of Destitute Colored Women and Children” for the purpose of “supporting such aged or indigent and destitute colored women and children...”⁷³ which was reincorporated for additional funding in 1866⁷⁴ and again more strongly in 1867, expanding the funding “for the relief of freedmen or destitute colored people in the District of Columbia.”^{75 76}

Despite the several foregoing arguments that could be used to justify the continued use of modern affirmative action policies, the reality is that the United States is on a judicially unsustainable course to meet the end of affirmative action in a mutually satisfactory manner for both black Americans and our republic. President Roosevelt’s Executive Order 8802 in 1941 saw the goal of government (with respect to affirmative action) to be to provide for “the full and equitable participation of all workers”⁷⁷ that eventually extended from defense industries to all areas of government under President Truman in 1948, and to the general public through the Civil Rights Act under President

⁷³ Congressional Globe. 38th Congress, 2nd session. Act of February 14, 1863, ch. 33, 12 Stat. 650, 650.

⁷⁴ Congressional Globe. 40th Congress, 1st session. Act of July 28, 1866, ch. 296, 14 Stat. 310, 317.

⁷⁵ Congressional Globe. 41st Congress, 1st session. Resolution of March 29, 1867, No. 25, 15 Stat. 26.

⁷⁶ These acts and a discussion of them can be found in: Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 762-75, 778-82 (1985); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 430-31 (1997); Andrew Kull. *The Color-Blind Constitution*. Harvard University Press (1994).

⁷⁷ Exec. Order No. 8802, 3 C.F.R. (June 18, 1941)

Lyndon B. Johnson in Title II⁷⁸ and Title VII⁷⁹ respectively.⁸⁰ Regardless of the 14th amendments intent and use in the later half of the 19th century, as Chapter 1 pointed out, the right to positively act for the benefit of institutionally disenfranchised and disadvantaged citizens has been judicially chipped away throughout the later years of the 20th through the early years of the 21st century. Each case in affirmative action decided by the Supreme Court in the modern era is difficult to criticize in itself because they each, in their own way, represent our American value of liberty, but does so in a systematic way trending away from the recognition of past actions that trampled on that same value system that affirmative action is trying to correct. In *Miller v. Johnson* the Court saw the “central mandate” of the 14th amendments equal protection clause to mean “race neutrality in governmental decision making,”⁸¹ quickly imposing “the strictest of judicial scrutiny” on a cases concerning race such as in *Adarand v. Pena*, a subsequent case of the same year.⁸² While *Adarand* said that racial classification had to be “necessary to further a compelling governmental interest” and be “narrowly tailored to that end,”⁸³ affirmative action cases have repeatedly not met this standard, which have subsequently led to a severe constricting of the implementation of the policy or the effectiveness of whatever does finally get implemented.

⁷⁸ Pertaining to public facilities including private businesses that sold to the public like hotels, movie theatres, etc

⁷⁹ Pertaining to all firms with 25 or more employees

⁸⁰ Anderson, Terry H. *The Pursuit of Fairness: A History of Affirmative Action*. Oxford: Oxford University Press, 2004. p. 7, 30, & 72.

⁸¹ *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

⁸² *Adarand Constructors, Inc. V. Pena*, 515 U.S. 200, 224 (1995).

⁸³ *Id.*

The court has rejected the affirmative action notion of acting in most cases under the general language of the aforementioned executive orders and Civil Rights Acts, saying that “[T]he mere recitation of a benign or legitimate purpose” is not an “automatic shield which protects against any inquiry” into race-based preferences.⁸⁴ Right now, the court is being pushed to overturn the modern understanding of affirmative action outlined in *Grutter v. Bollinger* that imposes strict requirements for university admissions, saying that universities may only utilize affirmative action principles that can favor “underrepresented minorities” only if they use the applicants race on neutral footing with other application materials in a holistic fashion,⁸⁵ ruling in a concurrent case that an admission action that uses race as a mere “predominant” factor was too wide of an interpretation.⁸⁶ Critics of the policy are pleading the court in the case before it to put the final nail in affirmative action, asking specifically for a “decision that ends once and for all any racial preferences”⁸⁷ regardless of their strict use, intent, or recognition of need in our society. While Fisher, the petitioner in the case before the court, does not explicitly ask the court to overturn the precedent outlined in *Grutter*, the court can overturn it regardless. As outlined in Chapter 1, since 1970 affirmative action’s critics have quickly taken the policy and greatly decreased its effect on those who it attempts to help – only adding fuel to its opponent’s arguments. As it stands now post-*Grutter*, if the policy can only be used until underrepresented minorities constitute a ‘critical mass’ of students in

⁸⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁸⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁸⁶ *Gratz v. Bollinger*, 549 U.S. 244 (2003).

⁸⁷ Brief for University of Texas as *Amicus Curiae* by the American Civil Liberties Union for Writ of Certiorari Supporting Petitioner, *Fisher v. University of Texas at Austin* 631 F.3d 213, 226 (5th Cir. 2011)

our higher education system and various professional fields, then if the policy was proven to actually make that racial gap worse, it would (and should) be almost immediately struck down, a topic which will be discussed in detail in the ongoing chapters.

If the goal of public policy is to achieve an end, and more specifically the goal of affirmative action is to take “affirmative steps...to realize more fully the policy of nondiscrimination...and to ensure that applicants are employed...and are treated during employment, without regard to their race, creed, color, or national origin,”⁸⁸ then paradoxically the race aspect of affirmative action must be scrapped in lieu of an economic measurement for it to survive in its intended effect. While the constitutional arguments for an expansive affirmative action policy have definite backing, the Supreme Court is highly unlikely to re-expand the law’s provisions, as they are still populated by a conservative majority, and have largely been persuaded by the *Grutter* and *Gratz* interpretations as generally correct. Furthermore, even a re-expansion of affirmative action would not necessarily fix the systemic problems underlying affirmative action and policy’s recent ineffectiveness, and could even make it worse, as Chapter 5 discusses in great detail. Therefore, despite the political backlash that changing affirmative action to a class-based system will inevitably incite, to drastically aid in the success of the program change is necessary. I will get into more detail about the constitutionality and effect of such a change in the next chapter.

⁸⁸ Exec. Order No. 10925, 3 C.F.R. (1961).

Chapter 4: Is Class-Based Affirmative Action Constitutional?

Though the constitutional merits of the current form of affirmative action are being weighed and measured in the Supreme Court with *Fisher v. Texas* awaiting a final judicial decision, the debate has moved away from the original intent of the law to the merits of its methods. As outlined in previous chapters, due to the overwhelming divide in public (and judicial) opinion of the constitutionality of the law affirmative action in a race-based form has effectually decreased continually since the 1970s. Therefore, in order to save the intended effect of affirmative action – to continue providing positive governmental steps to systematically try to correct for past injustices – as well as to promote diversity as the policy has been used today, this paper argues that affirmative action must change to an economic approach that targets class-based remedies in favor of race-based ones. The obvious follow-up question is whether a class-based remedy could be argued unconstitutional as race-based policies have, and I posit that it could not.

Deciding whether a class-based affirmative action system could be ruled unconstitutional is a difficult task on its face because, as Goldsmith points out in his vision of a class-based affirmative action policy, “no court has examined a challenge to class-based affirmative action plans,” despite the introduction of these policies in a few bold universities.⁸⁹ When the Supreme Court delves into matters concerning the 14th Amendment’s equal protection clause, they use different levels of ‘scrutiny’ to determine whether or not a law or policy is or is not constitutional. This practice was famously created in footnote four of *United States v. Carolene Products Co.*, a case which changed

⁸⁹ Such as the UCLA school of law, which shall be discussed later. Neil Goldsmith, *Class-Based Affirmative Action: Creating a New Model of Diversity in Higher Education*, 34 Wash. U. J. L. & Pol’y 313 (2010).

the traditional view of the Court regarding congressional actions, relaxing their rules guiding the constitutionality of (at first) commercial activity.⁹⁰ This change in precedent over time led to the creation of three levels of judicial ‘scrutiny,’ based on what the law in question was concerning. ‘Strict scrutiny,’ outlined in the *Carolene Products* case, is the most difficult level to pass. If the Court uses this level of scrutiny, then a law must be justified by a compelling governmental interest, be implemented in a narrowly tailored way to achieve that goal without being overly broad in its effect, and finally must use the *least* restrictive means of achieving the government’s interest that can be used. Strict scrutiny is automatically triggered when a ‘suspect class’ is involved, which today apply to any case involving policies surrounding race, national origin, and alienage.⁹¹ Intermediate scrutiny, the middle option, is similar to strict scrutiny except it requires a law to further a governmental interest in a way that is *substantially related* to that interest, and not necessarily in the *most* restrictive way.⁹² Intermediate scrutiny grew to typically be triggered by policies regarding equal protection⁹³, discrimination, and illegitimacy,⁹⁴ most commonly used in cases looking at sex-based classifications and regulations on speech when it impacts a particular message.⁹⁵ Lastly, the ‘rational-basis test,’ as the least stringent of the three levels of scrutiny, applies to all other cases as the

⁹⁰ *United States v. Carolene Products Co.* 304 U.S. 144. Footnote 4. (1938)

⁹¹ Race-based policies enjoyed a brief stint of being subjected to intermediate scrutiny following *Metro Broadcasting, Inc. v. FCC.* 497 U.S. 547 (1990) before being overruled a short time later by *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

⁹² *Wengler v. Druggist Mutual Ins. Co.*, 446 U.S. 142 (1980).

⁹³ Unless it involves race, in which it triggers strict scrutiny.

⁹⁴ See *Caban v. Mohammed*, 441 U.S. 380 (1979)

⁹⁵ Specifically, cases involving speech look at the time, matter, and place of the speech that is being regulated, as outlined in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

default review test when looking at cases involving the 5th and 14th Amendments to the Constitution. The rational-basis test only needs a legitimate governmental reason for a law or policy, and often it does not even need the explicit outlining of what that reason is by the legislature, executive, or agency involved in passing that policy.⁹⁶

As affirmative action policies are generally argued under the Equal Protection Clause of the 14th amendment,⁹⁷ the merits of affirmative action (and any de jure shift in policy whatsoever) would seem to hinge on what level of scrutiny the court applies to the case, however I argue that a class-based affirmative action policy could satisfy both the intermediate and strict scrutiny doctrines outlined above.

