

MAKING IT TO CLASS:  
SOCIOECONOMIC DIVERSITY AND THE  
STATUTORY AUTHORITY OF THE  
DEPARTMENT OF EDUCATION

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*A college degree is increasingly viewed as a necessary pre-requisite to success and financial stability in the United States. However, higher education has long been—and continues to be—a luxury enjoyed disproportionately by the privileged. This is especially true among the country’s most elite academic institutions, where the vast majority of students come from families in the top quarter of the income distribution, in spite of the fact that high-achieving students are much more evenly distributed throughout the socioeconomic strata.*

*This Note considers the statutory authority of the Department of Education to regulate admissions policies at American universities. In particular, it argues for a novel and broader interpretation of the Department’s regulatory authority than is contemplated today, and suggests that the Department is positioned to make radical, immediate changes to college admissions policies in order to increase socioeconomic diversity in postsecondary degree programs. This Note concludes by considering the practical and constitutional considerations involved in instituting a class-based admissions preference, and how such a policy should co-exist with other diversity-enriching programs.*

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INTRODUCTION

Adam is a high school senior<sup>1</sup> in a small, rural Minnesota town, where he plays on the football and soccer teams. His father is a farmer and mechanic, while his mother cleans houses and works at the grocery store. Adam helps out on the family farm on the weekend; he works at the local Applebee’s full time during the summer and after practice during the school year. Adam’s parents have always hoped that he might go to college—hopefully a state school close to home, and on scholarship—but neither they nor their son really known what it takes to achieve that goal.

Adam’s guidance counselor is also of little help: he remembered to tell Adam to register for the ACT only a few weeks before the test, much too late to meaningfully prepare or to try again if things went badly. Adam scored relatively well, but not as well as he might have if he had known more about the test. Similarly, Adam does well in school, but not as well as he could if he had time to focus on his schoolwork, which he must instead balance with supporting his family. Still, he is in line to graduate close to the top of his class, and his teachers are fond of him.

One teacher in particular thinks that Adam has serious potential and could be a huge success. Realizing that Adam might not *really* want to live in the Midwest for the rest of his life, the teacher gives Adam a handful of college admissions brochures—from places like

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1. Adam is also a work of fiction, but this isn’t to say that he doesn’t exist. In this case, Adam’s experiences and characteristics are an amalgam of elements drawn from my own personal experience, anecdotes, and stereotype, as well as inspired to some small extent, admittedly, by Peter Berg’s *Friday Night Lights*.

Yale, Stanford, Columbia, and NYU. No one from Adam's school has ever gone to any of those schools—the very brightest, every few years, end up at the University of Minnesota or Wisconsin—but Adam is intrigued. Even though Adam expects to go to a small school in the University of Minnesota system, he also applies to some of the schools his teacher told him about.

Very few students at our nation's top colleges look like Adam. According to a 2003 article, in our nation's 146 most selective schools,<sup>2</sup> only ten percent of the students come from the bottom half of the socioeconomic scale.<sup>3</sup> On the other hand, students from families in the top socioeconomic quartile make up seventy-four percent of the student bodies at those schools. Yet nearly forty percent of the highest-achieving students, by test score, come from the bottom half of income.<sup>4</sup>

Wherever Adam may be admitted, he will likely be among the more fortunate of his peers. Adam's story is not extraordinary, but most students in his position are not nearly as successful in endeavoring to support their families while doing well in school and on standardized tests. Students from families in the lower half of the income distribution are underrepresented even at America's *least* selective schools.<sup>5</sup> This comes as no surprise when one considers the correlations between socioeconomic status (SES) and performance on standardized tests: when compared to average students of high SES, an average student of low SES would be expected to score 400 fewer points on the SAT<sup>6</sup> (on the pre-2006 scale out of 1600 possible).<sup>7</sup>

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2. In their 2003 study, Anthony Carnevale and Stephen Rose divided schools into prestige tiers using a classification system based on the Barron's guides to American colleges. The "top tier" consisted of the 146 schools where "[g]enerally, students . . . are in the top 35 percent of their high school class, have a high school grade point average that is B or better, and score about 1240 on the SAT I or above 27 on the ACT. Colleges in this tier accept less than 50 percent of the applicants." Andrew Carnevale & Stephen Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in THE CENTURY FOUNDATION, AMERICA'S UNTAPPED RESOURCE: LOW INCOME STUDENTS IN HIGHER EDUCATION 104 (Richard Kahlenberg ed., 2004).

3. *Id.* at 106.

4. See CAROLINE M. HOXBY & CHRISTOPHER AVERY, NATIONAL BUREAU OF ECONOMIC RESEARCH, BROOKINGS INSTITUTION, THE MISSING "ONE-OFFS": THE HIDDEN SUPPLY OF HIGH-ACHIEVING, LOW INCOME STUDENTS 11 (2012).

5. *Id.* Students in the bottom quartile make up less than their share even of community college classes. *Id.*

6. Andrew Carnevale & Jeff Strohl, *How Increasing College Access is Increasing Inequality, and What to Do About It*, in THE CENTURY FOUNDATION, REWARDING STRIVERS: HELPING LOW INCOME STUDENTS SUCCEED IN COLLEGE 170 (Richard Kahlenberg ed., 2010). Of course, socioeconomic status can be measured in countless ways. In their study, Carnevale and Strohl considered score correlations among students from the lowest income quartile, students with parents in blue-collar occupa-

Ultimately, low-SES students who seek to attend college face a system that is stacked against them. Given their relatively poor showing on standardized tests, it is no surprise that low-SES students tend to opt out of the college application process or into schools of low prestige, where fewer resources are invested in their potential.<sup>8</sup> But even those students that do achieve high marks in school and on standardized tests still—more often than not—“undermatch” into schools less prestigious than they could be admitted to.<sup>9</sup> Among other reasons, successful low-SES students have few role models who have gone to prestigious (often far away) schools before them. In short, access to equal educational opportunity is limited for many American students.

Low-SES students are not unique in this respect. Women and ethnic minorities have been,<sup>10</sup> and in many cases still are,<sup>11</sup> underrepresented in higher education. Unlike low-SES students, however, women and minorities have enjoyed support from states, private educational institutions, and the federal government in the form of affirmative action.<sup>12</sup> By recognizing structural barriers to entry and real

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tions or with no high school diploma, students enrolled in poor public schools, students from certain geographic areas, students not enrolled in AP or honors courses, students with jobs during high school, and students with no college savings, *inter alia*. *Id.* Throughout this Note, when referring to low-SES students, I am generally making reference to students from the lowest income quartile, in poor public schools, and from communities where higher education is uncommonly pursued. Where—as in Part III—more specific definitions of SES categories are necessary, I endeavor to elaborate them.

7. At this time, it does not appear that any studies have considered post-2006 SAT scores, after the test began to be scored out of 2400 points.

8. Carnevale & Strohl, *supra* note 6, at 170.

9. William G. Bowen et al., Commentary, *Helping Students Finish the 4-Year Run*, CHRONICLE OF HIGHER EDUC. (Sept. 8, 2009), <http://chronicle.com/article/Helping-Students-Finish-the/48329>.

10. See, e.g., Patricia Albjerg Graham, *Expansion and Exclusion: A History of Women in American Higher Education*, 3 SIGNS 759 (1978); Shaun R. Harper et al., *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts*, 80 J. HIGHER EDUC. 389, 393–97 (2009).

11. See Carnevale & Rose, *supra* note 2, at 106 (discussing the underrepresentation of minorities); Emily Grey Goldman, *Lipstick and Labcoats: Undergraduate Women's Gender Negotiation in STEM Fields*, 5 NASPA J. WOMEN IN HIGHER EDUC. 115 (2012) (explaining that while women are sufficiently represented in undergraduate institutions generally, they remain underrepresented in various fields and majors).

12. See, e.g., Harper et al., *supra* note 10, at 397 (relating the introduction of the term “affirmative action” by President Kennedy and the advent of “elaborate plans to remedy the problem of persistent exclusionary practices and decades of unfair treatment of women and racial/ethnic minorities in all facets of American life”). Women, in fact, have gone from being underrepresented to overrepresented in some cases, as some schools are now giving admissions preferences to *men* in order to achieve gender parity. See Jennifer Delahunt Britz, Op-Ed., *To All the Girls I've Rejected*, N.Y. TIMES, Mar. 23, 2006, <http://www.nytimes.com/2006/03/23/opinion/23britz.html> (last

inequalities in representation for minority groups—and by placing explicit value on diversity in the educational context—affirmative action has contributed to significant strides forward in achieving equal access to educational opportunity for women and minorities.<sup>13</sup> Still, as race-based affirmative action has come under significant political and constitutional fire, and as supporters of diversity in education begin to consider alternative approaches, class-based affirmative action has yet to gain traction.<sup>14</sup> Current policies aimed at increasing representation of low-SES students have been limited in number and scope, and have not proven especially successful, either.<sup>15</sup>

The onus of creating diverse student bodies and increasing access to education does not fall exclusively on America's universities, however. That responsibility also falls on the United States Department of Education (DOE), which under the Department of Education Organization Act (DEOA), is directed to “strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual.”<sup>16</sup> The DOE has worked toward increasing access to education for low-SES students by providing grants, scholarships, and subsidized loans to defray the costs of education.<sup>17</sup> This solution helps students who are admitted to college to matriculate and graduate, but does nothing to improve the chances of admission for students that are severely disadvantaged on that score.

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viewed Mar. 18, 2013) (describing, from an admissions officer's perspective, that “because young men are rarer, they're more valued applicants”).

13. See, e.g., Harper et al., *supra* note 10, at 397; Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding affirmative action policy because of its purpose to increase diversity in education).

14. See, e.g., CAL. CONST. art. I, § 31 (resulting from Proposition 209, an amendment to the California constitution banning the consideration of race in admission); Fisher v. Univ. of Texas, 570 U.S. \_\_\_, (2013) (considering a challenge to the consideration of race in undergraduate admissions and remanding to the appeals courts for proper application of strict scrutiny); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (striking down racial quotas as permissible affirmative action and applying strict scrutiny in considering the policy). This is not to say that class-based affirmative action—which would obviously reach significant numbers of minority students—has not been discussed as an alternative approach to ensuring diversity. See *infra* note 75 (discussing competing positions on class-based affirmative action). Just the same, as is discussed *infra*, Part III, class-based affirmative action is by no means widespread, even where race-based affirmative action has been disallowed.

15. See, e.g., HOXBLY & AVERY, *supra* note 4, at 29 (critiquing existing efforts to increase the pool of high achieving low-income students as ineffectively, among other things, limited in geographic scope).

16. 20 U.S.C. § 3402 (2011).

17. See OPE Functional Statements – Higher Education Programs, U.S. DEP'T OF EDUC., [http://www2.ed.gov/about/offices/list/om/fs\\_po/oep/highered.html](http://www2.ed.gov/about/offices/list/om/fs_po/oep/highered.html) (last visited Nov. 4, 2012).

This Note suggests that the DOE has been authorized by Congress not just to help low-SES students pay for college, but to actually help them to secure meaningful access to higher education: in other words, to improve, through regulation, the college admissions prospects for low-SES students.<sup>18</sup> Part I presents an argument for the desperate need of low-SES students for federal admissions policies that place them on equal footing with their more privileged peers. I identify the DOE as an entity well-positioned to realize these goals through the creation of such policies. Part II considers the statutory authority of the DOE as handed down by Congress in the DEOA, putting forward the position that the Department could wield significantly more power in regulating college admissions practices. If adopted, I further argue that my interpretation would be afforded *Chevron* deference if an exercise of this authority were challenged in court.

With this new interpretation of the DOE's authority, Part III briefly considers the practical concerns of implementing such regulation, and of affirmative action generally. This Part begins by examining the role that the DOE plays in admissions policy today. By sketching the universe of options available to the DOE to ensure access to educational opportunity, I argue that class-based affirmative action presents the best solution to the problems identified in Part I. It is, however, by no means the only course that the Department could pursue.

Finally, I conclude by evaluating the impacts that class-based affirmative action could have on diversity beyond SES. Though it should not be considered a perfect replacement for other affirmative action programs, I find that class-based affirmative action presents a politically acceptable and constitutionally permissible means of increasing diversity more broadly.

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18. This would be a politically bold and revolutionary step by a progressive Department, but one that could be spurred on by a Supreme Court decision that eliminates race-based affirmative action policies. In my view, as discussed *infra*, Part III, an optimal arrangement for ensuring equal access to educational opportunity would involve concurrent race- and class-based affirmative action programs, but this option may be foreclosed at any time by a Supreme Court convinced that race-based affirmative action violated the Fourteenth Amendment.

## I.

SOCIOECONOMIC DISPARITIES IN ACCESS TO EDUCATION:  
UNDERSTANDING THE EDUCATION GAP

This Part explores the education gap between the underprivileged and the highly-privileged, and argues that structural impediments exist to deprive low-SES students of equal educational opportunity.

Low-SES students are increasingly deprived of realistic opportunities, particularly at our nation's top colleges. According to a recent study by Professors Caroline Hoxby and Christopher Avery, "[o]nly 34 percent of high-achieving high school seniors in the bottom fourth of income distribution attended any one of the country's 238 most selective colleges . . . . Among top students in the highest income quartile, that figure was 78 percent."<sup>19</sup> Meanwhile, colleges continue to miss opportunities to increase diversity,<sup>20</sup> empower promising students, and enrich educational discourse.

If Adam were born to a successful businessperson in New York City, it is easy to imagine that his approach to high school and the college search would have been radically different. His parents, teachers, and community would have had different expectations for him; he would have had more freedom to focus on school and enriching extracurricular activities; he would have had top-notch college preparation and counseling available to him; he would have been more prepared for standardized tests. These and other factors have an obvious and unsurprising effect on a student's candidacy and preparation for college. The best test scores skew heavily toward high-SES students: only thirteen percent of SAT scores above 1300 (out of 1600) were

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19. David Leonhardt, *Better Colleges Failing to Lure Talented Poor*, N.Y. TIMES, Mar. 16, 2013, <http://www.nytimes.com/2013/03/17/education/scholarly-poor-often-overlook-better-colleges.html> (citing HOXBY & AVERY, *supra* note 4).

20. In Part I, I turn my attention primarily to the education gap for low-SES students and the problem that this gap poses in our society, but a diversity rationale for affirmative action (or some other corrective policy) will always lurk in the background (especially when comparisons are drawn to existing race-based affirmative action policies). For a concise elaboration of the diversity rationales for affirmative action, see generally Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862–65 (1995) (arguing that, among other things, diverse perspectives create educational dialogue and a sensitivity for differences of values and culture while preventing latent assumptions based on privilege or shared experience, and concluding that "[u]ltimately, what matters to an institution's intellectual mission is not group membership or background as such, but a multiplicity of intellectual perspectives. But it is a fact that people's backgrounds affect the way they perceive and evaluate the world."). As both elite and non-elite institutions of higher education grow ever-more homogeneous with respect to SES, see *supra* notes 2–4 and accompanying text, the contribution to be made by students of diverse socioeconomic background is clear.



attained by students in the bottom half of the income scale.<sup>21</sup> Success in college admissions is inexorably linked to performance on standardized tests, which clearly explains why only ten percent of students at our nation's most selective schools come from the bottom half of the income scale.<sup>22</sup>

Of course, simply being poor does not make students less likely to succeed, just as simply being a minority does not make students less likely to succeed. Pure family income is correlated with a gap of only thirteen points on the SAT on average.<sup>23</sup> Yet other SES-related factors deeply linked with income may hamper SAT performance and college admissions preparedness. Controlling for different factors across a huge number of students, Anthony Carnevale and Jeff Strohl determined that various factors related to SES are correlated significantly with educational disadvantage, as measured by average SAT performance. For instance, on average:<sup>24</sup>

- **Family college savings:** students from families that did not save money for college score 41 fewer points than those from families that saved at least \$40,000;
- **Father's occupation:** the children of laborers score 48 points fewer than the children of doctors;
- **Parental high school completion:** students with at least one parent who failed to complete high school score 43 points fewer than students with two parents who completed high school;
- **Sibling high school completion:** students that have a drop-out sibling score 24 points fewer than those that do not;
- **School SES composition:** students at schools where 90 percent of students receive free or subsidized lunch score 38 points fewer than students at schools where no students receive subsidized lunch;
- **School type:** students in public school earn 28 points fewer than students in private school;
- **High school courses:** students that do not take AP courses earn 81 fewer points than those who do, and students that do not take honors courses earn 59 points fewer than those who do;
- **Peer role models:** where college-going is not a norm within peer groups, students score 39 fewer points;

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21. Carnevale & Rose, *supra* note 2, at 130.

22. *Id.* at 106.

23. Carnevale & Strohl, *supra* note 6, at 170.

24. *Id.*

- **Neighborhood role models:** in neighborhoods where very few adults have pursued graduate education, students score 113 fewer points than students from neighborhoods where most adults have pursued graduate education.

Taking these and other factors together, Carnevale and Strohl posit that the *most* disadvantaged students would be expected on average to score almost 800 fewer points (out of 1600) on the SAT than students of the highest SES.<sup>25</sup>

Performance on standardized tests is only one element of accessing higher education, and—as with minorities—a battery of other structural roadblocks exist for low-SES students. Very few selective schools give special consideration to SES, even though they could afford to do so without adversely impacting their rankings or the average credentials of incoming classes.<sup>26</sup> Moreover, people of low SES lack the group identity and political mobilization necessary to frame themselves as an underrepresented demographic. Their relative lack of education only further perpetuates their disenfranchisement, since universities do not face pressures from low-SES populations to further include them.<sup>27</sup> Accordingly, low-SES students are found to have low expectations of their future, small social networks, less preparation for higher education, few educational resources, and low awareness of college, its benefits, and their opportunities to attend.<sup>28</sup>

SES appears to be the strongest of all factors in determining and guiding aspiration in the educational context.<sup>29</sup> Aspiration, ambition, and expectation are vital to achievement in high school and the college admissions process, but are subtly undermined and discouraged in low-SES communities. According to the College Board, high school teachers typically have lower expectations for lower-SES students,<sup>30</sup>

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25. *Id.*

26. Carnevale & Rose, *supra* note 2, at 102.

27. Mary Beth Walpole, *Socioeconomic Status and College: How SES Affects College Experiences and Outcomes*, 27 REV. HIGHER EDUC. 45, 46 (2003).

28. THE COLLEGEKEYS COMPACT, THE COLLEGE BOARD, EXPANDING OPTIONS FOR LOW-INCOME STUDENTS: A REVIEW OF BARRIERS, RESEARCH, AND STRATEGIES 6 (2011).

29. *Id.* at 7. *But see* THE COLLEGE BOARD, COMPLEXITY IN COLLEGE ADMISSION: THE BARRIERS BETWEEN ASPIRATION AND ENROLLMENT FOR LOWER-INCOME STUDENTS 4 (2011) (asserting that lower-income students have similar levels of aspiration toward college as higher-income students, but admitting that among low-SES students, there is a greater degree of “melt” between levels of aspiration and actual enrollment), available at [http://advocacy.collegeboard.org/sites/default/files/11b-4062\\_AdmissComplex\\_web.pdf](http://advocacy.collegeboard.org/sites/default/files/11b-4062_AdmissComplex_web.pdf).

30. THE COLLEGE BOARD, EXPANDING OPTIONS FOR LOW-INCOME STUDENTS, *supra* note 28, at 8.

while guidance counselors form ungrounded ideas about the prohibitive costs of education for low-SES students.<sup>31</sup> Meanwhile, low-SES students depend on the input and advice of teachers and counselors to a significantly greater extent than higher-SES students.<sup>32</sup> This has the heartbreaking result of discouraging even well-qualified low-SES students from applying to college.<sup>33</sup> Consequentially, low-SES students report the perception that two-year community colleges are the only means for students like them to access education.<sup>34</sup> Low-SES students—even those that perform well in school and on tests—are also more likely than any other class to “undermatch,”<sup>35</sup> belying diminished expectation, apprehension about unfamiliar schools, and economic concerns about the most prestigious schools.

Still, even the rare, highly-successful low-SES student—like Adam—faces challenges in accessing the top colleges. The fact that low-SES students are underrepresented at the most selective colleges<sup>36</sup> is a result in some part of recruiting disparities. Selective colleges conduct extensive outreach to students of diverse racial and ethnic backgrounds—as well as students possessing special talents in athletics, music, and art—but they reach out to low-SES students and rural residents at much lower rates.<sup>37</sup> As a recent New York Times article bluntly observes, “elite public and private colleges, despite a stated desire to recruit an economically diverse group of students, have largely failed to do so.”<sup>38</sup>

These same colleges also place particular emphasis on qualifications that are completely out of reach for students in poor or rural school districts, such as Advanced Placement courses or honors pro-

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31. *Id.* at 9. Reportedly, these ungrounded ideas are formed based on an ignorance of financial aid opportunities at many institutions. *Id.*

32. *Id.* at 10; THE COLLEGE BOARD, COMPLEXITY IN COLLEGE ADMISSION, *supra* note 29, at 4.

33. THE COLLEGE BOARD, EXPANDING OPTIONS FOR LOW-INCOME STUDENTS, *supra* note 28, at 10.

34. Ronald Ehrenberg, *Reducing Inequality in Higher Education*, in ECONOMIC INEQUALITY AND HIGHER EDUCATION: ACCESS, PERSISTENCE, AND SUCCESS 197 (Stacy Dicket-Conlin & Ross Rubenstein eds., 2007). In spite of this, low-SES students “strongly disagree”—at a higher rate than any other SES class—with the proposition that going to a two-year school before transferring to a four-year program is just as good as starting at the four-year college. THE COLLEGE BOARD, COMPLEXITY IN COLLEGE ADMISSION, *supra* note 29, at 4.

35. See Bowen et al., *supra* note 9; HOXBY & AVERY, *supra* note 4.

36. THE COLLEGE BOARD, EXPANDING OPTIONS FOR LOW-INCOME STUDENTS, *supra* note 28, at 18.

37. Carnevale & Rose, *supra* note 2, at 119.

38. Leonhardt, *supra* note 19.

grams.<sup>39</sup> Even if a low-SES student has perfect grades and a perfect SAT score, his or her school very possibly does not offer AP classes. Or perhaps such students never learn that they should take the SAT Subject Tests required by some of the country's most selective schools. This severely imperils their applications—unless those schools give low-SES applications a boost because of their contributions to diversity. Many top schools are doing nothing of the sort. Additionally, Sigal Alon has observed that socioeconomic inequality in education increases as competition rises, making the disadvantage of low-SES students most pronounced at the most competitive schools.<sup>40</sup>

Finally, the importance of high-quality education—disproportionately difficult to attain for low-SES students<sup>41</sup>—cannot be overstated. It is not enough to ensure that all students be able to attend *some* college. Family pressures and other structural complications make college students from low-SES backgrounds much more likely to drop out of college—including two-year colleges—even when they are well-qualified.<sup>42</sup> Indeed, while the most selective schools provide benefits *especially* needed by low-SES students, those same students are being specifically excluded from those benefits. Highly selective schools promise higher graduation rates, easier access to graduate education, and wage premiums that are vitally important to students of few means.<sup>43</sup> Moreover, low-income students are almost twice as likely to graduate from top schools as compared to lower-ranked institutions, a trend not observed to the same extent by higher SES students.<sup>44</sup>

The most selective schools also offer the most resources, which low-SES students can and must capitalize on to succeed.<sup>45</sup> Highly selective schools spend more than 7.5 times as much—or as much as

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39. THE COLLEGE BOARD, EXPANDING OPTIONS FOR LOW-INCOME STUDENTS, *supra* note 28, at 18.

40. See Sigal Alon, *The Evolution of Class Inequality in Higher Education: Competition, Exclusion, and Adaptation*, 74 AMER. SOCIOLOGICAL REV. 731, 746 (2009).

41. *Supra* notes 2–4 and accompanying text.

42. See MARIAM ASHTIANI & CYNTHIA FELICIANO, PATHWAYS TO POTENTIAL SUCCESS, LOW-INCOME YOUNG ADULTS CONTINUE TO FACE BARRIERS TO COLLEGE ENTRY AND DEGREE COMPLETION 2 (2012), available at [http://pathways.gseis.ucla.edu/publications/201201\\_ashtianifelicianoRB\\_online.pdf](http://pathways.gseis.ucla.edu/publications/201201_ashtianifelicianoRB_online.pdf).