There is a slight chance that, if the class-based affirmative action system were to reach the Supreme Court, the justices would use the rational basis review due to the fact that socioeconomic distinctions under the law have yet to be held inherently suspicious in the courts interpretation of the 14th amendment. Justice Powell's majority opinion in *San Antonio Independent School District v. Rodriguez* found that "wealth discrimination in the school financing context does not invoke strict scrutiny, but rather, rational basis review."⁹⁸ However, this justification is thin and will likely be tossed out in favor of a higher level of scrutiny if inevitably brought to the court under a challenge through the Equal Protection Clause. In *Washington v. Davis*, the Court held that government actions must be both discriminatory in purpose and impact to be seen as unconstitutional, a

⁹⁶ While officially being introduced in modern terms in *United States v. Carolene Products Co.*, the test's origins lie in *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁹⁷ See previous chapter on the constitutionality of the current form of race-based affirmative action

⁹⁸ Genevieve Campbell. *Is Classism the New Racism? Avoiding Strict Scrutiny's Fatal in Fact Consequences By Diversifying Student Bodies on the Basis of Socioeconomic Status*. 34 N. Ky. L. Rev. 679. 2007. p. 7.

precedent of inherent skepticism that has generally triggered intermediate or strict scrutiny when brought to the Court's attention.⁹⁹ Even though a class-based affirmative action policy would appear neutral on its face, the implementation and the underlying reasons for the policy would almost undoubtedly trigger a higher level of scrutiny. As proof, Justice White's majority opinion in *Washington v. Davis* continues that "the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race," going on to say in a disclaimer that official acts are not held inherently unconstitutional because they have a "racially disproportionate impact," but they are held under a closer lens to try and find any "invidious quality" or "discriminatory purpose."¹⁰⁰ So, even though class-based affirmative action viewed in a political vacuum would not appear racially discriminatory, the shift in a typically race-based law would inevitably be for the "discriminatory purpose" that Justice White and the Court is skeptical of, and therefore would trigger a higher form of scrutiny than the simple rational-basis review.

This precedent creates a difficult problem for advocates of class-based affirmative action to mitigate, as the obvious intention of the policy is to try and help disadvantaged minorities through race-neutral means, which could be seen as a guise and subsequently struck down. However, precedent exists in both constitutional law and economic theory that can bolster the class-based argument. In *Palmer v. Thompson*, argued two years prior to *Washington*, Justice White wrote in a concurring opinion that "the operative effect of

⁹⁹ *Washington v. Davis*, 411 U.S. 1 (1973).

¹⁰⁰ *Id.*

the law, rather than its discriminatory purpose, is the paramount factor.”¹⁰¹ In the Court’s majority opinion as well, Justice Black held that no discrimination occurred due to the relevant law in the case not using “invidious racial motivations” and the law was applied “equally to both its white and African American citizens.”¹⁰² The *Palmer* case was about the forced segregation of public pools in heavy African-American populated areas in Jacksonville, Mississippi, which the city claimed could not be integrated due to economic concerns and shut them down, keeping pools in predominantly white areas untouched. If the ‘incidental effect’ on race of a policy that is as blatant as forced segregation of public pools is not held to a higher level of scrutiny, then it becomes dubious to assume that a policy that could be taken advantage of by all races – as a class-based affirmative action policy would – would then be held to a higher judicial standard. More recently and more relevantly to the way affirmative action policy is discussed today, *Parents Involved in Community Schools v. Seattle School District* came down from the Court as a rare 4-1-4 split decision, holding that while race could not be used as the sole determining factor for assigning students to specific schools, race *could* be used as one metric to achieve the diverse environment that the Seattle School District was looking for.¹⁰³ In the foregoing case, Chief Justice Roberts famously said in his plurality opinion that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” a sentiment joined fully by three other justices on the court, with four generally weighing the constitutional benefits of re-segregation more important than concerns of equal

¹⁰¹ Justice White. Concurring opinion in *Palmer v. Thompson*. 403 U.S. 217 (1971).

¹⁰² *Id.* Justice Black, majority opinion.

¹⁰³ The Court rejected the ‘racial isolation’ argument as a legitimate reason to reapportion students based on race to specific schools. *Parents Involved in Community Schools v. Seattle School District No. 1*. 551 U.S. 701 (2007)

protection.¹⁰⁴ The official opinion of the court included a piece that found that diversity for educational purposes is enough to serve a compelling state interest, and that it could pass the strict scrutiny analysis that was used to rule in the case.¹⁰⁵ The Chief Justice continues in this opinion to say that “the interest in diversity in higher education” is a compelling state interest that passes the strict scrutiny test, coupled with the “remedying [of] the effect of past intentional discrimination” as the two compelling state interests for the use of racial classifications.¹⁰⁶ I argue that class-based affirmative action fits both of these two interest more effectively and (more importantly) in a more narrowly tailored way than the current system does by remedying the past effects of state-sponsored discrimination quicker, with a greater emphasis on and interest in diversity in higher education than we have currently. I will get into the logistics of this policy in the next chapter.

As stated above, the Court will likely be inherently skeptical of any case regarding affirmative action policy, triggering some form of higher scrutiny. However, looking at class-based affirmative action policies in isolation, they do not explicitly trigger these higher levels of scrutiny. The current precedent of the Court outlines the necessity of higher levels of scrutiny to combat “prejudice against discrete and insular minorities,”¹⁰⁷ which have applied an intermediate level of scrutiny to cases regarding

¹⁰⁴ The 9th justice, Justice Kennedy, is somewhat in between these two points, and is the single split vote on this case that tries to reconcile the dichotomous viewpoints.

¹⁰⁵ See Chief Justice Roberts plurality opinion in Part III-A.

¹⁰⁶ *Id.*

¹⁰⁷ *United States v. Carolene Products Co.* 304 U.S. 144. Footnote 4. (1938)

sex,¹⁰⁸ and strict scrutiny to ‘suspect classifications’ of citizens.¹⁰⁹ Nowhere in these higher levels of scrutiny is socio-economic status ever mentioned. However, in their interpretation of *Grutter*, the court said that “diversity constitutes a compelling interest under the first prong”¹¹⁰ of strict scrutiny interpretation, which could be applied to a class-based affirmative action plan; because

“Just as a Hispanic student seemingly brings different views and experiences to a classroom predominantly filled with white students, a student from a lower socioeconomic class similarly brings different view to a classroom filled with white students.”¹¹¹

However, this chapter has outlined that the lens through which the Court views any challenge to class-based affirmative action cases is essentially irrelevant, as a properly-constructed plan would satisfy any level of review. While the racial gap in the United States has seen improvement in the decades since affirmative action’s inception (despite becoming recently stagnant), the socio-economic gap has widened.¹¹² The ultimate question is then how to continue to decrease the racial gap with race-blind policy, while simultaneously hindering or decreasing the spread of economic disparity. If a class-based system will pass constitutional scrutiny in the face of any challenge, then the obvious follow-up question is: Will class-based shifts in affirmative action policy would be more effective than the system we have in place currently? The next chapter takes up this issue

¹⁰⁸ Intermediate scrutiny restricts laws regarding sex if they are unrelated to an ‘important’ government interest. *Craig v. Boren*. 429 U.S. 190 (1976).

¹⁰⁹ Typically regarding race, nation of origin, religion, and alienage.

¹¹⁰ *Grutter v. Bollinger*, 539, U.S. 306 (2003).

¹¹¹ Neil Goldsmith. “New Directions in ADR and Clinical Legal Education: Note: Class-Based Affirmative Action: Creating a New Model of Diversity in Higher Education.” 34 *Washington University Journal of Law & Policy* 313. 2007. p. 6

¹¹² G. William Domhoff. “Wealth, Income and Power, Who Rules America?” *University of California at Santa Cruz*. February 2011.
<http://sociology.ucsc.edu/whorulesamerica/power/wealth.html>

and delves into the logistics of the policy factors that surround the effective implementation of a class-based system.

Chapter 5: Data-Driven Change

Part I: The Broken System

By devoting the previous two chapters to the constitutionality of affirmative action I have begged an important question – does affirmative action really work? As the introduction alluded to, over the last decade or so the data seems to show that it has not worked in the way it was originally intended. While the policy has continued to bring racial diversity to college campuses and corporations alike, this paper makes the argument that the way the program is currently run veils the real systemic racial and socioeconomic problems that it was originally intended to remedy. This failure of the affirmative action system is the result of dual constriction of the policy's scope as well as the ever-increasing competitiveness of our education and employment systems, realities that will help us grapple with possible solutions to the issue. Part I of this chapter is devoted to the identification of these problems by looking at a myriad of studies and linking their findings together to create a narrative, while Part II looks at the University of California system as a case study for reform, as the UC schools unilaterally did away with explicit racial preferences in the late 1990s and the data on the reform's effectiveness has just recently been analyzed. Juxtaposing the two parts, Part III will offer comprehensive reforms based on these studies.

To draw out the technical problems of affirmative action, one can begin by using a remedy drawn meticulously from the issues' root causes. Attempting to link these technical issues together will give society a greater understanding of the crux of the problem with modern day affirmative action, and provide insight into the necessary scope of the solution. First and foremost, the data on affirmative action in higher education

shows that there is a great discrepancy between the educational intentions of Black students entering college and their graduating-selves years later. Black students are entering colleges and universities more frequently than their academically-similar White peers. Controlling for academic preparation (i.e. comparing similarly prepared students), “Black high school graduates are about 30% more likely than comparable Whites to attend a 4-year college.”¹¹³ Furthermore, “Black [students] are more likely to achieve STEM bachelors degrees” than their White peers.¹¹⁴ Again controlling for academic preparation, 43% of Black students achieve a STEM degree compared to 33% of White students in the top 16% of student academic preparation scores, and 23% to 16% respectively in the next 16% of students. However the story of Black student’s experiences in college is a dichotomous tale. Despite the incoming figures, overall only “22.6% of Black students earned STEM degrees to Whites’ 23.1%”¹¹⁵ and only 16.3% of native-born Black students achieved a four-year college education.¹¹⁶ Overall, the figures draw out the raw effect of the mismatch theory: on average around 54% of Black male students drop STEM degrees, (compared to 6% of White male students).¹¹⁷ More shocking is the fact that only 5% of black students who receive preferences end up

¹¹³ Sander, Richard & Taylor, Stuart. *Mismatch: How Affirmative Action Hurts Students It’s Intended to Help And Why Universities Won’t Admit It*. Basic Books. New York, New York. 2012. p. 251.