43. Carnevale & Rose, *supra* note 2, at 102.

44. *Id.*

45. See Leonhardt, *supra* note 19 (“The colleges that most low-income students attend have fewer resources and lower graduation rates than selective colleges, and many students who attend a local college do not graduate. Those who do graduate can miss out on the career opportunities that top colleges offer.”).

\$80,000 more—on each student; this suggests that the resources necessary to guide, support, and empower low-SES students are available at more selective schools.<sup>46</sup> The return on educational investment is similarly higher at the most selective schools, which is invaluable for students of limited means.<sup>47</sup>

Crucially, college does not present an insurmountable challenge to students from disadvantaged educational backgrounds once they have been admitted. As Professors Hoxby and Avery concluded in their 2012 study, those admitted to highly selective institutions “graduate at high rates.”<sup>48</sup> Another illustrative study followed students that took advantage of open enrollment at the City University of New York. That study found that while the many disadvantaged students struggled early on (mostly because they were unfamiliar with college and worked while in school), those students surpassed expected graduation rates and a surprising number went on to pursue graduate-level work at other schools.<sup>49</sup>

Yet another study found that among undergraduate students in Texas, low-income students were more likely to pursue majors in the hard sciences and engineering.<sup>50</sup> Because those fields are typically regarded as more challenging, this reflects inspiring ambition and provides an explanation for lower grades early in the college careers of relevant low-SES students. In the end, SES contributes very little to students’ ability to complete college once enrolled: above a certain minimum SAT score (approximately 900–1000, or about average), graduation rates for low-SES students fall in line with those of higher scoring students.<sup>51</sup>

Access to higher education may be sorely curtailed for low-SES students, but if given the opportunity, those students can succeed and thrive. This can have lasting outcomes, possibly even changing educational outcomes for future generations.<sup>52</sup> As discussed above in the context of SAT performance, children with parents who went to col-

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46. See Carnevale & Strohl, *supra* note 6, at 97.

47. *Id.*

48. HOXBLY & AVERY, *supra* note 4, at abstract.

49. TANIA LEVEY ET AL., PASSING THE TORCH: DOES HIGHER EDUCATION FOR THE DISADVANTAGED PAY OFF ACROSS THE GENERATIONS? 32–33 (2007).

50. Sunny Niu & Marta Tienda, Test Scores, Class Rank and College Performance: Lessons for Broadening Access and Promoting Success, 53 RASSEGNA ITALIANA DI SOCIOLOGIA 199 (2012), available at [http://theop.princeton.edu/reports/forthcoming/NiuTienda\\_2011.pdf](http://theop.princeton.edu/reports/forthcoming/NiuTienda_2011.pdf) (at 17 of online manuscript).

51. See Carnevale & Rose, *supra* note 2, at 137–38.

52. See LEVEY, *supra* note 49, at 84–86.

lege perform better on standardized tests, and this effect persists even when controlling for such factors as SES and race.<sup>53</sup>

Of course, the problem of college enrollment in low-SES communities is not limited to factors entirely beyond a student's control: a "supply-side problem" exists as well, leading even high-achieving low-SES students not to pursue selective colleges.<sup>54</sup> The challenge facing low-SES students is not insurmountable, but barriers to success are unjustifiably and artificially high—and when SES proves so difficult to overcome, the stakes are significant.

In the next Part, I argue that the DOE is not only able to increase access to education for low-SES students, but that the Department's purpose—to "strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual"<sup>55</sup>—should compel it to make efforts to make a college education more attainable for low-SES students. In particular, I argue that the organic statutes organizing the Department can be interpreted as authorizing the Department to regulate admissions policies at colleges and universities to improve the prospects of low-SES students. For one, the regulation of college admissions has a rich basis in the regulatory history and legislative history behind the Department of Education Organization Act. If pursued by the DOE, I argue that this interpretation of agency authority would likely be entitled to *Chevron* deference if challenged.

## II.

### THE POWER TO ENSURE ACCESS: THE REGULATORY AUTHORITY OF THE DEPARTMENT OF EDUCATION

#### A. *An Imperative and a Solution: The Department of Education and its History*

Before the creation of the Department of Education, federal educational policy was largely within the jurisdiction of the Department of Health, Education, and Welfare (HEW).<sup>56</sup> A monolithic department, HEW commanded a budget in excess of \$200 billion, which at the time was larger than that of any other governmental entity in the world except for the central governments of the United States and So-

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53. *See id.*

54. *See generally* HOXBY & AVERY, *supra* note 4.

55. 20 U.S.C. § 3402 (2011).

56. *See* 125 CONG. REC. 7555–56 (1979) (statement of Sen. Ribicoff) (introducing the Department of Education Organization Act, which would create a separate Education Department and reorganize HEW into the Department of Health and Human Services).

viet Union.<sup>57</sup> Education accounted for only five percent of the HEW budget, and Secretaries of Health, Education, and Welfare attested that the “E” of “HEW” was easily lost in the shuffle—even though more money was spent on it than any of the State, Commerce, Justice, Interior, and Energy Departments.<sup>58</sup> The creation of the DOE promised to elevate the status of education to Cabinet-level concern, and to “strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual.”<sup>59</sup>

### 1. *Early Federal Involvement with Affirmative Action*

Even under HEW, the federal government involved itself in college admissions and administration. For one, HEW was active in regulating affirmative action policies with respect to faculty and administrator employment at America’s universities. By the early 1970s, HEW banned discrimination against women and minorities at universities accepting public funds, and reformed the process for advertising and hiring in open faculty positions.<sup>60</sup> During the Ford administration, HEW was so specific in its demands that it set specific numerical quotas for gender and race in specific departments.<sup>61</sup> When universities were accused of discriminatory hiring practices, HEW would launch formal investigations and demand changes in such practices.<sup>62</sup> Similarly, HEW issued guidelines describing the ideal form that voluntary affirmative action policies in admissions would take following the Supreme Court’s invalidation of strict racial quotas in the *Bakke* case.<sup>63</sup> Among those guidelines were suggestions that universities add plus factors to minority applications and that numerical goals for enrollment be set.<sup>64</sup> Finally, HEW would establish

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57. *Id.* In fact, according to Senator Ribicoff, HEW’s average yearly budget increase of about \$20 billion could account for ten State Departments. *Id.*

58. *Id.*

59. 20 U.S.C. § 3402 (2011).

60. See TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 142–46 (2004).

61. See *id.* at 145 (describing a plan at the University of California at Berkeley whereby the hiring of “1.4 Orientals” were needed in the architecture department, while 0.19 women were needed in engineering and at least 100 women and minorities were needed within thirty years’ time).

62. See, e.g., Joyce Rechtschaffen & Sue Murphy, *HEW Accepts Affirmative Action Plan*, DAILY PRINCETONIAN, Sept. 29, 1972, at 1 (discussing an HEW investigation of Princeton University, and a subsequent requirement by HEW that Princeton institute changes in its hiring practices with respect to women and minorities).

63. See, e.g., David Grant, *HEW establishes guidelines on affirmative action policies*, DAILY PRINCETONIAN, Oct. 17, 1972, at 5 (describing HEW guidelines and the measures that Princeton University would be taking in order to comply).

64. *Id.*

mandatory policies for admissions programs where past discrimination could be identified.<sup>65</sup> In these respects, HEW functioned much like other federal agencies involved in hiring, such as the Departments of Labor and Defense.<sup>66</sup>

Since the creation of the DOE in 1979, the Department continued to support affirmative action. Shortly after its formation, the Department interpreted Title VI of the Civil Rights Act to reaffirm that colleges must implement affirmative action policies to remedy past discrimination.<sup>67</sup> Like HEW, the DOE urged colleges to exercise “voluntary affirmative action to attain a diverse student body” even where discrimination was not at play.<sup>68</sup> The early-DOE certainly did not mean to be an idle bystander in ensuring access to education. Indeed, one Congressional report observes that Shirley Hufstедler—the first Secretary of Education—“envisioned a Department that was no longer reactive but instead proactive . . . as [Hufstедler] concluded at one point, ‘The education institutions of the U.S. must change in response to the changing needs of the country.’”<sup>69</sup>

## 2. *The Department’s Efforts on Behalf of Low-SES Students*

Unfortunately, the DOE has, to date, done very little to actually increase access—particularly though admissions—for low-SES students. In fact, since its creation, the DOE’s regulatory portfolio has been effectively limited to executing specific initiatives that Congress has put under DOE control. For instance, the Higher Education Opportunity Act governs student aid and other efforts to assist low-income and nontraditional college students: it has been primarily under the authority of this statute that the DOE has acted to improve access

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65. *Id.*

66. *Id.*

67. See CHARLES V. DALE, *FEDERAL AFFIRMATIVE ACTION LAW: A BRIEF HISTORY* 2 (2005), available at <http://fpc.state.gov/documents/organization/53577.pdf> (relating the history of affirmative action as implemented by the Department of Education); accord *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492–93, 504 (1989) (permitting affirmative action under a remediation rationale where past discrimination was committed on the part of entity now exercising affirmative act); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 307–10 (1978) (recognizing a State’s substantial interest in remedying identified past discrimination if supported by concrete findings).

68. DALE, *supra* note 67, at 2 (quoting 44 FED. REG. 58,509 (Oct. 10, 1979)); 34 C.F.R. § 100.3(b)(vii)(6)(ii) (2004) (“Even in the absence of past discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.”); accord *Grutter v. Bollinger*, 539 U.S. 306 (2003) (endorsing diverse student bodies as a permissible rationale for affirmative action).

69. DALE, *supra* note 67, at 4.



according to SES.<sup>70</sup> Examples of such efforts include Pell Grants for low-income families, Student Success Grants for at-risk students, and grant programs aimed at helping low-income students transition from degree programs to jobs.<sup>71</sup> Not only are these efforts aimed at students that have already applied and been admitted to college, but they simply implement strategies dictated to the DOE by Congress.

One reason that the DOE has not acted more affirmatively is the fact that SES has not been a serious focal point for policy makers and education advocates. Recently, however, it has been discussed as an alternative to race-based affirmative action. A recent strategic plan for the Department for the fiscal years 2011–14 is among the first to proactively mention issues of SES and representation of low-SES students in colleges, though the plan mentioned SES decidedly less often than race, ethnicity, sex, and disability.<sup>72</sup> Still, the plan expresses DOE's commitment to "effective educational opportunities for all students regardless of race, ethnicity, national origin, age, sex, disability, language, and socioeconomic status" and declares that "all students—regardless of circumstance—deserve a world-class education."<sup>73</sup> To further this commitment, the DOE reaffirmed its efforts with regard to grants, funding, outreach, and data collection for low-SES students.<sup>74</sup>

The fact that the DOE has not recommended or regulated admissions policies more aggressively can certainly be explained. It may be that the Department has simply avoided the issue of admissions preferences because of political concerns.<sup>75</sup> The Department itself has also

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70. See, e.g., Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program; Final Rule, 74 Fed. Reg. 55,972, 55,972–73 (to be codified at 34 C.F.R. pts. 673, 674, 682, 685) (amending practices in various federal loan programs under the authority of the Higher Education Opportunity Act of 2008); see also *Office of Postsecondary Educ. – Policy Initiatives*, DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ope/policy.html> (last visited Apr. 17, 2013) (listing postsecondary education regulations).

71. See AMY ELLEN DUKE-BENFIELD & JULIE STRAWN, CONGRESS EXPANDS STUDENT AID AND SUPPORTS INNOVATION IN STUDENT ACCESS, BASIC SKILLS, AND WORKFORCE PARTNERSHIPS 3–5 (2008), available at <http://www.clasp.org/admin/site/publications/files/0430.pdf>.

72. U.S. DEP'T OF EDUC., STRATEGIC PLAN FOR FISCAL YEARS 2011–2014, 39–47 (2011), available at <http://www2.ed.gov/about/reports/strat/plan2011-14/draft-strategic-plan.pdf>.

73. *Id.* at 39.

74. *Id.* at 40–41.