¹¹⁴ *Id.* p. 44.

¹¹⁵ *Id.* p. 44.

¹¹⁶ U.S. Census. Educational attainment in the United States: 2003. June 2004. <http://www.census.gov/prod/2004pubs/p20-550.pdf>

¹¹⁷ Gerald A. Reynolds, et al. “Encouraging Minority Students to Pursue Science, Technology, Engineering and Math Careers.” *United States Commission on Civil Rights*. October, 2010.

majoring in engineering, compared to 43% that do not receive substantial preferences.¹¹⁸

The data shows a simple trend – Black students are not graduating with STEM degrees at nearly the same rate as they intend to upon matriculation into colleges and universities.

Overall, Black students are more likely to go to college and are more interested in achieving STEM degrees than their White peers (and do so in the upper academic echelons), but in reality the graduation and STEM degree rates do not remotely reflect those pre-matriculation interests. Even if the argument could be made that those students most affected by mismatch are receiving invaluable education that will pay off in the long run, the *sort* of education they are receiving is not what they are necessarily passionate about, interested in, or have very successful careers with after being forced out of the major due to academic mismatch.

These examples highlight two of the most notable differences in the incoming versus outgoing data, but they are not unique cases. Further studies that looked into this question of race disparity came across an illuminating example – the primary reason for the discrepancy was not about race at all. Interestingly, the largest producers of STEM degrees among Black students are Historically Black Colleges and Universities (HBCUs). In fact, “among the top twenty-one college producers of future Blacks with science doctorates, seventeen were HBCUs and **none** were Ivies,” (emphasis added) despite the supposedly much higher caliber of student attending Ivy League schools

¹¹⁸ Anthony T. Caso. “Amicus Brief of Gail Herior, Peter Kirsanow & Todd Gaziano, Members of the United States Commission on Civil Rights, in Support of the Petitioner.” *Fischer v. University of Texas. Supreme Court of the United States*. No. 11-345. May 29, 2012.

compared to HBCUs.¹¹⁹ At the same time, studies showed that less academically prepared students avoided STEM degrees. So what was the cause? In a narrowly tailored study, Smyth and McArdle found that “the greater the disparity between a student’s classmates and an individual, the less likely they are of getting a STEM degree,” *regardless* of that student’s absolute academic caliber.¹²⁰ Even before looking at racial preferences in isolation, a narrative begins to form. The data shows that students who are pushed into an academic atmosphere they are not prepared for are significantly less likely to get a STEM degree than their peers, and it also shows that Black students outside of the top 16% of the general academic performance index rarely graduate with STEM degrees, despite apparently desiring to do so when they enter college or university. This finding is interesting, but hardly enough to bring an indictment against affirmative action as a policy.

Digging deeper into the relativity aspect of educational success, a comprehensive data set from the American Bar Association – who runs the Bar exam whose passage is a precursor to practice law – was analyzed. An initial regression of the data showed that “Blacks were much less likely to pass the Bar exam than were Whites with the same academic index coming out of college.”¹²¹ But, while this surface level analysis was necessary to illuminate the problem, a second regression highlighted the problem more concretely. Adding class ranking into the equation, the second regression showed that

¹¹⁹ Sander and Taylor, *Mismatch*, p. 34.

¹²⁰ Frederick Smyth & John McArdle. *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*. Research in Higher Education 45, no.4 (2004) p. 353-381. In: Sander and Taylor, *Mismatch*, p. 40.

¹²¹ Sander and Taylor, *Mismatch*, p. 58.

“relative performance in law school was the single-best predictor of Bar [passage] results...and more importantly, in this second regression the “race” effect disappeared altogether.”¹²² Controlling for class rank within law schools, there was no difference in Bar passage rates across Black and White students. Despite some claims that less Black students were passing the Bar exam because of some inherent bias problems within the test itself, the second regression highlights a much bolder claim – that it is not the test, but the educational institutions themselves that are contributing to the continued marginalization of Black students by propagating admissions practices that propagate mismatch.

A third analysis of this data set that controlled not only for college grades and class ranking, as mentioned above, but for the quality of the student’s undergraduate college or university attended, reaffirmed the findings. Sander estimated that unequal law school preferences that create academic mismatch between students upon their matriculation “explain *at least* 80% of the low grades Blacks received.”¹²³ To take away the race element completely, Sander studied to see if the same effect held firm when substituting older White students, who also generally receive admissions preferences in law school, for Black students and found that:

“When...controlled for mismatch, a large percentage of older White students were attending schools with credentials a good deal lower than their classmates...had disproportionate trouble on the bar...and [again], when...controlling for mismatch, the difference disappeared.”¹²⁴

¹²² *Id.* p. 59.

¹²³ *Id.* p. 60.

¹²⁴ *Id.*

If true, then the problem becomes much more complex than simply trying to weed out any biases in standardized testing. The hypothesis in the law school data essentially says that any way you want to turn the data, it clearly shows that one of the greatest hindrances of affirmative action effectiveness is, ironically, that students get too much help and are therefore underprepared and often underperform. A careful study by Duke University looked at admissions preferences blindly in all categories, and found no race effect whatsoever, but did find an inverse correlation of admission preferences to academic performance.¹²⁵ If these students are getting preferential treatment to promote diversity, they are certainly not feeling its beneficial effects while at school. The foregoing studies show that conversations about race in admissions processes are begging the question of pre-matriculation performance, and that a small tweak to the scale of these preferences could alter the national effectiveness of affirmative action policy. Especially in high-skilled degrees such as STEM degrees, law degrees, and medical degrees, the knowledge necessary to succeed builds upon itself with each passing class and semester. If a student is thrown into that competitive climate without proper instruction, they are being set up for failure, which is exactly what Sander and others are finding.

Countering Sander's bold claim, Rothstein and Yoon (professors at Princeton and Northwestern Universities respectively) dispute the importance of the discovery. They break down the mismatch argument and make the claim that if it were true, and relative academic performance were as strong and important of an indicator of collegiate success as the proponents of the theory suggest, then Black students who attend a slightly (or

¹²⁵ *Id.* p. 96.

significantly) less rigorous institution should do better than their peers who went to more rigorous ones with the help of affirmative action. The two professor's contend that a closer analysis of the same Bar-passage data shows that, when controlling for within-race distributions, Bar-passage rates for Blacks would only be a mere 4 percent lower if they attended a more selective school than a less selective one. Similarly, "...the corresponding figure [for Whites] is [only] 1.1 percent higher."¹²⁶ If the numbers were indeed this insignificant, then the mismatch hypothesis would be severely overstated. While the data would still show a slight gap in performance, it would be insignificantly different from zero. Therefore, Rothstein and Yoon conclude unequivocally that any difference in the raw gap in bar passage rates among Black students could be attributed to their personal credentials directly correlated to these passage rates, unrelated to any mismatch relating to the caliber of schools they attended as a result of affirmative action.

However, a closer look at the actual breakdown of the bar passage data showed that Rothstein and Yoon's analysis was not as uniformly correct as they posit. While true that "in the upper four fifths of the distribution, Black students perform about as well as White students...and sometimes outperform them,"¹²⁷ this was not true across the entire academic spectrum. And while approximately "three quarters of Black law students are in the bottom quintile,"¹²⁸ it is important to note these differences where their effects are greatest. In these lower quintiles (as Sander splits them), Black students admitted to elite schools based on large preferences were failing the bar exam more than twice as

¹²⁶ Jesse Rothstein & Albert H. Yoon. *Affirmative Action in Law School Admissions: What Do They Actually Do?* NBER Working Paper no. 14726 (2008).

¹²⁷ Sander and Taylor, *Mismatch*, p. 28.

¹²⁸ *Id.*

frequently as similarly credentialed students who got the same preferences but chose to go to a less elite school.¹²⁹ Rothstein and Yoon applied their study generally, while Sander points out that to understand the true cost of affirmative action, you have to look at those it ‘helps’ the most. Black students in the upper levels of academic preparation do not need as much (if any) preferences granted to them in order to succeed at a top tier school, whereas the largest preferences are granted by mid-tier colleges to less academically prepared individuals. If these students are then pushed into elite universities, they face extraordinary academic difficulty and have a much rougher time entering the legal field than their peers.

A quandary that the law school at George Mason University faced drew out more details to this effect. Accused of dismissing diversity’s importance by the American Bar Association (ABA), the body mandated that they change their admissions policy to reflect a greater emphasis on diversity or else face possible denial in their re-accreditation as a law school (as they are a relatively new school, established in the 1980s). The Dean responded to the ABA by pointing to its own official rulebook. He said that while George Mason uses diversity as a soft metric for admittance, they weigh it against the ABA’s other accreditation criterion – called Standard 501 – which says, “A law school shall not admit applicants who do not appear capable of satisfactorily completing its education program and being admitted to the bar.”¹³⁰ Deciding which standard to weigh more

¹²⁹ *Id.* p. 86.

¹³⁰ Standards and Rules. Chapter 5. “Admissions and Services.” *American Bar Association* Standard 501.

http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/chapter_5_2012_2013_aba_standards_and_rules.authcheckdam.pdf

heavily, George Mason University law school looked at their student's data and found that:

"...our analysis of student performance over the past five years has demonstrated that numerical qualifications do place some boundaries around our discretion [related to affirmative action policies]. Students with LSAT scores below 150 are more than six times as likely to experience academic difficulty...more than thirteen times as likely to be dismissed for academic cause, and almost twice as likely to fail the bar exam on their first attempt."¹³¹

George Mason University was caught between a rock and a hard place. They were being pushed to accept and use admissions preference principles that were more far-reaching than they were comfortable with using and risk devaluing the caliber of their student body and reputation as a strong law school, or keep their admissions practices and be faced with defamation as a racially biased institution and face possible disestablishment as a law school entirely. Eventually, with a new Dean and an accreditation process taking half a decade, the law school at George Mason University accepted commonly practiced affirmative action policies and received their re-accreditation, continuing in perpetuity the flaws of affirmative action policy in higher education.¹³²

The obvious question to ask the proponents of the mismatch doctrine is whether the academic preparedness due to admissions preferences that create dichotomous entrance standards based on race have any post-graduation effects on an individual's career prospects. If one of the main goals of our education system is to prepare students for the rigor and quality of the professional life, then the entire conversation about the

¹³¹ The material regarding GMU law school comes mainly from unpublished documents and data files obtained through public records upon request by Sander. They are generally available www.mismatchthebook.com. *Sander* and Taylor, *Mismatch*, p. 226-7 & p. 331.

¹³² *Id.* p. 227.

effectiveness of admissions preferences would be overshadowed by evidence contradicting the mismatch hypothesis. In short – if these students can still achieve promising careers out of college in the face of all of these deleterious hindrances, then the mismatch discussion is rather pointless. While reforms would certainly help underrepresented minority students gain social and economic mobility faster, the problem would not be a very pressing one if these students left these overwhelming academic atmospheres to work good jobs post-graduation. Speaking to this point directly in one of the most famous books about affirmative action ever written, Bowen and Bok (presidents of Princeton and Harvard respectively) gathered data on tens of thousands of students in three college settings: in super-elite colleges, ‘good’ state schools, and HBCUs.¹³³ The study found that racial preferences increased the college graduation rates of Black students, which they measured by dividing colleges into three tiers of selectivity and “showing that, other things being equal, Blacks were more like to graduate if they attended the top tier of colleges.”¹³⁴ However, critics took issue with that statements for several reasons, the simplest being that *everyone* has a higher graduation rate at top tier colleges as it is a more primary concern for top tier schools than lower tier ones.

The more complex and convincing argument against *The Shape of the River* has to do with the implementation of mismatch in educational intuitions. In his study of America’s colleges and universities, Sander found a ‘cascade effect’ of racial preferences. In short, “racial preferences are smaller at super-elite college than they are at

¹³³ William G. Bowen & Derek Bok. *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*. Princeton, NJ: Princeton University Press, 1998.

¹³⁴ Sander and Taylor, *Mismatch*, p. 106.

very elite colleges, and are smaller at very elite colleges than they are at ‘regular’ elite colleges,” and so on and so forth.¹³⁵ It is called a ‘cascading effect’ in part because the use of racial preferences at these institutions set a standard that less elite schools follow, which pushed to use even *larger* preferences, greatly expanding the general size and scope of the mismatch problem. Furthermore, there is some evidence that race based admissions preferences has a negative effect on future earnings and income levels. While a degree from a name-brand school like Harvard or Yale is a distinction that a graduate carries with them for life and can open occupational doors in a way that few other degrees can, the evidence that degrees from these institutions are inherently better for one’s career is surprisingly weak, especially for those that receive admissions preferences. In an analysis of the data in *The Shape of the River*, Sander found that “ending up in the bottom 1/3rd of one’s class (as do most students who receive large preferences[, as discussed earlier]) has a large, negative effect on long-term earnings.”¹³⁶ An interesting study by Dale and Krueger¹³⁷ took the same foregoing data and analyzed college choices of students and compared them to their present employment situations. They took students who had been accepted into “similar or identical pairs” of colleges, with one going to the more elite college than the other. Fifteen years later, they analyzed their earnings and found, surprisingly for proponents of the current form of affirmative action, students that attended the less prestigious institution earned either “as much and

¹³⁵ *Id.* p. 107.

¹³⁶ *Id.* p. 108.

¹³⁷ Krueger chairs President Obama’s Council of Economic Advisors and serves in his cabinet as of March 2013.

perhaps more than did similar students attending more-elite schools.”¹³⁸ Similarly, a post-graduation study by the University of Michigan law school on its graduates from 1972 to 1985 found that students with high grades that got into law firms were 7 to 8 times more likely to stay and become partners compared to those with low GPAs – regardless of the caliber of the law school.¹³⁹ This educational data is nothing revolutionary, but it shows how diminished the race effect is compared to the preparedness and academic performance of the student, further proving the weakness of our affirmative action system. The Dale and Krueger study of the data in *The Shape of the River*, coupled with the Sander and Yakowitz study using the same data, outlines how the claims of racial preferences leading to better graduation rates, and therefore better employment opportunities, are flawed. At best, the foregoing authors contest, the data is stretched and manipulated to frame the debate in the best way possible for the proponents of affirmative action with confirmation bias, rather than letting the data drive the results.

Recently, Rothstein and Yoon¹⁴⁰ again contested the findings of the proponents of the mismatch hypothesis, arguing in favor of the impact of elite college attendance on future career prospects and tried to reaffirm at least some of the claims in *The Shape of the River*. They found “zero evidence of mismatch effects on employment outcomes,”¹⁴¹

¹³⁸ Stacy Dale & Alan Krueger. “Estimating the Payoff to Attending a More Selective College.” *Quarterly Journal of Economics*, 117, no. 1491 (2002). In Sander and Taylor, *Mismatch*, p. 108.

¹³⁹ Richard Sander & Jane Yakowitz. “The Secret of My Success: How Status, Eliteness and School Performance Shape Legal Careers.” Forthcoming. *Journal of Empirical Legal Studies* (2013).

¹⁴⁰ The same researchers whose claims were analyzed in the first part of this chapter.

¹⁴¹ Jesse Rothstein & Albert H. Yoon. “Mismatch in Law School.” *National Bureau of Economic Research*. 2006. p. 31.

finding instead that Black students were much *more* likely than similarly qualified White student to obtain good jobs.¹⁴² The researchers say that this so-called “reverse mismatch”¹⁴³ means that Black students do not have to achieve great academic success to be employed to a ‘good’ firm. Their point is purely to counter Sanders, and they do not go so far to say that affirmative action in law schools necessarily *helps* Black students, but they find no evidence of the supposed negative effects. However, their argument rests on the core claim “Black underperformance appears primarily in the bottom quintile of the entering credentials distribution,”¹⁴⁴ with small diversity among Black and White students in the upper four quintiles. Ironically, this argument essentially proves the mismatch hypothesis. The Black students employed at big firms are typically those in the upper four quintiles (often by requirement) and do not have the same academic mismatch that Black students in the lowest quintile do in their respective law school, overwhelming made up of students not needing admissions preferences to succeed. By recognizing that these ‘reverse mismatch’ preferences completely overlook the large swath of Black students concentrated in the lowest quintile due to academic mismatch from race-based preferences, Rothstein and Yoon prove the great depth of the mismatch problem and the extraordinary inefficiency of our current system. While the original goal of affirmative action regarding education policy was to propel disadvantaged Black students to career heights that would be immensely difficult to reach without institutional help, in effect our

¹⁴² Often these firms offered salary premiums as long as Black students stayed outside of the bottom quintile of their class.

¹⁴³ Sigal Alon & Marta Tienda. “Assessing the “Mismatch” Hypothesis: Differences in College Graduation Rates by Institutional Selectivity.” *Sociology of Education*, Vol. 78: 294-315. October 2005.

¹⁴⁴ Rothstein and Yoon. *Mismatch in Law School*. p. 34.

policies are doing the opposite – putting these students in through academically rigorous institutions with very few job prospects upon graduation.

The data, case studies, and examples draw out the core problem with affirmative action policy as it being affected today. Ironically, Black and Hispanic students are often being offered far too *much* assistance in admissions practices in higher education, the last real bastion of affirmative action policy. Regardless of your stance on affirmative action policy generally, the thesis that there is a drastic mismatch between the goals of the policy and its effects is a disconcerting one. Moreover, this effect is not unique to the American education system. The ‘mismatch’ effect was seen in an unrelated test by the World Bank to try and develop an efficient means of childhood education in countries that desperately needed help:

“Several years ago the World Bank helped to fund an experiment in Kenya in which thousands of elementary school children were randomly assigned to two types of classes: one that grouped students with a broad range of academic skills together, and one that separated them into high-preparation and low-preparation halves. Three distinguished American economists participated in the experiment’s design, observed its outcomes, and concluded that the “tracked” students (in both the higher and lower classes) learned more – suggesting that teachers taught more effectively when they calibrated their teaching to a narrower range of student preparation.”¹⁴⁵

The independent World Bank study confirms the mismatch hypothesis and adds to its credibility, showing how the mismatch effect plays out in the classroom. Because the study was performed essentially for internal use, it is untainted with the bias so readily ascribed to the policies’ detractors in the affirmative action discussion. The question then becomes one of ‘why?’ Why fight for a losing cause, both in its

¹⁴⁵ Esther Duflo, Pascaline Dupas, and Michael Kramer. “Peer Effects, Teacher Incentives, and the Impact of Tracking: Evidence from a Randomized Evaluation in Kenya.” *American Economic Review* 101, no. 1739 (2011). In Sander and Taylor, *Mismatch*, p. 94.

constitutional merits and in the effects of its policy? Aside from the core mismatch issue described in the foregoing chapter, there are several other outstanding issues with the policy that are being overlooked.

As described in the introduction, being Black does not necessarily equate to being African-American, nor do either Black or African-American equate to having been disenfranchised in ones heritage. In fact, nearly 40% of Black students who are Ivy League undergraduates are first or second generation immigrants,¹⁴⁶ completely outside of the purview of the intended beneficiaries of affirmative action policy, but receiving its benefits all the same. This statistic is only forecasted to become more confusing with time. The immigrant Black population constitutes fully 20% of the current Black population in the United States, and tends to be highly educated due to our strict domestic immigration laws. Furthermore, the multiracial population grew by 36% from 2000-2009 and is projected to grow another 21% by 2015. Classifying which races to include in affirmative action policies gets more difficult when you factor in these multiracial populations who have some tangential heritage to disenfranchised groups, especially when trying to include Hispanics, Southeast Asians, or American Indians, all of whom have higher cross-racial marriage rates than Blacks.¹⁴⁷ As a society, if we are to push for racial diversity, the line at which ‘diversity’ begins and ends is not so clear. So far, biracial individuals have taken advantage of affirmative action policies, but what about multiracial students who may be 25% or 10% Black, Hispanic, or Native American? A recently-elected U.S. Senator in Massachusetts, Elizabeth Warren, was put in the national

¹⁴⁶ *Id.* p. 252.

¹⁴⁷ *Id.*

spotlight for taking advantage of these affirmative action programs by possibly checking the box marked 'Native American,' on college and job applications, having 1/32nd of her heritage tied to the Cherokee people, despite not appearing Native American at all.¹⁴⁸ Is affirmative action simply about what race someone appears? The social line seems difficult to find, and it is only going to become harder with time.