75. The controversial nature of affirmative action in American law requires little introduction. See generally, e.g., *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) (invalidating racial quotas in medical school admissions and suggesting, without a majority, that consideration of race as a "plus factor" in admissions would be permissible); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (allowing race-based affirmative action using race as a "plus factor" in law school admissions);

been the subject of serious political skepticism since its inception.<sup>76</sup> It is better, the reasoning goes, to lay low and simply do the work Congress hands it to do, without taking its own potentially risky initiative. Whatever the reason, the Department has not envisioned itself as playing a role in shaping admissions policy.<sup>77</sup>

Yet, I argue that the authority granted by Congress to the DOE includes the authority to influence admissions, protections of state authority notwithstanding. What's more, if the Department is to stay true to its organizing principle of ensuring access to equal educational opportunities, it can no longer remain dormant with respect to low-SES students.

### B. *The Organic Statutes: A History of Ambiguity and Authority*

On October 19, 1979, President Jimmy Carter signed the Department of Education Organization Act, which had passed the Democrat-controlled Senate easily but was approved by a much closer margin in the House of Representatives, where it faced opposition from lawmakers on both sides of the aisle.<sup>78</sup> Chief among concerns voiced

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Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012) (applying *Grutter* in an undergraduate admissions case, but not to the satisfaction of the Supreme Court, as determined in *Fisher v. Univ. of Texas*, 570 U.S. \_\_\_, (2013)). In recent years, however, class-based affirmative action has become a *cause celebre* for commentators on both sides of the debate. Compare, e.g., Richard H. Sander, *Class in American Legal Education*, 88 DENV. L. REV. 631, 664–68 (2011) (advocating class-based affirmative action as at least a partial substitute for race-based preferences), with Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1847, 1894–98 (1996) (tempering expectations for supporters of class-based affirmative action by discussing negative implications for race-based schemes); Carnevale & Rose, *supra* note 2, at 153–54 (supporting a blend of class- and race-based preferences). Among critics of race-based preferences, class-based affirmative action presents an opportunity to disband racial “discrimination” while increasing access to disadvantaged communities. See Sander, *supra*. These dynamics are discussed at greater length in Part III, *infra*. In any event, such discussions have focused on the prerogative of states and colleges to implement class-based preferences, with no mention of Department involvement.

76. The Department of Education Organization Act was passed by a narrow majority in the House following intense debate and a contentious House-Senate conference. 125 CONG. REC. 25,824–32, 26,535–36 (1979); see also Marjorie Hunter, *Congress Approves Department of Education; Victory for Carter*, N.Y. TIMES, Sept. 27, 1979, at A1. Republican presidential candidates since Carter have since made dismantling the Department of Education a marquee campaign priority. Veronique de Rugy & Marie Gryphon, Commentary, *Elimination Lost: What Happened to Abolishing the Department of Education?*, NATIONAL REVIEW ONLINE (Feb. 11, 2004), [http://old.nationalreview.com/comment/derugy\\_gryphon200402110914.asp](http://old.nationalreview.com/comment/derugy_gryphon200402110914.asp).

77. See *What We Do*, U.S. DEPARTMENT OF EDUC., <http://www2.ed.gov/about/what-we-do.html> (last visited Aug. 7, 2012) (describing the role and authority of the Department as the Department itself presents it).

78. See Hunter, *supra* note 76, at A20.

by the Act's opponents was the question of whether the new department would curtail states' rights.<sup>79</sup> This prompted President Carter to insist at the bill signing ceremony that "[p]rimary responsibility for education should rest with those states, localities, and private institutions that have made our nation's educational system the best in the world."<sup>80</sup>

Since its establishment, the Department's authorities and responsibilities have been further defined by a handful of statutes, including the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act,<sup>81</sup> the America COMPETES Act,<sup>82</sup> and a series of legislation on post-secondary school loans.<sup>83</sup> Nonetheless, the 1979 grant (and clarification) of authority remains untouched by more than three decades of legislation and reconsideration.

But the original authority of the Department in large part predates even the DEOA. The DEOA is not an organic statute in the same vein as those that create other agencies from scratch; it transfers regulatory authority from HEW and other departments without explicitly—but perhaps implicitly—speaking to new regulatory authority.<sup>84</sup> As discussed above, Title VI granted authority to HEW and later DOE to regulate affirmative action. But various other statutes existing at the time of DOE's creation can be taken—on their own and in concert with the DEOA and its legislative history—to establish an authority to regulate admissions policies, with or without Title VI.

The remainder of this Part focuses accordingly on relevant sections of the DEOA, particularly those codified at Sections 101 through

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79. *Id.*

80. Jimmy Carter: *Department of Education Organization Act Statement on Signing S. 210 Into Law*, AM. PRESIDENCY PROJECT (Oct. 17, 1979), <http://www.presidency.ucsb.edu/ws/index.php?pid=31543>.

81. 20 U.S.C. § 1092 *et seq.* (2012) (passed in 1990 and requiring secondary schools to keep campus crime statistics).

82. Pub. L. No. 110-69, 121 Stat. 572 (2007). Passed in 2007, the American COMPETES Act calls for increased attention to certain science and technology fields, including undergraduate research opportunities in such fields. It was reauthorized in 2011. America COMPETES Reauthorization Act of 2010, Pub. L. No. 111-358, 124 Stat. 3982 (2011).

83. *E.g.*, Higher Education Reconciliation Act of 2005, Pub. L. No. 109-17, subtit. VIII-A, 120 Stat. 155 (2005); Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008); Student Aid and Fiscal Responsibility Act, Pub. L. No. 111-152, subtit. II-A, 122 Stat. 1071 (2010).

84. 20 U.S.C. § 3441(a)(1)–(2) (2006) (transferring “all functions of the Assistant Secretary for Education and of the Commissioner of Education of the Department of Health, Education, and Welfare” and “all functions of the Secretary of Health, Education, and Welfare under [enumerated statutes]”); *see also* discussion *infra* Part II.C (discussing, *inter alia*, the implied authority of the Department in the context of *Mead* and *Chevron*).

103 of Title 20 of the United States Code, before considering its implications for existing pre-DEOA statutes. The following discussions assess these Sections of the Act and other statutes in turn, establishing the inherent ambiguity of the Department's regulatory authority and developing reasonable interpretations of agency authority, which would be entitled to *Chevron* deference.<sup>85</sup>

1. *Textual Analysis: Ambiguity in the Statutory Language of the DEOA*

a. *Sections 101 and 102: Ensuring equal access and preventing denial of access are two different directives*

Section 101 of the Department of Education Organization Act, codified at 20 U.S.C. § 3401, provides Congressional findings supporting the decision to delegate authority to the newly organized Department. It provides in particular that:

- (1) education is fundamental to the development of individual citizens and the progress of the Nation;
- (2) there is a continuing need to ensure equal access for all Americans to educational opportunities of a high quality, and such educational opportunities should not be denied because of race, creed, color, national origin, or sex;
- (3) parents have the primary responsibility for the education of their children, and States, localities, and private institutions have the primary responsibility for supporting that parental role;
- (4) in our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States. . . .<sup>86</sup>

Section 102, codified at 20 U.S.C. § 3402, goes on to declare the purposes of the Act in establishing the Department. Among those purposes are:

- (1) to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual;
- (2) to supplement and complement the efforts of States, the local school systems and other instrumentalities of the States, the private sector, public and private educational institutions, public and pri-

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85. See generally *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984) (describing the deference accorded to agencies in their interpretations of the statutes they administer). For further analysis of the interpretation to follow within the *Chevron* framework, see discussion *infra* Part II.C.

86. 20 U.S.C. § 3401 (2006).

vate nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education; . . .

(7) to increase the accountability of Federal education programs to the President, the Congress, and the public.<sup>87</sup>

While Section 101 makes explicit reference to certain demographic groups requiring protection by the Department, the fact that class is not addressed should not be read to preclude regulation by the Department in favor of equal educational opportunity for students of low-SES.

Note that Section 101, subsection (2) begins by espousing a commitment to “ensuring equal access” to educational opportunities for all Americans (the “first clause”), only to go on to say that access “should not be denied” on the basis of certain traits (the “second clause”). Does “equal access for all” not already imply that access should not be denied to certain classes of people? Yet it is axiomatic in statutory interpretation that every word of a statute should be given meaning, with no word or phrase relegated to surplusage if any reasonable interpretation permits every word to have purpose.<sup>88</sup> To suggest that Congress did not mean “all Americans” when it said “all Americans” would be absurd: Congress must have had some specific meaning in mind when including the second clause.

Perhaps the simplest explanation is that Congress was sensitive to past impediments to equal access for the demographic groups that it specifically identified,<sup>89</sup> and that it wanted to be sure to emphasize that future discrimination on the basis of race, creed, color, national origin, or sex would not be tolerated. In Section 102, which deals with congressional purpose, the language of the second clause is absent, implying that the purpose of the statute is to increase access for truly every individual, not just those classes that have faced past discrimination. As such, the second clause of subsection (2) can be read as a

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87. 20 U.S.C. § 3402 (2006).

88. See, e.g., *United States v. Locke*, 471 U.S. 84, 93–96 (1985) (interpreting a deadline to submit paperwork “before December 31” to literally mean on or before December 30 and holding that the counterintuitive result must be sustained to afford meaning to every word in the statute); *United States v. Marshall*, 908 F.3d 1312, 1317–18 (7th Cir. 1990) (en banc) (interpreting the use of the words “substance” and “mixture” in drug sentencing statute to imply that they must mean different things, even when this result meant that possession of a single sheet of blotter paper soaked with LSD would lead to vastly different sentences depending on whether it had been placed in a fluid upon the suspect’s apprehension).

89. See *infra* Part II.B.2.a (discussing how Congress rejected an amendment to the Act that would have banned race- or sex-based quotas in college admissions).

congressional observation and the insertion of an anti-discrimination principle,<sup>90</sup> while the first clause should be considered as a more general requirement that access to high quality education for all Americans should be equal.

An illustrative example can be found in the Pregnancy Discrimination Act (PDA), as interpreted by the Supreme Court in *California Federal Savings & Loan Association v. Guerra*.<sup>91</sup> The PDA amended Section 701 of the Civil Rights Act to provide that prohibitions against discrimination “because of sex” and “on the basis of sex” would also include discrimination

because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .<sup>92</sup>

This statutory text resembles Section 101 of the DEOA in that it sets forth a category of people not to be discriminated against, juxtaposed with a principle of equal treatment for all similarly-situated people. In *Guerra*, the Court determined that Congress had not “impos[ed] a limitation on the remedial purpose of the PDA” but rather set “‘a floor beneath which pregnancy disability benefits may not drop’.”<sup>93</sup> In other words, the PDA provided simply that women affected by pregnancy, childbirth, or related medical considerations be treated at least as well as everyone else. The same could be said of the enumerated groups in Section 101.

It bears noting that *Guerra* rejected a strictly textual reading of the PDA which asserted that women affected by pregnancy, childbirth, or related medical conditions could not be given special, more beneficial treatment, as California allowed in that case. In doing so, the Court relied on legislative history to locate Congress’ purpose in passing the PDA.<sup>94</sup> But even if the Court had not relied on legislative

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90. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (recognizing past discrimination in contracting and allowing restitution for it as a legitimate goal of affirmative action, but only where the specific entity had discriminated in the past); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (allowing a set-aside program in contracting for minority businesses); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (presenting remediation as a potential justification for non-quota affirmative action goals).

91. 479 U.S. 272 (1987).

92. Pub. L. No. 95-555 § 1, 92 Stat. 2076 (1978).

93. 479 U.S. at 285–86 (quoting *Cal. Fed. Savings & Loan Ass’n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

94. *Guerra*, 479 U.S. at 284–90.

history, and had indeed reached an opposite result—that the PDA preempted California’s preferential treatment law—the fact would remain that the statute, in enumerating a list of protected classes, did not foreclose the possibility that another more general class not be treated as well as the enumerated groups.

In sum, the anti-discriminatory language of Section 101, subsection (2) does not limit the responsibility or authority of the Department in protecting the educational access rights of certain groups. When Section 102 states that a *purpose* for the Act was to ensure equal access for all Americans—not just the enumerated, previously discriminated-against groups listed in Section 101—it becomes clear that it falls within the purview of the Department to do so, since the Act actualizes its purposes by creating a Department of Education.