As affirmative action policies reach a decreasing amount of impoverished and disadvantages Black students, its effects become increasingly meaningless. Furthermore, with the growth of our population and increase in economic disparity, countervailing forces make effective affirmative action policies more necessary than ever. Briggs, an editor for the Brookings Institution, published a book outlining the dangers of our singular growth pattern, pointing out that “compared with their counterparts in European and other wealthy regions, America’s metropolitan areas are both very sprawling and very segregated by race and class,”¹⁴⁹ an effect that gets compounded with the fact that “low income Blacks tend to be substantially worse off than Whites with similar incomes...[and] tend to live in highly segregated neighborhoods [more so than their White counterparts].”¹⁵⁰

In fact, this phenomenon is so widely accepted that it has been a term has been coined for the experiences of various racial and class groups in different “geographies of

¹⁴⁸ Josh Hicks. “Everything you need to know about Elizabeth Warren’s Claim of Native American heritage.” *Washington Post*. September 28, 2012.

¹⁴⁹ Xavier N. De Souza Briggs. “The Geography of Opportunity: Race and Housing Choice in Metropolitan America.” *The Brookings Institute*. Washington D.C. 2005. p. 2.

¹⁵⁰ Sander and Taylor, *Mismatch*, p. 253.

opportunity.”¹⁵¹ Up through 1972, “more than half of Blacks entering elite colleges came from families in the bottom half of the socio-economic distribution.”¹⁵² Just thirty years later the story was completely flipped - by 1992, “the proportion was down to 8%, [and] two thirds of the 1992 cohort of Black students at elite colleges came from the *top* quartile of the American socioeconomic distribution.”¹⁵³ For poor Black Americans, segregation has moved from forced government action to the invisible hand of market forces and private segregation by race. While this type of segregation may not be as explicit or deleterious as government sponsored segregation of public and private enterprises, the cyclical nature of poverty and segregation is still ever present in Black America. With affirmative action policies that fail to reach their intended beneficiaries, poor Black students have very little hope of escaping this cycle. Current measurements of social mobility show that “persons who start life in the bottom 1/5th of the income distribution are less likely now than they were a generation ago to ‘move up’ to the top half, [regardless of race],”¹⁵⁴ largely due to the fact that high school seniors “in the bottom 1/5th of the socio-economic distribution are 70% less likely to attend a four-year college than *academically similar* seniors in the top 1/5th of the socio-economic distribution,” also regardless of race.¹⁵⁵ Forgetting about race for a moment, the trend in our society and education system is that our elite colleges are split alarmingly along income lines. Today, “roughly three-quarters of students at elite colleges are from

¹⁵¹ Briggs (2003); Galster and Killen (1995); Inhlantfeldt (1999); Pastor (2001); Squires (2002). Found in Briggs, “The Geography of Opportunity.” p. 2.

¹⁵² Sander and Taylor, *Mismatch*, p. 248.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Richard Sander. “Class in American Legal Education.” *Denver University Law Review* 88, no. 631 (2011). See Figure 1 & Figure 2, attached.

families in the top quarter of the socio-economic distribution, whereas only 3% come from the bottom quarter and fewer than 10% come from the bottom half.”¹⁵⁶ Though social mobility has dramatically increased for the relatively well off in society, it has become increasingly stagnant for the poor. Black students are left to combat both racial isolation, which is inversely correlated to wealth, and with the (far more daunting) economic isolation and disadvantage that has steadily reduced their odds at success for decades. As of 2011, Black youth are three times as likely to be poor than White youth (and more than three times as likely to live in poverty),¹⁵⁷ the largest percentage poor Black youth are under the age of five,¹⁵⁸ and as a group Black youth have a 40% change of being born poor (compared to 8% of their White peers).¹⁵⁹ The racial and economic disadvantage faced by Black children born in the United States today has created an increasingly destitute subgroup of society that affirmative action is effectively missing, exacerbating the dismal outlook that the youth face. With the odds stacked against poor Black student’s success in an extreme way, reforming affirmative action policy to is more critical than ever to fulfill the promise of our grandfathers.¹⁶⁰

¹⁵⁶ Sander and Taylor, *Mismatch*, p. 250.

¹⁵⁷ U.S. Department of Commerce, Bureau of the Census, Current Population Survey, 2010 Annual Social and Economic Supplement, Table POV01.

¹⁵⁸ *Id.*

¹⁵⁹ Caroline Ratcliffe & Signe-Mary McKernan. "Childhood Poverty Persistence: Facts and Consequences." June 2010. In "Portrait of Inequality 2011: Black Children in America." *Children's Defense Fund*. July 2011. p. 1.

¹⁶⁰ The various data on socio-economic distribution comes from two sources: Richard Sander. "Class in American Legal Education." *Denver University Law Review* 88, no. 631 (2011); and Richard Sander. "Listening to the Debate on Reforming Law School admissions Preferences." *Denver University Law Review* 88, no. 889 (2011). Details about how the socio-economic indices are constructed and measured can be found in the appendix on the former article.

Part II: California Proposition 209 – A Case Study

In the mid-1990s the debate about racial preferences, especially when used in higher education, became the spotlight of national discussion. The domestic conversation had not yet discovered to the mismatch hypothesis, but instead was focused on the declining effectiveness of affirmative action, the apparent racial tension that the program created, and the disadvantage that affirmative action created opposite of those it helped, namely to Whites and Asians. In 1995 the Board of Regents of the University of California (UC), who oversaw nine UC campuses across the state, voted to unilaterally end racial and gender preferences in their admissions processes. The new proposition, called SP-1, read that the state shall bar admissions policies that “use race, religion, sex, color, ethnicity, or national origin as a criterion for admission to the university or program of study.”¹⁶¹ Soon after in 1996, the citizens of California that extended those prohibitions in the form of Proposition 209 to all state programs, passing overwhelmingly in the November election.¹⁶² Without getting too entrenched in the details of the immediate aftermath of SP-1 and Prop. 209, suffice it to say that the backlash against the policy was overwhelming, and the debate about racial preferences raged on a national level to heights not seen since the 1960s. Scores of protests were held outside the meeting places of the UC system’s Board of Regents, regularly drawing crowds of hundreds. High

¹⁶¹ Regents of the University of California. SP-1, Policy Ensuring Equal Treatment Admissions. University of California Office of the President. (1995).

<http://www.ucop.edu/ucophome/commserv/factsheets/sp1and2.pdf>

¹⁶² Prop. 209 extended the prohibition to public employment, public education, as well as public contracting as per the Supreme Court decision in *Adarand v. Peña*, which was handed down in June of 1995. In: Cruz Reynoso. *A Survey of Latino Lawyers in Los Angeles County – Their Professional Lives and Opinions*. 38 U.C. Davis Law Review 1563. June, 2005.

profile Senators such as Lieberman and Kerry clashed with prominent figures like Jesse Jackson, and even President Clinton got involved to some degree with his “mend it, don’t end it” stance on affirmative action policy that was outlined more concretely during 1995 and 1996.¹⁶³ Throughout the vitriolic opposition and impassioned support, the UC Board of Regents held firm and the policies have remained in place since their inception. As the first major institution to put aside race-based admissions preferences, the UC System serves as the paramount case study regarding affirmative action policy, and a thorough analysis of the data from the ongoing experiment succinctly illuminates the thread of data and observation behind the mismatch hypothesis. Using a comprehensive dataset obtained through the University of California Office of the President (UCOP) on a wide range of academic metrics from the institution of Prop 209 in 1998 (when it first took effect), Duke professors led by Economist Peter Arcidiacono ran several studies. Monumentally surprising to some (but not to its proponents) their initial findings were as follows:

“Using these [UCOP] student-level data, we find evidence that the graduation rates of minorities increased after Prop 209 was implemented. Indeed, the data reveal that under-represented minorities were 4.4 percentage points more likely to graduate in the period after Prop 209 than the period before. We also find that the distribution of minorities entering the UC system shifted from its more selective campuses (e.g., UC Berkeley and UCLA) towards its less selective ones. Moreover, while there was an overall improvement in the academic preparation of minorities enrolling at UC campuses after Prop 209 went into effect, the greatest improvements occurred at the less-selective campuses. Taken together, this evidence may be consistent with the mismatch hypothesis...”¹⁶⁴

¹⁶³ Sander and Taylor, *Mismatch*, p. 126-130.

¹⁶⁴ Peter Arcidiacono, Esteban Aucejo, Patrick Coate, & V. Joseph Hotz. “Affirmative Action and University Fit: Evidence From Proposition 209.” *National Bureau of Economic Research*. Working Paper. November 2012. p. 2. See Figure 3, attached.

The mismatch hypothesis adds practical weight when combined with an earlier study by the same economists that found that “Prop 209 had the effect of raising five-year minority graduation rates from 3 to 7 percent” depending on the group¹⁶⁵, and that these effects only significantly increase when focused on STEM degrees and the time it takes to achieve a degree. Sander and Taylor supplemented these findings with more detailed evidence. Absolute minority enrollment plummeted at the better UC schools like UCLA and Berkley, but interestingly yield rates increased across the schools affected.¹⁶⁶ Black student applications increased in 7 of the 8 UC campuses affected, and increased in all eight for Hispanic students, which in turn was coupled with a nearly all-time record yield rate at Berkley¹⁶⁷, where critics were saying that the new affirmative action policies had failed. Grade Point Averages (GPA) immediately rose as well, as Blacks and Hispanics who graduated in four years with a 3.5+ GPA increased by 63% from the implementation of Prop 209 through 2003.¹⁶⁸ Doctorates and STEM degrees earned by Black and Hispanic students combined rose by nearly 50% from 1997 through 2003, whereas the number of Blacks and Hispanics majoring in ethnic studies and communications – the degrees typically pursued after preferred minority students dropped STEM courses – fell by 20% during the same period.¹⁶⁹ The data put forth by Arcidiacono and Sander overwhelmingly found “The elimination of formal racial preference led to increases...in

¹⁶⁵ Peter Arcidiacono, Esteban Aucejo, Patrick Coate, & V. Joseph Hotz. “The Effects of Proposition 209 on College Enrollment and Graduation Rates in California.” *National Bureau of Economic Research*. Unpublished paper. 2012. In: Sander and Taylor, *Mismatch*, p. 147.