*b. Section 103: Admission practices are fair game to regulate*

Section 103 presents a more nuanced challenge of statutory construction, as it addresses the relationship between the federal Department and state governments. Still, it should not be read as preventing the Department from regulating admissions preferences in post-secondary schools. Section 103 provides as follows:

(a) It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.

(b) No provisions of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any discretion, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system . . . except to the extent authorized by law . . . .<sup>95</sup>

This Section explains that the rights of states and other non-federal institutions would be protected, such that the authority of the fed-

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95. 20 U.S.C. § 3403 (2006). This language is ripe for interpretation by the agency, and as noted above, an agency’s reasonable interpretation of its own statutory authority is entitled to *Chevron* deference on judicial review. See *infra* note 85; Part II.C.

eral government over education would not be increased. This strictly-worded limitation is called into question by the following subsection, which provides a discrete list of limitations on the Department's authority. Surely these matters are included in the rights and responsibilities ostensibly protected by Congress in subsection (a). Arguably, this is in fact a complete list of those rights and responsibilities. The oft-cited<sup>96</sup> canon of interpretation, *ejusdem generis*, holds that when a general statement is followed by a specific list, the specific list informs the scope of the general provision.<sup>97</sup> For instance, in *Circuit City Stores, Inc. v. Adams*, Section 1 of the Federal Arbitration Act—which excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from coverage—was read to be limited in scope to “transportation workers” because of the specific nature of “seamen” and “railroad employees” which had transportation elements in common.<sup>98</sup> Similarly, the canon of *expressio unius* suggests that where a list is provided in a statute, it is meant to be exhaustive unless there is a suggestion to the contrary.<sup>99</sup> In *City of Chicago v. Environmental Defense Fund*, the Supreme Court considered Section 3001(i) of the Solid Waste Disposal Act, which allowed an exemption from regulation to facilities that “receive[d] and burn[ed] only . . . household waste.”<sup>100</sup> The Court read this—finding no legislative intent to the contrary—to exempt facilities that burned *only* such waste from regulation, but *not* facilities that burned *other* waste in addition to household waste. Here too there is no such ambiguity or suggestion to the contrary, and under the aforementioned theory that all Congressional language has meaning, it can only be assumed that the particulars of subsection (b) are meant to limit and contextualize the sweeping state-

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96. See WILLIAM ESKRIDGE, PHILIP FRICKEY, & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* App. B. [20] (4th ed. 2007) (citing *James v. United States*, 127 S. Ct. 1586, 1592 (2007); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991); *Hughey v. United States*, 495 U.S. 411, 419 (1990)).

97. *Id.* (explaining that *ejusdem* instructs to “interpret a general term to reflect the class of objects reflected in more specific terms accompanying it.”).

98. 532 U.S. 105, 115 (2001).

99. *Id.* at App. B. [19] (citing *Hinck v. United States*, 550 U.S. 501, 505 (2007); *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001); *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328 (1994); *United States v. Smith*, 499 U.S. 160 (1991); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 46–47 & n.22 (1989); *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 133–34 (1989)).

100. 511 U.S. 328, 329 (1994).



ment of Congressional intent in subsection (a).<sup>101</sup> It should also be noted that these canons are appropriately applied to Section 103 but not to Sections 101 and 102: in Section 101, to allow the words “all Americans” to actually only apply to a specific subset of Americans would be inapposite to the clear meaning of “all Americans.” That phrase is not general, for it is precise in its inclusion of literally *all* Americans.

But this is not to say that subsection (a) is rendered irrelevant by subsection (b). Unlike the example of Section 101, here subsection (a) may require further interpretation. In this case, subsection (a) is not unlike the second clause of Section 101, subsection (2) in that it reflects Congress’ sensitivity to criticism and concern (the former with respect to discrimination, the latter to state rights).

Moreover, the limitation of the DOE’s authority to pre-DEOA levels does not dispose of the DOE’s ability to regulate admissions policies. As I discuss below, the authority to regulate admissions was established pre-DEOA, and was intended to be maintained post-DEOA.<sup>102</sup>

With the limitations of Section 103 in mind, it remains unlikely that the regulation of admissions policies would fall outside of the DOE’s authority. Admissions policies do not appear to be included in Section 103’s definition of “programs and policies” reserved for the discretion of non-federal entities. Subsection (a) of Section 103 does offer its own sort of specificity by referring to “programs and policies” administered by states and educational institutions, while subsection (b) provides context as to what constitutes a “program” or “policy.” Curriculum and instruction are obviously matters that fall to the discretion of states and institutions, but changes to admissions and access policies would not likely impact those programs.

Meanwhile, though subsection (b) discusses “personnel” and “administration,” admissions policies also do not likely fall within the sphere of limitations suggested by Section 103. Consider the usage of the words “personnel” and “administration” throughout the Act. The word “personnel” is used repeatedly with reference to institutional em-

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101. See also *Kravel v. Iowa Methodist Medical Ctr.*, 95 F.3d 674, 679–80 (8th Cir. 1996) (interpreting the Pregnancy Discrimination Act using *ejusdem generis* to hold that infertility was not a “related medical condition” when that general term was contextualized by the specific terms “pregnancy and childbirth”, which the court deemed to be “strikingly different” from infertility); 42 U.S.C. §§ 2000e-1–2000e-17 (2006) (Pregnancy Discrimination Act).

102. See discussion *infra* Parts II.B.2 and II.B.3.

ployees: neither its definition<sup>103</sup> nor its usage<sup>104</sup> permit the interpretation that it might apply to a student body. The word “administration” could potentially permit an interpretation including admissions procedures,<sup>105</sup> but its usage is similarly confined to the context of oversight and operation of programs by executives and administrative staffs.<sup>106</sup>

The text of the DEOA presents an immediately ambiguous and seemingly contradictory picture of DOE authority; thus it is understandable that even the DOE itself has taken a narrow view of the Department’s purpose and sphere of influence.<sup>107</sup> But because the Act betrays Congressional ambiguity, inconsistency, and even self-contradiction, the DOE can and should take a broader view of its authority. In the world of statutory interpretation and agency authority, such ambiguity invites the DOE to consider a larger role for itself in regulating higher education, particularly with respect to admissions. Beyond textual authority, legislative history provides insight into the actual purpose of the Act and sheds further light on the question of Congressional intent with respect to admissions preferences.

## 2. *Purposive Analysis: Congressional Limitations Were Not Meant to Extend to Admissions or Higher Education*

### a. *Clear intent to maintain existing boundaries of authority*

Throughout the legislative process, Congress was particularly concerned with the question of whether the creation of a separate Department of Education would expand federal control over educa-

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103. *personnel*, n.: *Oxford English Dictionary*, OED.COM, <http://www.oed.com/view/Entry/141512?redirectedFrom=personnel> (last visited Oct. 30, 2012) (defining “personnel” in definition 1.a. as “[t]he body of people employed in an organization, or engaged in a service or undertaking, esp. of a military nature; staff, employees collectively.”).

104. *See, e.g.*, 20 U.S.C. § 3444 (discussing the continual professional education of “scientific personnel” at the National Science Foundation); *Id.* § 3463 (discussing Department personnel reduction in conjunction with the Act).

105. *administration*, n.: *Oxford English Dictionary*, OED.COM, <http://www.oed.com/view/Entry/2541?redirectedFrom=administration&> (last visited Oct. 30, 2012) (defining “administration” in definition 3.a. as “[t]he action of carrying out or overseeing the tasks necessary to run an organization, bring about a state of affairs, etc.; the process or activity of running a business, organization, etc.”).

106. *See, e.g.*, 20 U.S.C. § 3463(a)(1) (discussing appropriations for the purposes of the administration of the Department); *Id.* § 3463(c)(5) (identifying the “development of policies to promote the efficient and coordinated administration of the Department and its programs” as a responsibility of certain sub-Cabinet presidential appointees in the Department).

107. *See What We Do*, *supra* note 76 (discussing, in the Department’s own words, the Department’s mission and initiatives in a much narrower way than I argue is possible).

tion.<sup>108</sup> Senator Abraham Ribicoff, sponsor of the Act and chairman of the Senate Governmental Affairs Committee (which recommended the Act to the Senate), assured the Senate that “[i]n our bipartisan spirit, Senators Roth and Danforth have worked with me in the committee to include very specific and strong language in the bill to protect State and local control.”<sup>109</sup> To that end, the House-Senate conference on the Act—including Senator Ribicoff and a 1978 sponsor of the Act in the House, Representative Jack Brooks—agreed that creating the Department would not increase federal influence over education beyond its existing scope.<sup>110</sup>

With this in mind, Congress proceeded to debate federal influence over admissions—specifically affirmative action—under the Department’s authority should the Act be enacted. Indeed, the pre-conference House version of the bill attempted to use the creation of the Department as means of banning existing affirmative action policies in admissions: these attempts were rejected along with amendments prohibiting busing to desegregate schools and encouraging school prayer<sup>111</sup> by the House-Senate conference.<sup>112</sup> Representative Rudd felt certain, to his chagrin, that the DEOA as written would grant the DOE the authority to set quotas for minority enrollment in colleges, as Title VI allowed and other statutory grants of authority

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108. *See, e.g.*, 125 CONG. REC. 7556 (1979) (statement of Sen. Ribicoff) (“Some have argued that establishment of the Department of Education would lead to more Federal control of education or a national education policy.”); *Id.* at 7564–65 (statement of Sen. Cohen) (arguing that creating a separate Department would necessarily increase federal authority over education).

109. *Id.* at 7556.

110. *Id.* at 26,523 (statement of Rep. Brooks) (“The conference report clearly indicates the intention of the Congress that the rights of the State and local governments are to be protected and that the establishment of the Department of Education shall not increase the authority of the Federal Government over education . . . .”); *see also id.* at 25,825 (1979) (statement of Sen. Ribicoff) (asserting that the Act would result in “no new programs, no increase in the Federal Government’s powers, and no changes of any kind in substantive education law and policies.”).

111. *See id.* at 25,831 (1979) (statement of Sen. Javits) (“These amendments, dealing with subjects such as school prayer, abortion, busing, and affirmative action, had no place in a reorganization bill . . . . I am pleased to report, however, that the House conferees receded to the Senate position on each of these amendments.”); Hunter, *supra* note 76.

112. 125 CONG. REC. 26,531–32 (1979) (statements of Reps. Edwards and Rudd) (alternately applauding and lamenting the loss in conference of House language that would have prevented the Department from implementing race- and sex-based quotas); *see also id.* at 26,525 (statement of Rep. Stokes) (arguing in favor of affirmative action and that opponents of affirmative action place an undue emphasis on the dangers of quotas); Marjorie Hunter, *New Education United Approved by House*, N.Y. TIMES, July 11, 1979, at A1.

otherwise enabled.<sup>113</sup> Senator Hayakawa related that, as a former college administrator, he had “resented” federal influence over his college’s admissions policies, arguing that affirmative action had “seen semi-literates enter college, only to be swept along by the bureaucratic broom.”<sup>114</sup> Meanwhile, Representative Chisholm celebrated the omission of the House language prohibiting quotas, noting that it “would have had a devastating impact on the separate Department’s ability to carry out Federal affirmative action efforts.”<sup>115</sup>

It is clear from this discussion that Congress was cognizant of affirmative action policies and agreed on both sides of the aisle that the implementation of affirmative action was an existing federal initiative within the new Department’s purview. Republicans attempted to curtail this practice, while Democrats agreed that it was an element of federal policy that should be maintained by the Department. In the end, of course, the Democrats triumphed, and the DEOA involved no roll-back of existing HEW authority.

It is typically agreed—at least among jurists who value the insights that legislative history can offer<sup>116</sup>—that proposals rejected during the legislative process provide persuasive evidence as to what statutes were *not* meant to communicate.<sup>117</sup> In this case, Congress

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113. Representative Rudd lamented that an amendment that would have “insist[ed] that quotas . . . not be implemented by the new Department . . . [had] been watered down to the point of non-existence by the conference.” 125 CONG. REC. 26,532 (1979) (statement of Rep. Rudd); *see also* discussion *infra* Part II.B.3.

114. *Id.* at 8,935 (statement of Sen. Hayakawa).

115. 125 CONG. REC. 26,534 (1979) (statement of Rep. Chisholm).

116. Certainly not all judges and practitioners believe that the consideration of legislative history is appropriate when interpreting statutes. For one entertaining critique of legislative history, see Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998), where Chief Judge Kozinski suggests in typically flamboyant fashion that “judges who rely on legislative history commit treason against the Constitution” and argues against the usefulness of legislative history beyond the fact that volumes of the U.S.C.C.A.N. can be used to “prop open heavy doors, raise the seats of little children not quite tall enough to reach the table, [and] even serve as firewood in a pinch.” *Id.* at 807, 812 n.22, 813–814. Similarly, Judge Leventhal has been widely quoted as having quipped that relying on legislative history is akin to “looking over a crowd and picking out your friends.” Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983). On the other hand, legislative history is not without numerous prominent supporters. *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1991) (defending the use of legislative history from criticism and espousing its virtues in avoiding absurd results, identifying drafting errors, discerning specialized meanings, maintaining fidelity to purpose, and choosing among reasonable but politically controversial alternative interpretations).

117. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress

considered foreclosing the authority of DOE in the area of affirmative action policies—and rejected that approach. While it might be argued that rejected amendments do not support a strong interpretive inference in favor of one broad reading of a statute versus another,<sup>118</sup> it should be noted here that the choice was stark: should affirmative action policies by the DOE be disallowed, or not? The fact that Congress chose not to place restrictions on existing federal affirmative action policies at the time of DOE's creation is an implicit ratification of race- and sex-based preferences, and seems to demonstrate Congressional intent to leave preferences in admissions policies within the potential purview of the Department. Affirmative action policies are only one type of regulation of admissions policy, and probably the most interventionist—yet both affirmative action and less invasive forms of admissions policy regulation were challenged by opponents in Congress, and left untouched in the final legislation.<sup>119</sup>

It stands to reason, then, that the Congressional acceptance of race- and sex-based affirmative action would also extend to the less politically and Constitutionally controversial<sup>120</sup> policy of class-based affirmative action. Relatedly, it seems clear that Congress also did not intend to roll back or limit existing HEW authority that would ultimately be transferred to DOE.

*b. Congressional concern regarding local control did not extend to postsecondary education*

Finally, concerns about the Department's potential influence over education were almost completely cabined in discussions of primary and secondary schools.<sup>121</sup> Where the possible impact of a Department

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does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.”).

118. See, e.g., ESKRIDGE, FRICKEY, & GARRETT, *supra* note 96, at 1026 (discussing a wariness among scholars to allow rejected amendments to limit a broad reading of a statute when an attempt to codify that broad reading failed).

119. See also discussion *infra* Part II.B.3 (on general authority over admissions policies governed through federal funding for student aid).

120. See discussion *infra* Part III.B.

121. See, e.g., 125 CONG. REC. 7569 (1979) (statement of Sen. Hayakawa) (complaining that the Department would “likely benefit programs desired at the elementary and secondary school level . . . rather than higher education programs”); *Id.* at 7575 (statement of Sen. Levin) (noting concern that the Department would contribute to “a gradual erosion of control of education at the elementary and secondary levels”); *Id.* at 8799 (statement of Sen. Danforth) (“we must be very careful not to transfer responsibility for decisionmaking from local school boards to a giant new Federal bureaucracy”); *Id.* at 25,825 (statement of Sen. Ribicoff) (arguing that the pre-Department status quo would in fact only increase “the threat of more Federal intrusion in the local control of education,” while the Department would protect local school boards).

of Education on higher education was explicitly discussed in the Senate, it was in protest of existing educational policies under the HEW. Senator Hayakawa, one of the Act's most vocal opponents and a former college administrator, mentioned higher education on three occasions: once to briefly lament the "administrative annoyances" he had experienced due to HEW;<sup>122</sup> once to point out that the DOE would change little in higher education;<sup>123</sup> and once in his above-cited polemic against existing affirmative action practices.<sup>124</sup> Only one amendment on higher education was proposed in the House, where Representatives Hance and Skelton were disturbed by past uses of federal funding to force colleges to adopt federal policies. Their amendment sought to disallow the Department from cutting off funds to colleges that failed to adopt the Department's policies, but it was rejected by the House-Senate conference.<sup>125</sup> No significant discussion of new policies or increasing federal power at the higher education level was found in the debates of either house of Congress.

The final statutory language itself, quoted in previous discussions above, also has an arguable primary and secondary school bent. Section 101, subsection (3) announces that parents have the primary responsibility for the education of their children, with the government (specifically state and local government) playing a support role.<sup>126</sup> Similarly, in his signing statement, President Carter offered reassurance to those who worried that the Department would take influence away from local school boards.<sup>127</sup> Of the federal government, Carter said that "[i]nstead of assisting school officials at the local level, it has too often added to their burden," and he pledged that the Act and the Department would remove layers of bureaucracy that had made the government ineffective in supportive local school systems.<sup>128</sup>

Parents play a significantly smaller role in shaping the educational trajectories of their children at the post-secondary school level, such that it seems strange to expect them to take "primary" responsibility. Local school boards lose even more influence than parents. States and individual institutions become more important, but their rights were not expanded by the Act, nor was the existing authority of

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122. *Id.* at 7567.

123. *Id.* at 7569.

124. *See supra* note 121 and accompanying text.

125. *See* 125 CONG. REC. 26,522 (1979) (statement of Rep. Erlenborn) (detailing House amendments from opponents of the Act that had been scrubbed from the conference version of the bill).

126. 20 U.S.C. §§ 3401–3402 (2011).

127. *See* Hunter, *supra* note 76; Jimmy Carter, *supra* note 80.

128. *Id.*

the federal government, as realized by HEW and later the DOE, significantly expanded. In short, insofar as the DEOA touches the authority of the DOE with respect to higher education, it does not appear to withdraw authority to enact regulations of admissions policies from the DOE, nor does it reinvest state or local authority that might be offended by a federal admissions scheme favoring low-SES candidates.<sup>129</sup>

### 3. *Considering Pre-DEOA Statutes to Locate Authority*

The foregoing discussion demonstrates that the text and legislative history of the DEOA should not be read to limit or withhold existing HEW authority to regulate admissions policies in higher education upon the transfer of that authority to the new DOE. Nor can the DEOA be taken to foreclose any regulation of admissions policies with respect to SES. This subsection identifies pre-DOE authority and argues how, in concert with the DEOA, this authority can be taken to authorize the regulation of admissions policies.

As has been discussed, HEW—and later DOE—was involved in regulating admissions policies under the authority of Title VI, which explicitly authorized federal agencies to regulate affirmative action policies to remedy past discrimination against women and minorities. Additionally, the Secretary of Education has been granted generalized authority to regulate, in order to implement and govern the DOE's programs and policies; these regulations carry the force of law.<sup>130</sup> Together with other sources of authority, pre-dating the DOE, I argue that authority to directly regulate admissions with respect to SES can be located in the DOE.

In 1965, Congress passed the Higher Education Act (HEA), one of the earliest efforts to increase access to education for low-income individuals. Title IV of the HEA created grants “to assist in making available the benefits of higher education to qualified high school graduates of exceptional financial need, who for lack of financial

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129. Relatedly, the regulation of admissions practices would turn on the provision of federal funding, which avoids federalism concerns: if schools choose not to follow regulations, the consequence is that federal funding will be withdrawn. While universities are obviously as diverse as the states that they are located in (and often run by), and they may object to a sweeping federal mandate on the basis of federalism, their recourse is to reject federal funding, as many schools have in the past in response to Congressional actions and DOE regulations. For more on the issue of withdrawing federal funding, see *infra* note 136.

130. This authority to act with the power of law is discussed further *infra* as an element of my analysis of *Chevron* deference. See 20 U.S.C. §§ 1221e–3, 1232; discussion *infra* Part II.C.1.

means . . . would be unable to obtain such benefits [of higher education].”<sup>131</sup> Title IV further provided that institutions of higher education would receive funding for such grants only upon agreeing to, among other things, “mak[ing] vigorous efforts to identify qualified youths of exceptional financial need and to encourage them to continue their education beyond secondary school through programs and activities” appropriate to those ends.<sup>132</sup> This mandate went on to offer two such possible programs and activities: Section 407(3)(A) of the HEA suggested that colleges build relationships with high school administrators to create recruitment pipelines, while Section 407(3)(B) suggested that colleges offer “conditional” financial aid grants to promising students as early as their junior year of high school.<sup>133</sup> The statute also did not limit permissible “programs and activities” to these proposals alone, but rather offered them merely as suggestions.

Section 407(3)(B) offered a programmatic suggestion that went well beyond recruitment and indeed suggested that colleges begin affirmatively offering provisional seats in their freshman classes to low-SES students. As Part III discusses, colleges can encourage applications by low-SES students by altering their admissions policies to be more favorable for such students.<sup>134</sup> By empowering HEW—and now the DOE—to condition funding for financial aid grants on agreements to change admissions policies in this way, the HEA laid a groundwork principle for the regulatory authority that I offer here.

### C. *Anticipating Chevron Deference in the Event of Litigation*

In light of the foregoing textual and legislative history analyses of the Act, there is a very plausible argument that the DOE is within the scope of legislatively-granted authority to issue rulemaking<sup>135</sup> that would direct colleges to adopt admissions policies in our nation’s colleges and universities. Enforceable through the Department’s ability to

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131. Pub. L. 89-329, § 401, 79 Stat. 1219, 1232 (1965).

132. *Id.* at § 407(3), 1235.

133. *Id.*

134. See discussion *infra* Part III.A.1.

135. Needless to say, such rulemaking would need to undergo appropriate informal rulemaking procedures under Sections 553 and 554 of the Administrative Procedure Act. This is because the DEOA and other statutes do not prescribe that rules must be “made on the record after agency opportunity for hearing,” which would require formal rather than informal rulemaking. 5 U.S.C. § 553 (2011). Such informal rulemaking would involve a “notice and comment” period pursuant to Section 553 and would be held to the standard of *Motor Vehicle Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29 (1983), requiring that the Department examine all relevant evidence, articulating a satisfactory explanation with a rational connection to relevant evidence without demonstrably clear error of judgment.



withhold federal funds from schools not in compliance,<sup>136</sup> such regulations would likely withstand challenges to the Department's authority under *Chevron*.<sup>137</sup>

The *Chevron* inquiry begins with applying *United States v. Mead Corp.* Introduced in 2001 by the Supreme Court as an analytically-prior element<sup>138</sup> to the *Chevron* question, *Mead* asks whether an

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136. Following the Supreme Court's decision in *NFIB v. Sebelius*, the extent to which Congress can "coerce" states to adopt certain policies by threatening to withhold funding, see *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (concluding that mandating a minimum drinking age by conditioning five percent of federal highway funds on a minimum age was permissible and not coercive because it was "relatively mild encouragement"), has been cast into doubt. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (plurality opinion) (discussing the Spending Clause and allowing only that Congress "may use its spending power to create incentives for States to act in accordance with federal policies. But when 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism" (internal citations omitted)); Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. UNIV. L. REV. 577 (2013). Professor Pasachoff provides a painstaking analysis of the possible consequences for *NFIB* both in general and with respect to federal education law, concluding that no major existing conditional spending policies in the educational spending regime would be threatened by the decision. *Id.* at 612–13. Because the analysis of the Spending Clause as applied to regulation could easily amount to a Note in its own right, I decline to fully explore the question here.

It suffices to note that under Professor Pasachoff's reading of *NFIB*, the regulations I propose here would be most at risk for being new, independent policy requirements conditioning previously existing funding. See *id.* at 596 (arguing that conditioning new funding on compliance with a policy requirement may be permissible, but conditioning previously-existing funding on a new requirement may not be). But the new regulation could perhaps avoid this problem if it is not a "significant" and "independent" threat to existing funding: to harken back to *South Dakota v. Dole*, it may still be permissible to threaten to withhold some small percentage of funding (such as five percent) in exchange for compliance with related new requirements. Compare *Dole*, 483 U.S. at 211 (where Congress withheld five percent of traffic funding to achieve a new traffic-related interest, namely aimed at underage drinking), with *NFIB*, 132 S. Ct. at 2605–06 (taking issue with the fact that the Affordable Care Act constituted a "shift in kind, not merely degree" of a significant portion of Medicaid funding to populations not initially envisioned in original Medicaid funding). Here, I suggest shifting some amount of money that already exists to fund grants and financial aid for low-income students, as in the HEA, to require that schools implement programs for the benefit of such students.