¹⁶⁶ Sander and Taylor, *Mismatch*, p. 138.

¹⁶⁷ *Id.* p. 134. See Figure 4, attached.

¹⁶⁸ *Id.* p. 148.

¹⁶⁹ *Id.* p. 150.

the numbers of Blacks and Hispanics earning bachelor's degrees...and even more dramatic increases in the numbers earning bachelors degrees on time,"¹⁷⁰ in areas previously unattainable to Black and Hispanic students due to the mismatch concept. The number of Black and Hispanic freshman who graduated in four years rose 55% from Prop 209's inception through 2003, the average absolute increase of Black students who received bachelors degrees was 90 students per year and over 1,100 for Hispanic students per year as well.¹⁷¹ There did not seem to be an academic downside to the analysis of the UCOP data.

Countering the mismatch theory somewhat, Arcidiacono tried to lessen the power of his and Sander's blunt analysis by attributing the dramatic changes to other effects. The mitigation of the mismatch construct through the elimination of racial preferences did not create graduation rate increases for students at the bottom of the academic preparation spectrum, and overall the effects decrease when looking at five-year graduation rates rather than four-year rates.¹⁷² Also, specific responses by the UC system schools themselves may have lessened the effect. In order not to appear to care less about their minority students after Prop 209, many universities ramped up their efforts to prevent drop-out rates from increasing and offered increase assistance in achieving a degree, positing that this mitigation effect explained 34%-50% of the increase in minority graduation rates in the years after Prop 209's inception. This finding was coupled with a similar estimation, saying that 30-46% of the minority graduation increase could be attributed to programs aimed at minority retention from grade to grade, all the way

¹⁷⁰ *Id.* p. 148.

¹⁷¹ *Id.* p. 154.

¹⁷² Arcidiacono et al. *Affirmative Action and University Fit*. p. 30,

through graduation, with only 20% of the effect coming from ‘better matching’ of students to schools.¹⁷³ Furthermore, while admissions and yield rates increased generally across the UC system, they drastically fell at the highest ranked schools of UCLA and Berkley.

Interestingly, due to other metrics aside from race being used in the UC system’s admission policy such as parental income and parental education, the socioeconomic diversity of minority enrollees greatly increased, which could be argued is the primary intent of affirmative action policy.¹⁷⁴ In fact, the advantages gained were not uniform at all, and Arcidiacono found that the share of applicants and admits who had educated parents with a combined income of over \$80,000 fell, showing that although minorities from advantaged backgrounds applied at similar rates to similar levels of institutions, they were ironically less likely to enroll and less likely to graduate than their less-well-off peers.¹⁷⁵ Whatever the detractors of Prop 209 may have to say about the program, the fact remains that under represented minorities saw a modest increase in their yield rate relative to non-under represented minorities after the institution of the proposition, which interestingly happens above the (also) modest increase in the general yield rate of *all* students after Prop 209.¹⁷⁶

Prop 209 and the UC system’s experience with the proposition have drawn out the evidence of the mismatch hypothesis. The UC system saw a shift in matriculation into the universities generally leaning on higher applicant pools for the less academically

¹⁷³ *Id.* p. 3, 15, 31.

¹⁷⁴ *Id.* p. 4.

¹⁷⁵ *Id.* p. 7-8.

¹⁷⁶ Antonovics and Sander. “Affirmative Action Bans and the “Chilling Effect.”” *University of California San Diego*. Working paper. June 2012. p. 3.

stringent schools, with a marked decrease in the absolute number of under represented minorities across the campuses. However, the decreases were countered by marked increases in the matriculation rate out of the universities, higher GPAs, a faster rate and higher likelihood of degree achievement, a drastic increase in STEM degrees for Black and Hispanic students, and the advancement of socioeconomically disadvantaged minorities relative to their more well-off peers, both within their race and outside of it. Taking the lessons from Prop 209, as well as including some recent findings based on additional data about academic preferences and performance, the solutions to the affirmative action ‘problem’ can be proscribed relatively simply.

Chapter 6: Proposed Reforms

Throughout this work, I have outlined the constitutional and political problems with affirmative action policy, and drawing attention to those that will simultaneously pass constitutional muster as well as serve underrepresented minorities more effectively in its implementation. Without doubt, affirmative action policy has to change to survive, a reality that even its most staunch defenders must acknowledge. I am proposing what I believe will be reforms that will fix our current system as well as create continuous feedback loop to further modify the policy as circumstances change over time. Every day that floundering policies are allowed to continue is another day that those same policies harm the lives that they are supposed to aid.

Reform I: Change Affirmative Action policies to a Class-Based system - catering these preferences in an explicitly Race-Neutral yet implicitly Race-Focused way

The mismatch hypothesis is founded on a simple principle – that affirmative action policies regarding admissions preferences would work better if they were less extreme. Instead of making them superficially weaker like the Supreme Court does through the mandated constriction of abstract definitions (as explained in Chapters 1 & 3), this reform is referring to the vast aid that underrepresented minority students receive upon applying to a college or university. The Court has systematically restricted affirmative action's use except in a very narrow set of cases, especially since *Bakke* was handed down in 1978, over 35 years ago. While it may not particularly be caused by these court cases directly, there had been a correlated increase in racial wealth disparity,

especially over the last 25 years. Nearly all ethnic groups have made absolute gains during this time, yet Black individuals have become relatively much worse off than their White counterparts. If you recall, in the previous chapter a significant amount of time was spent on the importance of a relative inequality in the education system, which in turn creates poor academic performance and restarts the cycle of poverty for the marginalized group. In fact, a study by Thomas Shapiro, one of the foremost scholars on racial inequality in the United States, found that some of the biggest drivers of the increasing racial wealth gap are the lack of either a beneficial college education or any college education at all, as well as years of homeownership, household income, unemployment, and inheritance.¹⁷⁷ The gains of equal achievements of wealth or business strategy have also yielded disproportionately more gains for Whites than for Blacks. All of these factors have led the income gap to widen from \$85,000 in 1984 to over \$236,000 in 2009 – a 277% increase in 25 years, or an average of 11% annually.¹⁷⁸ Though showing signs of weakness in recent years, a trite (yet core) argument of affirmative action is that it helps underrepresented minorities get into good schools, and good schools lead to good jobs, and good jobs lead to a better quality of life. Clearly this has not been working for the Black community over the last 25 years, as the wealth inequality has increased at a staggering rate.

Antovics and Backes recently released an interesting paper detailing how these reforms could be carried out. They looked at Prop 209 and the admission changes that

¹⁷⁷ Thomas Shapiro, Tatjana Meschede, & Sam Osoro. “The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide.” Institute on Assets and Social Policy. *Brandeis University*. February 2013. p. 1.

¹⁷⁸ *Id.*

took place across the UC system, as well as how those rules affected the quality of the students based on SAT scores, high school GPA, and other predictors of college performance.¹⁷⁹ They constructed a model to figure out how the UC system changed the weight of their admissions practices after Prop 209 (which were not publically released) by comparing student data to admissions statistics before and after the change. When they came up with a relatively sound model that fairly accurately predicted whether or not a student would gain admittance into the various UC system schools, they discovered the interesting ways that the UC system was catering their admissions decisions in a race neutral way but still managing to admit high levels of underrepresented minorities.¹⁸⁰ Looking at the top four UC schools in isolation, Antonovics and Backes saw a decrease importance of SAT scores and a relative increase in the importance of GPA and family background, leading to a near 7% increase in admission for underrepresented minorities by 2004-2006. Similarly, at UCLA underrepresented minorities saw an 11% increase in admissions ‘odds’ in the same period through similar tactics.¹⁸¹ While these steps to mitigate the decrease in underrepresented minorities attending Berkley and UCLA did not cover the near 31% drop after the implementation of Prop 209, the universities were still able to make up a significant amount of the loss (about 16-26% depending on the campus) with such simple changes, which also have positively affected Asians’ relative chances slightly.¹⁸²

¹⁷⁹ Kate Antonovics & Ben Backes. “Color-Blind Affirmative Action and Student Quality.” *University of California San Diego*. Preliminary Draft. March 6, 2013. p. 3.

¹⁸⁰ *Id.* p. 10-11.

¹⁸¹ *Id.* p. 13.

¹⁸² *Id.* p. 13-14.

The obvious follow-up question is how these admittance changes affect the new student body at the various UC campuses. After noting that the changes are not restricted to underrepresented minorities, Antonovics and Backes compare the student's high school test scores and GPA to their first-year college GPA. They find a steady increase in the quality of the students over time.¹⁸³ Furthermore, while Antonovics and Backes measured the sum of the student body's change in academic quality, they also estimated (based on their admittance equation) that this overall shift was due to the substantial changes in the marginal admits, which they are not able to measure with the data they have.¹⁸⁴

The Antovics and Backes study outlines how explicit race-neutral practices could be applied in an implicitly race-based way, which would also pass constitutional muster as discussed in Chapter 4. The next crucial step in this process of effectively reforming affirmative action policy is to determine what metrics should be applied. There are a plethora of studies looking at the dismal reality that underrepresented minority youth face in our society today, and taking some of those realities and applying them to weigh in on educational reforms neutrally can help begin the process of jumpstarting affirmative action's effectiveness. Affirmative action policies should provide academic preference to *qualified* individuals (by the standard of the relevant College or University) to the following areas, which only represent a few ideas to kick-start the discussion surrounding the most effective race-neutral implicitly race-helping admissions and hiring tactics:

¹⁸³ *Id.* p. 19 & 25, see Figure 3 attached.

¹⁸⁴ *Id.* at p. 19.

1. Focus on geographic areas with low rates of health insurance and/or high health risks for young people

Young people, and men in particular, are more likely to be uninsured than any other cognizable group in our country. Almost 40% of Black youth ages 18-29 do not have health coverage, which is a *smaller* percentage than Hispanics, Native Americans, and other indigenous peoples (E.g. Native Hawaiians).¹⁸⁵ Furthermore, the homicide rate among young Black men is three times that of Hispanic men, which is the next highest mortality rate. In fact, the number one reason Black youth are killed before reaching the age of 29 is intentional homicide, and has been so for over a decade. Homicide and HIV death rates combined for Black youth ages 15-24 are over ten times higher than for Whites.¹⁸⁶ Targeting general areas (by zip code, for example) where these homicide and health risks (especially in areas affected highest by HIV if possible) generally will greatly help Black youth escape the crushing cycle of poverty and early death in a way that current affirmative action policies do not even come close to doing. While these policies can be taken advantage of by any race within that area, as Chapter 5 pointed out, the more impoverished an area is the more the areas segregates by race, so while Black youth only count for 14% of the total United States youth population, the ones most affected by poverty and crime are clustered in geographic pockets that represent a far higher number than the national average. Catering to this group would seem to reach higher levels of low-income individuals to achieve the broader spectrum of diversity discussed near the end of Chapter 5, Part I, as over 58,000 households with incomes less than \$25,000 go

¹⁸⁵ "Race, Ethnicity, and Health Care Fact Sheet." *Henry J. Kaiser Family Foundation*. July 2006.

¹⁸⁶ *Id.*

without health insurance. However, this is nearly the exact same number of households without health coverage as the income bracket from \$50,000 to \$75,000, which actually contains 200 *more* households that go without coverage.¹⁸⁷ To target individuals with health risks even more directly, focus should be put on these youth within metropolitan areas, as over 84% of households without health coverage come from these densely populated areas¹⁸⁸ – which brings me directly to my second point.

2. Provide Admission Incentives for Metropolitan Youth

While the focus on education and general high school graduation rates among youth are steadily improving unilaterally, urban youth are struggling to keep pace with their suburban counterparts. While three out of every ten students fail to get a high school diploma, this figure is made more alarming with the recognition that barely *half* of high school students in America's largest cities graduate high school, accounting for a significant portion of the former statistic.¹⁸⁹ While cities overall are gradually catching up to their suburban peers, the gaps are getting more severe in 10 of America's largest 25 cities.¹⁹⁰ In our largest 100 cities, Hispanics make up 26% of the population and 22% are

¹⁸⁷ Rebecca M. Blank. "Income, Poverty, and Health Insurance coverage in the United States: 2010." *U.S. Department of Commerce*. September 2011. p. 26.

¹⁸⁸ *Id.*

¹⁸⁹ Christopher Swanson. "Closing the Graduation Gap: Educational and Economic Conditions in America's Largest Cities." *Editorial Projects in Education, Inc.* Bethesda, Maryland. April 2009. p. 16.

¹⁹⁰ Specifically in Philadelphia, Washington D.C., New York City, Columbus, Indianapolis, El Paso, Chicago, Baltimore, Seattle, and San Francisco/Oakland (counted together) *Id.* p. 16.

Black, compared to just 16.3% and 12.6% of the national averages, respectively.¹⁹¹

Furthermore, as of the 2010 census, 58 of America's cities are 'majority minority,' up from 43 in 2000.¹⁹²

By putting in place admissions programs aimed at talented youth in these areas, race-neutral admissions policies would help close the education gap between metropolitan and exurban students, particularly aiding the Black and Hispanic populations that largely make up these areas. The University of Texas system came up with a highly successful way to target these talented yet underrepresented youth (as Texas has seven of the nations largest 50 cities¹⁹³), which was to implement a 'Top 10%' plan granting automatic admission to any student academically finishing in the Top 10% of their high school graduating class. As discussed in the introduction, the program was so successful that the case of *Fisher v. Texas* rests on the presumption that affirmative action policies in their current form are not even necessary at all, as this one new admissions practice almost completely altered the racial makeup of the UT school system. While neutral on its face, incentives like these can help reduce both racial and economic divisions in our education system generally.

As college campuses generally have turned from correcting past governmental transgressions to valuing diversity over time, colleges have begun to find non-race based ways to include vast socioeconomic diversity that still retains a high level of underrepresented minorities. As noted in the end of Part I of the previous chapter, classes

¹⁹¹ William H. Frey. "Melting Pot Cities and Suburbs: Racial and Ethnic Change in Metro America in the 2000s." *Brookings Institute – Metropolitan Policy Program*. May 2011. p. 1.

¹⁹² *Id.*

¹⁹³ Christopher Swanson. *Closing the Education Gap*. p. 4.

of citizens have been tending to live together based on socioeconomic status rather than race, putting a greater emphasis on diversity of background along those economic rather than racial ones. By changing the admittance policies to turn in a way that benefits underrepresented groups in a non-racially discriminatory way, the college system generally can maintain a higher level of diversity while simultaneously pulling in a more intelligent and promising student body. However, without a continuous stream of feedback data on these policies as they are put into place, our education system could easily slip into the same mistake of propagating outdated and irrelevant metrics, which brings me to my second reform

Reform II: Mandate Open Data Practices by all Government-Subsidized Colleges and Universities

Much as the pre-*Bakke* system of quotas would not be as effective today as they were some 35 years ago (pre-1978) due to the increased competitiveness of our schools, an increase in wealth gaps among races and people generally, and a myriad of other factors, so too will it likely be that policies enacted in 2013 will likely not be as effective 35 years from now due to similar shifting social and economic trends. Without the Bar Passage Study data, the raw admissions statistic given to education academics from the University of California system Office of the President, and other data sets from the George Mason accreditation issue and post-Prop 209 respectively, the current mismatch phenomenon may have gone a long while without being discovered. Regardless of what the solutions may be, it is vitally important to continue the constant flow of data to ensure that policies are serving their end purpose effectively or even at all.

While the best option for public discourse is complete transparency, colleges and universities are highly unlikely to release current datasets for fear of criticism, especially when it comes to race relations. Therefore, a fair compromise would be to either provide a small set of academics or Department of Education officials the access to this data to analyze, or to create a panel of the foregoing experts to act independently as advisors to the institutions generally. Even if the process were done behind closed doors, it would still allow an open dialogue among the higher education system's officials in a single, practical location, rather than being confined to Op-Eds, university press articles, law reviews, and other relatively superficial means of effecting long-term change (at least compared to *de jure* changes in admissions policies). The only downfall in the later, less-transparent approach is that it would give aspiring students less information in the application process, which could in turn lead to negative experiences at the institution they end up attending due to an information disconnect between what the university advertises versus what they do in practice. In Chapter 5, Part I we touched on this occurrence with students experiencing the realities of the current affirmative action system, and too much opaqueness in the reform system would likely continue this problem – yet another mismatch phenomenon. In fact, too much vagueness in any reform system could easily lead to ever greater problems with the already-convoluted policy, a lesson we have learned since Justice O'Connor's confusing *Grutter* opinion, and further complications split regionally after *Hopwood*. As Staton and Vanberg point out in their criticism of *Grutter*, "Supreme Court decisions that set vague standards are particularly

likely to be half-heartedly implemented, or even completely ignored, by the government actors with relevant operational responsibilities.”¹⁹⁴

Lastly, Sander points to a third key benefit of open data leading to increased benefits, which is that the practice “would make far more public the extraordinary lack of socioeconomic diversity at nearly all professional schools and elite colleges,” a realization that would surely fuel changes in affirmative action policy to become more effective in the class-based way the mismatch theory advocates.¹⁹⁵ These levels of accountability to the public, and to the societal goals that colleges and universities advocate (or, at least should advocate) will help keep affirmative action policies relevant to the present day, regardless of the time period. Policies like affirmative action are intricate and require a very detailed catering to the facts of the era to continue to be successful across generations, and the foregoing ideas will allow the policy to remain flexible and effective.

Reform III: Means Test Race-Based Educational Awards

While race-based awards have generally shown to do little to increase racial diversity in college campuses, they can provide invaluable aid to students who could not otherwise afford college. The proponents of the mismatch hypothesis argue that colleges and universities should outlaw all race-based awards,¹⁹⁶ but they can still provide personal benefits to many underrepresented minority students who need financial

¹⁹⁴ Staton, Jeffrey K. and Georg Vanberg. “The Value of Vagueness: Delegation, Defiance, and Judicial Opinions.” 52 *American Journal of Political Science* 504 (2008).

¹⁹⁵ Sander, Richard. “Class in American Legal Education.” *Denver University Law Review* (2011). & Kahlenberg, Richard. *The Remedy: Class, Race, and Affirmative Action*. New York: Basic Books, 1996.

¹⁹⁶ Sander and Taylor, *Mismatch*, p. 285-6.

assistance. But that begs the mismatch question regarding class-based remedy's as being more effective than race-based ones: Why not simply give these awards to relatively poor students?

Affirmative action is still a race-based program at its core, and my reforms have tried to satisfy both constitutional critics of the policy as well as its proponents. However, as there has been no significant legal challenge to race-based awards generally (as private actors are allowed to discriminate so long as it does not significantly affect the public sphere), I see no reason to stop this practice – just to amend it.

One point I did not touch on earlier was how students of different income levels chose which college or university to attend. Not surprisingly:

“Compared with similarly qualified students from more affluent families, low-income students have higher financial threshold requirements for enrolling in four-year colleges, especially the more expensive selective colleges. They face greater loan burdens and are more debt averse. Financial barriers are even growing, as evidenced by the way the value of Pell Grants as a percentage of the costs of college attendance has fallen precipitously since the 1970s...Unmet financial need—the total price tag minus all student aid—was roughly equivalent across income classes in the 1974–75 school year and is still the same for high income families but has since doubled for low-income families.”¹⁹⁷

At first glance, it makes sense to apply to a State school where tuition and general expenses total less than \$20,000 a year, versus a highly ranked private school where costs can soar well north of \$60,000 annually. However, this economic fear is leading highly qualified low-income students to apply to lower-tier schools than they are capable of excelling in, and coming out with more debt. A recent study conducted jointly between Stanford and the University of Virginia found that “low-income students often pay

¹⁹⁷ Anthony P. Carnevale & Stephen J. Rose. “Socioeconomic Status, Race/Ethnicity and Selective College Admissions.” *The Century Foundation*. New York, New York. March, 2003. P. 156-7.

significantly more to attend lower-tier schools than selective colleges, which have the resources to offer large scholarships.”¹⁹⁸

By reforming affirmative action’s raced-based educational awards system to cater to low-income students specifically, the awards can cater to exactly the type of student that the policy is trying to help in a highly detailed way. The foregoing study found that these students “are admitted, enroll, progress, and graduate at the same rates as high-income students with equivalent test scores and grades,” and are eager to attend these institutions when they are presented with “accurate information about colleges’ net costs.”¹⁹⁹ Furthermore, these students can go through the tedious and costly admissions process with low costs to both them and well as the university (estimated at \$6 per student) with waivers for application and testing fees.²⁰⁰ By means testing these race-based awards and advertising them in the relevant communities, our nations best colleges and universities can recruit the best and brightest students, who “come from households neighborhoods” very similar to other low-income students who *do* use these methods to attend the best educational institutions with very little to no debt upon graduation.