137. While judicial approaches to evaluating an agency's interpretation of its own authority are central to the Note's argument, an in-depth analysis or critique of the *Chevron* doctrine is beyond the scope of this Note. As such, the discussion of this Subpart will be limited to a relatively straightforward application of *Chevron* and its progeny to the foregoing statutory interpretation.

138. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 213–16 (2006) (discussing *Mead* and implying that it is a sort of *Chevron* "Step Zero," because the *Mead* question of regulatory authority is dispositive of whether *Chevron* deference can be afforded); but see Michael P. Healy, *Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 39–42 (2011) (arguing that *Mead* is

agency has been granted authority by Congress to make rules carrying the force of law.<sup>139</sup> In *Mead*, the Court considered whether interpretive rules and informal adjudications by the U.S. Customs Service were entitled to *Chevron* deference.<sup>140</sup> Concluding that such determinations were not infused with the force of law by a grant of authority by Congress, the Court declined to avail the U.S. Customs Service of *Chevron* deference in their informal adjudications.<sup>141</sup>

Next comes the *Chevron* test itself: in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>142</sup> the Supreme Court articulated a highly deferential approach to determining whether agencies have adequately interpreted their own authority in issuing regulations or formal adjudications meant to carry the force of law.<sup>143</sup> The first step of the *Chevron* analysis asks whether Congress has spoken directly to the issue of the agency's authority to regulate.<sup>144</sup> Where the relevant organic statutes are ambiguous or silent, courts typically defer to agency judgment.<sup>145</sup> This brings us to the second step—which the Supreme Court has never applied to the detriment of an agency's interpretation—which asks whether the interpretation falls within a permissible scope of granted authority.<sup>146</sup> This inquiry tends more toward a purposive approach in interpretation, considering the extent of Congress' clear grant of authority.

I begin with the threshold question of *Mead*, before proceeding to a deference analysis under *Chevron*.

### 1. Applying *Mead* at *Chevron* "Step Zero"

Before applying *Chevron* to determine whether an agency action is entitled to either *Skidmore* (merely "persuasive") or *Chevron* deference, *Mead* asks whether any deference at all should be afforded

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relevant only after *Chevron* Step One has been satisfied, because a clear contradiction of agency authority or interpretation found at Step One, is the fundamental question of *Chevron*).

139. 533 U.S. 218, 226–27 (2001).

140. *Id.* at 218.

141. *Id.* at 226–27.

142. 467 U.S. 837 (1984).

143. *See* United States v. Mead Corp., 533 U.S. 218 (2001) (establishing when *Chevron* analysis is applied); discussion *infra* Part II.C.1.

144. *Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).

145. *Id.* at 843–44 ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

146. *Id.*; E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 2 (2005) (on how *Chevron* Step Two has effectively required deference, in light of Supreme Court treatment of the analysis).

based on whether Congress meant for the agency action in question to carry the force of law. I propose that the DOE should institute policies through notice-and-comment rulemaking, which carries the force of law and—I argue—is authorized by Congress.<sup>147</sup> A simple (and common) reading of *Mead* is that the Court was primarily concerned with the ability of informal adjudication to carry the power of law as granted by Congress, as the U.S. Customs Service was not engaged in rulemaking or formal adjudication.<sup>148</sup> Where Congress grants authority to act and interpret that is not meant to carry the force of law, *Mead* holds, *Chevron* deference is inappropriate. But *Mead* allowed that notice-and-comment rulemaking generally counts as “administrative action with the effect of law” noting that:

[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.<sup>149</sup>

The power of the Secretary of Education to pass regulations by notice-and-comment rulemaking is clearly (and sweepingly) laid out in 20 U.S.C. § 1221e-3, which holds that:

The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.<sup>150</sup>

Additionally, the power of law carried by regulations made by the Secretary is clarified in 20 U.S.C. § 1232(a), which states that:

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147. See discussion *supra* Part II.B.

148. See Adrian Vermeule, Introduction, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348 (2003).

149. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). See also *id.* at 246 (Scalia, J., dissenting) (“Another practical effect of today’s opinion will be an artificially induced increase in informal rulemaking. Buy stock in the GPO. Since informal rulemaking and formal adjudication are the only more-or-less safe harbors from the storm that the Court has unleashed; and since formal adjudication is not an option but must be mandated by statute or constitutional command; informal rulemaking—which the Court was once careful to make voluntary unless required by statute, will now become a virtual necessity.” (internal citations omitted)); Vermeule, *supra* note 148, at 350 (identifying informal rulemaking and formal adjudication and rulemaking as *Mead*’s “safe-harbor categories”).

150. 20 U.S.C. § 1221e-3 (2011); see also *supra* note 135 and accompanying text.

For the purpose of this section, the term “regulation” means any generally applicable rule, regulation, guideline, interpretation, or other requirement that—(1) is prescribed by the Secretary or the Department; and (2) has legally binding effect in connection with, or affecting, the provision of financial assistance under any applicable program.<sup>151</sup>

Section 1221e-3 makes clear that the Secretary may regulate under any Congressional grant of authority delegated or assigned to him/her. This includes, I suggest, the authority discussed above, in the DEOA and other pre-DEOA statutes. Section 1232(a) in turn adds that such regulations affecting the provision of federal funds to universities would carry the power of law.

In addition to this general and explicit authority, the DEOA also at least impliedly grants the DOE authority to address “a continuing need to ensure equal access for all Americans to educational opportunities of a high quality.”<sup>152</sup> In *United States v. Southwestern Cable Co.*, the Supreme Court allowed that agencies were permitted to exercise regulatory authority not explicitly granted so long as that authority fell within the *purpose* of the agency’s organic statute.<sup>153</sup> Particularly, the Court held that courts could not “in the absence of compelling evidence that such was Congress’ intention . . . prohibit administrative action imperative for the achievement of an agency’s ultimate purposes.”<sup>154</sup> As I have established, the purpose<sup>155</sup> of the DEOA clearly encapsulates the authority I suggest that the DOE can and should wield.

However, I should note the fact that there is some ongoing discussion as to what *Mead* demands, which could pose a problem for a DOE assertion of authority. As noted above, it has been widely assumed that the *Mead* decision provides “safe harbor” for notice-and-comment rulemaking, the legal force of which needn’t be questioned by *Mead*’s considerations.<sup>156</sup> In practice, however, *Mead* has muddled lower courts,<sup>157</sup> leading to what some commentators view as a revival of a seemingly-defunct nondelegation doctrine, demanding a more ex-

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151. 20 U.S.C. § 1232(a) (2011).

152. 20 U.S.C. § 3401(2) (2011); see discussion *supra* Part II.C.1.

153. 392 U.S. 157, 177–78 (1968).

154. *Id.*

155. See discussion *supra* Part II.B.1; 20 U.S.C. § 3402 (2011).

156. See *infra* note 149 and accompanying text.

157. See, e.g., Vermeule, *supra* note 148, at 350–56 (critiquing inconsistent D.C. Circuit decisions applying *Mead*). See also *Motion Picture Ass’n of America v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002) (denying *Chevron* deference on the basis of *Mead* to notice-and-comment rulemaking); *c.f.* Vermeule, *supra*, at 352–53 (arguing that the D.C. Circuit simply misapplied *Mead* by assuming that it calls for an expressed dele-

acting inquiry of whether an agency was given the authority to act with the power of law.<sup>158</sup> Professor Adrian Vermeule has criticized the D.C. Circuit for using *Mead* to support the proposition that “[w]ere courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron*.”<sup>159</sup> Vermeule argues that this is actually a position antithetical to *Chevron*.<sup>160</sup>

Instead, Vermeule explains, “*Mead* . . . assumes that *Chevron* deference applies by virtue of an implied delegation so long as (1) the agency is given rulemaking powers and (2) the rule at issue is promulgated through the prescribed procedures, even if the agency’s express grants of authority do not, standing alone, encompass the rule at issue.”<sup>161</sup> And though lower courts have not stayed entirely true to it, *Mead* itself attempts to reinforce the basic deferential interpretive landscape of *Chevron*:

This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that “[s]ometimes the legislative delegation to an agency on a particular question is implicit.” Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which “Congress did not actually have an intent” as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise, but is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable . . . .<sup>162</sup>

The Supreme Court has recently reaffirmed this understanding in *City of Arlington v. FCC*, suggesting that *Mead* is simply a specific

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gation of agency power and calling that mistake an “overreaction” in *Motion Picture Ass’n*).

158. See generally Michael C. Pollack, *Chevron’s Regrets: The Persistent Vitality of the Nondelegation Doctrine*, 86 N.Y.U. L. REV. 316 (2011).

159. *Michigan v. EPA*, 268 F.3d 1075, 1082 & n.2 (D.C. Cir. 2001); Vermeule, *supra* note 148, at 354.

160. *Id.*

161. *Id.*

162. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (alteration in original).

carve-out from *Chevron* in cases where an agency is not acting under rulemaking authority.<sup>163</sup> Justice Scalia wrote for the majority that *Mead* “requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. . . . But *Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking.”<sup>164</sup> In response to the dissent’s suggestion that *Mead* could foreclose *Chevron* deference in a case where an agency with general rulemaking authority had issued rulemaking, Justice Scalia argued that “[w]hat the dissent needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency’s substantive field. There is no such case, and what the dissent proposes is a massive revision of our *Chevron* jurisprudence.”<sup>165</sup>

That would appear to settle the question of *Mead* raised in the lower courts, and satisfy us for present purposes that *Chevron* would be appropriately applied in this case. Still, even under more exacting interpretations of *Mead*, I would argue that the DOE has been given very broad rulemaking powers explicitly to satisfy *City of Arlington*,<sup>166</sup> and at least implicitly in the DEOA, which satisfies the first part of these stricter *Mead* requirements. The use of informal rulemaking satisfies the second. While it may be argued that affirmative action was only ever contemplated with respect to Title VI and redressing discrimination, the DOE can reasonably point to other pre-DEOA sources of authority—as well as the foundational principle of ensuring equal access to all Americans—as leaving interpretive space for affirmative action and other initiatives. And there is no denying the breadth of regulatory authority granted to impose programs on post-secondary institutions in exchange for funding.<sup>167</sup> This reading, I argue, is reasonable even under post-*Mead*, pre-*City of Arlington* D.C. Circuit cases.<sup>168</sup>

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163. 133 S. Ct. 1863, 1874 (2013).

164. *Id.*

165. *Id.*

166. *See, e.g.*, 20 U.S.C. § 1221e-3 (2011) (granting regulatory authority to the Secretary); 20 U.S.C. § 3441 (2011) (listing multiple statutes under which the DOE inherits power from HEW).

167. *See supra* notes 150–152 and accompanying text.

168. In *Motion Picture Ass’n of America v. FCC*, the D.C. Circuit applied *Mead* and found that the FCC lacked the authority to issue a regulation through notice-and-comment rulemaking when the FCC relied on a general grant of authority in the Communications Act of 1934. 309 F.3d 796, 802–06 (D.C. Cir. 2002). The general grant provided, in effect, that “[t]he Commission may perform any and all acts, make such

In sum, even with a broader-reaching reading of *Mead*, with its attendant skepticism of delegation, my interpretation of the DOE's authority to regulate admissions policies should stand to be evaluated under *Chevron*. Unlike *Motion Picture Ass'n*, where the court took issue with a lack of specific authority when other statutory provisions,, here the DOE has a general grant of authority supplemented by various statutory suggestions that the regulation of admissions practices is well within its authority. Similarly, unlike *Cline*—which Justice Breyer offered as a rare example of where notice-and-comment rulemaking should not reach *Chevron* analyses—there is obviously no clear conflict with DOE authority over admissions practices to be found.