While changing affirmative action policies to race-neutral, class-based policies positively affect the educational and long-term experience of underrepresented minorities (as early data from post-Prop 209 showed), I argue that the foregoing three reforms will increase that level of effectiveness in the pursuit of affirmative action’s original goals.

¹⁹⁸ The Editorial Board. “From Poverty to a Top-Tier College.” *The New York Times*. April 10th, 2013.

¹⁹⁹ Caroline Hoxby & Sarah Turner. “Expanding College Opportunities for High-Achieving, Low Income Students.” *Stanford Institute for Economic Policy Research*. Stanford University. 2013. p. 2.

²⁰⁰ *Id.*

The specific reforms, open policy practices, and means-testing of race-based awards will also allow for the continual reassessment of the program to remain up-to-date with the necessity of the times. Diversity-oriented practices outside of affirmative action policies can still be used to bring in foreign or immigrant populations to our higher education institutions, and could potentially aid in affirmative action's original intention of correcting for past governmental injustices. However, these diversity-oriented policies should complement affirmative action, not overtake its purpose and decrease its effectiveness.

Concluding Thoughts

Fisher v. University of Texas brings the affirmative action debate roaring back into the national limelight after it had remained relatively dormant since the Michigan cases in 2003. The problems and reforms I outline are intended to bring affirmative action back to its original intended end – to help minority citizens institutionally disadvantaged by governmental policy. Affirmative Action today pursues a vague definition of diversity, and applies preferential treatment to the underrepresented minority group that each institution is looking for. This diversity is not inherently bad, nor do I want to make that claim. Creating an environment that prides diversity of opinion through accessing sets of wealthy, immigrant, or foreign minority populations in our higher education system fosters many benefits to students, our workplace, and society generally. Yet it is when these types of diversity are being justified using affirmative action principles that originally were intended to reach the poor, institutionally disadvantaged, domestic minority population that these policies become problematic.

Throughout this work, I have laid out evidence that shows how preferences are at the heart of the problems with our affirmative action program. Simply changing to a class-based system will not help affirmative action policies become successful without either the complete elimination of or drastic cuts in these preferences to the level of typical athletic or legacy preferences, which are significantly smaller than racial preferences on average.²⁰¹ The Stanford study cited in the discussion of Reform III in Chapter 6 is particularly illuminating, because it shows that with only the simple dissemination of accurate college financial and admission information to the

²⁰¹ Sander and Taylor, *Mismatch*, p. 27.

underrepresented minority youth that I propose colleges and universities target, students overwhelmingly align themselves with academically well-matches institutions that also typically allow them to graduate with less debt than other options. This finding is crucial to keep in mind when reforming affirmative action policies – the reforms are not about simply shifting the preferences, but the system altogether. Moving from blanket racial preferences for diversity generally to narrowly tailored class-based outreach in specific areas can provide the much-needed spark to reignite the efficacy of the program.

The economic gap between races is growing. The policies in place, regardless of their legislative intent or strong constitutional underpinning, are failing miserably. The conversation surrounding race relationships in the United States is a difficult one to face, especially when the debate revolves around ways to create or amend legislation that directly affects racial groups. Yet these debates have been a part of America's growth since the very drafting of our Constitution, and in turn have (often rather quickly) molded and changed the constitution of our society. To avoid the mismatch framework's evidence because the topic is too difficult to broach is a mindset that is, in my opinion, diametrically opposed to the history and tradition of our American civic system. *Fisher v. University of Texas* provides a perfect platform to bring this issue to the halls of Congress as well as the West Wing, and to extending President Kennedy's famous rhetoric to this discussion; we must tackle these issues "not because they are easy, but because they are hard."²⁰²

²⁰² President John F. Kennedy. Moon Speech. *NASA.gov*. Rice Stadium, Rice University, Texas. September 12, 1962.

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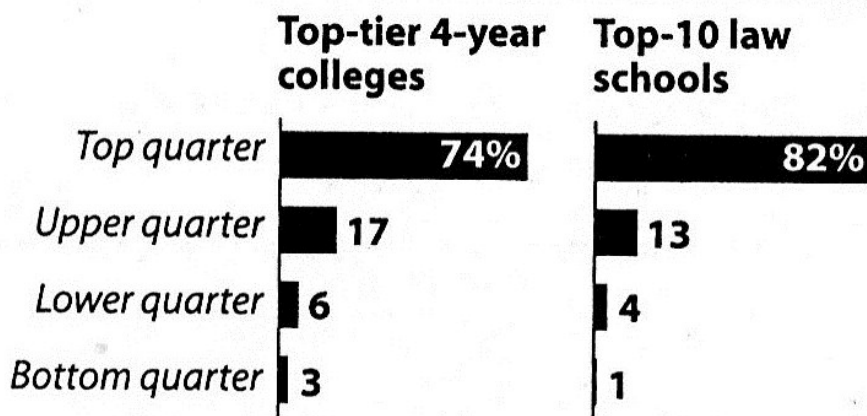
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Charts and Figures

Figure 1 Not-So-Diverse

Most students at elite undergraduate and law schools come from privileged backgrounds.

Proportion of students in each socioeconomic quartile

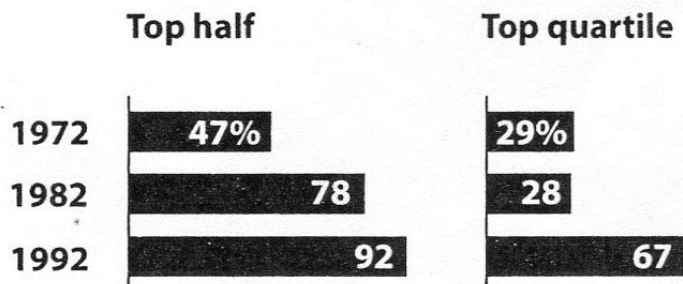
Source: Analysis of elite colleges is from Carnevale & Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," (2004); analysis of law schools is from Sander, "Class and American Legal Education," (2011).

Figure 2 Drift Toward Affluence

Each decade the federal government funds a longitudinal study that tracks high school students through college and the start of their careers. The socioeconomic background of blacks who attended elite schools has changed markedly since the early years of racial preferences.

Although the sample size is small (a total of 61 black respondents at elite schools) the socioeconomic background of blacks who attended elite schools has changed markedly since the early years of racial preferences, and the shifts are statistically significant.
























Proportion of black students at elite colleges whose family background puts them in the . . .



Sources: Authors' calculations of data from National Longitudinal Study (1972); High School & Beyond (1982); National Longitudinal Education Study (1992).

Figure 3 The Warming Effect

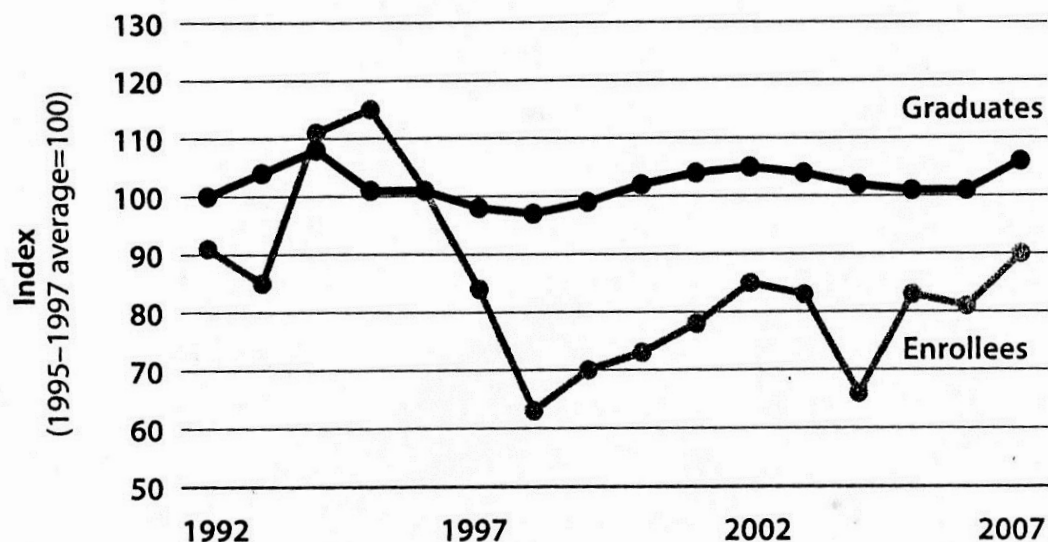
The announced end of racial preferences at the University of California coincided with a jump in the rate at which blacks and Hispanics accepted offers of admission from UC schools. This “warming effect” was particularly large at the more elite schools, which had formerly used the largest racial preferences, and seemed unaffected by drops in total minority enrollment at three elite campuses.

Campus	Campus eliteness (mean academic index of students on 0 to 1,000 scale, 1995–2000)	Comparing 1995–1997 with 1998–2000	
		Change in likelihood that Underrepresented Minorities would accept admissions offers	Change in absolute minority enrollment
 Berkeley	805	+15 % 	 -42%
 UCLA	776	+10 	 -33
 San Diego	752	+14 	 -9
 Davis	702	+14 	 -1
 Santa Barbara	682	+5 	 -1
 Irvine	680	0	+22 
 Santa Cruz	647	+9 	+18 
 Riverside	631	+13 	+65 

Source: Antonovics & Sander, “Affirmative Action Bans and the Chilling Effect” (2012), and calculations by the authors.

Figure 4 Minority Enrollment Falls While Graduation Numbers Hold Steady

Number of black and Hispanic enrollees and B.A. recipients at UCLA, before and after Proposition 209



Source: UC Office of the President. Note that the number of graduates is adjusted to parallel freshman cohorts; thus, graduates for the 1992 cohort is an average of those receiving B.A.s in 1996 through 1998. For all years, B.A.s include those received by students transferring to UCLA.