## 2. Applying *Chevron* (and the Administrative Procedure Act)

Moving to the question of *Chevron* deference itself, the intent of Congress is certainly ambiguous regarding the Department's authority to regulate admissions. In Section 102, Congress clearly states that it is within the Department's purpose to ensure equal access to educational opportunity; in Section 103(a), federal authority is not expanded beyond its pre-DEOA scope; in Section 103(b), the authority of the Department is seemingly constrained from extending to the exercise of discretion, supervision, or control over curricula, instruction, personnel, or administration.<sup>169</sup> However, federal regulation of admissions practices existed prior to the creation of the Department,<sup>170</sup> and the text of the statute does not seem to bear the interpretation that such regulations reach the limitations of Section 103(b).<sup>171</sup> Justice Scalia,

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rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." *Id.* at 802–03. The court determined that the specific regulation of video descriptions did not fall within this general grant, relying in large part on the fact that another statute limiting the agency's regulatory authority. *Id.* at 803–07. Similar D.C. Circuit cases attacked agency interpretations as lacking authority due to Congressional failure to speak specifically to the subject of regulation. See Vermeule, *supra* note 148, at 350–56. Vermeule objects—rightly, in my view—to the fact that the D.C. Circuit has taken *Mead* as license to narrow its understanding of what ambiguous and broad grants of authority allow. *Id.*

In his concurrence in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, Justice Breyer also attempted to address the issue of *Mead*'s scope. He argued that while it is true that notice-and-comment rulemaking is not sufficient for moving into the realm of *Chevron* deference, this is only true where "Congress may have intended *not* to leave the matter of a particular interpretation up to the agency." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (emphasis in original).

169. 20 U.S.C. §§ 3402–03 (2011).

170. See discussion *supra* Part II.B.2.a.

171. See discussion *supra* Part II.B.1.b.

dissenting in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, emphasized the importance of considering the whole act in question in order to understand meaning;<sup>172</sup> in this particular case, the usage of words like “personnel” and “administration” throughout the whole act contextualizes the limitations of Section 103(b) as inapplicable to affirmative action.<sup>173</sup>

Finally, regardless of the meaning of Section 103(b)’s limitations, section 103(b) also contains a caveat to the limitations: “except as authorized by law.”<sup>174</sup> This seems to suggest that the DOE *may* be authorized to exercise direction, supervision, or control over personnel and administration in certain circumstances. While the meaning of this exception is unclear, interventions in college admissions policies have historically been authorized by law; indeed, the legislative history of the Act shows both opponents and supporters referencing the Supreme Court decision in *Regents of the University of California v. Bakke*<sup>175</sup> as a guidepost for permissible affirmative action policies, for example, while legal authorization to make other such policies is found throughout the DEOA and other pre-DEOA statutes.<sup>176</sup>

Ultimately the Act is, at base, contradictory with respect to Congress’ grant of authority to the Department; it is at best, a clear grant of authority to continue past practices authorized by the Supreme Court with respect to affirmative action. It at once urges the Department to increase access to education, seems to limit its authority to do so, and carves out a wide-open exception to those limitations based on existing law. Legislative history demonstrates a significant commitment to the pre-DOE status quo, which included federal intervention in admissions policies.<sup>177</sup> Given this, the foregoing statutory discussion demonstrates that the Department would pass the first step of the *Chevron* analysis.

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172. 515 U.S. 687, 714–36 (1995).

173. See discussion *supra* Part II.B.1.b.

174. 20 U.S.C. § 3403(b) (2011).

175. 438 U.S. 265 (1978).

176. Compare 125 CONG. REC. 8936 (1979) (statement of Sen. Helms) (claiming that attempts to prohibit the use of quotas was simply meant to “bring the activity of the proposed Department of Education in line with the Supreme Court’s ruling in the *Bakke* case”) with *id.* at 26,534 (statement of Rep. Chisholm) (arguing that attempts to amend the Act actually “went considerably further than the Court mandated” in *Bakke* and *Weber*); *id.* at 26,525 (statement of Rep. Stokes) (supporting affirmative action in practice and drawing distinctions between quotas and goals as illustrated in *Bakke*); see discussion *supra* Parts II.B and II.C.1 (analyzing statutes authorizing regulation and their legal force).

177. See discussion *supra* Part II.B.2.a.



The second step is an even easier hurdle to overcome, with a rich legislative history supporting the implementation of affirmative action policies by the Department.<sup>178</sup> The Supreme Court has never overturned an agency interpretation at Step Two, and only a few lower courts have done so.<sup>179</sup> As Judge Posner has noted, “about all the court can do [at Step Two] is determine whether the agency’s action is rationally related to the objectives of the statute containing the delegation.”<sup>180</sup> Along those lines, in many cases, *Chevron* Step Two analysis begins to melt into the arbitrary and capricious standard required by *Motor Vehicles Manufacturer’s Ass’n v. State Farm* and the Administrative Procedure Act.<sup>181</sup> For the purposes of that test, an agency must simply show that in making its regulation, it has considered all relevant evidence, rationally connected the facts to its decision, articulated a reason for its decision, and without clear error.<sup>182</sup> To survive Step Two, an agency must simply be “reasonable” in choosing its course in order, a question largely informed by the agency’s purpose.<sup>183</sup> As I have explained before, an effort to regulate college admissions to make access to college more equal is quite within the explicit purpose of the Department.

### 3. *Considering the Consequences of a “Change of Policy” under Brown & Williamson*

Finally, we consider the question of whether my proposed interpretation of the DOE’s authority would represent a change of agency policy, and whether the attendant interpretive shift by the agency would imperil *Chevron* deference. An authoritative case in this area

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178. See discussion *supra* Parts II.B.2.a–b.

179. See Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. REG. 1, 31 (1998) (in a one-year period, “[w]hen the statute was declared ambiguous and the court moved on to step two, the agency constructions were accepted in 100 cases and rejected in 12 cases.”).

180. *Mueller v. Reich*, 54 F.3d 438, 442 (7th Cir. 1995).

181. 463 U.S. 29 (1983); see, e.g., *Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 234 (D.C. Cir. 2000) (providing that an overlap between the ill-defined Step Two test and the arbitrary and capricious inquiry exists); *Natural Res. Def. Council v. Daley*, 209 F.3d 747, 752 (D.C. Cir. 2000) (providing that an overlap exists between the ill-defined Step Two test and the arbitrary and capricious inquiry).

182. *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 43–44 (1983). Clear error would include a justification that stands in clear contrast to stated facts, or use of evidence that Congress has disallowed. *Id.* at 30–31.

183. *Mueller*, 54 F.3d at 442; Kerr, *supra* note 179, at 7 (“The role of reviewing courts is to ensure that agency decisions are ‘consistent with the purpose properly to be attributed to the statute.’”) (quoting Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 580 (1992)).

has been *FDA v. Brown & Williamson Tobacco Corp.*, where the Supreme Court denied *Chevron* deference to an FDA interpretation of its authority to regulate tobacco products as “drugs” and “devices” under the Food, Drug, and Cosmetic Act.<sup>184</sup> In the past, the FDA had not interpreted its authority to extend to tobacco, and Congress had taken it upon itself to regulate those products through legislation. The Court took this to mean that Congress had not intended to delegate power over tobacco to the FDA, undermining the agency’s claim that its authority was ambiguous under *Chevron* Step One.

It is hard to deny that the interpretation of authority that I suggest would be a change of policy for the DOE. The Department has not regulated college admissions outside of the scope of Title VI in the past, and has indeed not relied on its general purpose under the DEOA to pass regulations to increase access to education.<sup>185</sup> It also has not concerned itself with unequal access to education on the basis of SES, except as directed by the HEOA, having instead focused on the enumerated classifications of race, gender, and ethnicity when regulating to achieve equal access to education.<sup>186</sup>

But changes of policy are not dispositive of *Chevron* deference. *Brown & Williamson* must be contrasted with the earlier foundational holding of *Southwestern Cable*. That case allowed agencies to regulate in areas where they were not explicitly granted power, even after Congress refused to pass legislation explicitly granting that power.<sup>187</sup> Such a scenario involves a clear change of policy: an agency initially interpreting its organic statute to disallow particular action, to the point that it asked Congress for a supplementary grant of authority, only to reinterpret its powers to include such authority after being denied. *Brown & Williamson* changes this scheme only by providing that an alternative statutory scheme adopted by Congress forecloses the authority of an agency to regulate in that area absent a more explicit grant of power.<sup>188</sup> In essence, *Brown & Williamson* may stand simply for the proposition that an agency may not change interpretive policy for the purpose of entering an area already regulated by Congress, as was the case with cigarettes. Indeed, the majority in *Brown & Williamson* makes no mention of *Southwestern Cable*, while the dissent

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184. 529 U.S. 120 (2000).

185. See discussion *supra* Part II.A.

186. See discussion *supra* Part II.A.

187. *United States v. Southwestern Cable Co.*, 329 U.S. 157, 172–73 (1968) (noting that where an Act does not limit authority to specific areas and that regulation in a new, unexpected area is necessary to realizing an agency’s purposes, it is permissible for agencies to regulate in new areas without explicit authority).

188. *Id.*

points out that the majority (and the litigants) cabined the issue of *Brown & Williamson* in such a way that did not touch the holding of *Southwestern Cable*.<sup>189</sup>

*Brown & Williamson* has not been the last word on changes of policy under *Chevron*. In 2005, the Supreme Court wrote in *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services* that:

Agency inconsistency [in interpreting its authority] is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. . . . [C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations. That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy.<sup>190</sup>

This holding reaffirms the basic principles of *Southwestern Cable* and distinguishes the principles of *Brown & Williamson*. Unlike tobacco, Congress has not acted to legislate college admissions, and its past involvement in affirmative action (namely in Title VI) has been with the intended cooperation of the agencies, including the DOE. Under *Brand X* as contextualized by *Brown & Williamson*, the change of policy I suggest the DOE could undertake should not be denied *Chevron* deference, and indeed seems to embody the sort of interpretive shift that *Chevron* set out to empower.

Finally, as noted in *Brand X*, an agency's interpretation of its own authority to regulate can survive *Mead* and receive *Chevron* deference but still be deemed an arbitrary and capricious exercise of

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189. *Brown & Williamson*, 529 U.S. at 167 (Breyer, J., dissenting) ("But it should not have seemed unlikely that, assuming the FDA decided to regulate and proved the particular jurisdictional prerequisites, the courts would rule such a jurisdictional assertion fully authorized. After all, this Court has read more narrowly phrased statutes to grant what might have seemed even more unlikely assertions of agency jurisdiction. I shall not pursue these general matters further, for neither the companies nor the majority denies that the FDCA's literal language, its general purpose, and its particular legislative history favor the FDA's present jurisdictional view." (citing *Southwestern Cable*, 392 U.S. at 172) (internal citations omitted)). See also, e.g., *Am. Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (citing and applying *Southwestern Cable* both specifically with respect to FCC authority and generally to understand scope of authority).

190. 545 U.S. 967, 981–82 (2005).

power.<sup>191</sup> The lesson of *Brand X* in this respect seems to be that a change in policy may suggest a capricious shift from what seemed in the past to be a clearly supported position. In the case of affirmative action based on SES, however, the facts—articulated in Part I—seem to clearly support agency action to increase access to education for low-SES students, rather than maintaining the past policy of inaction. Indeed, action is imperative—to use the language of *Southwestern Cable*—to the DOE realizing its ultimate purpose. A reasonably-drafted policy, informed by notice and comment procedures and based upon the evidence discussed above, should face no serious arbitrary and capricious challenge, at least on the permissive precedent of past cases.<sup>192</sup>

In sum, the DOE bears not only the purpose of increasing access to education for students regardless of SES, but the statutory and Constitutional authority to do so through regulations that would implement class-based preferences for applicants to colleges and universities.

### III.

#### A PRACTICAL CONSIDERATION: WHY WE MUST REGULATE ADMISSIONS, AND HOW

Thus far, this Note has argued that there is an unacceptable education gap facing low-SES students, and has suggested that the DOE possesses the authority to directly address that gap by regulating college admissions policies. The remaining questions are *why* and *how*—why should we expect or want the Department to act to resolve the SES education gap, and not leave it to individual states and colleges to act? And how exactly should the Department tailor its regulatory efforts to achieve its purpose of ensuring equal access to educational opportunity for all Americans? This Part evaluates the options available to the DOE, before turning to a practical consideration of how a class-based affirmative action scheme might look. Of course, it is a considerable project to devise a fully-functional affirmative action scheme, and not one that I mean to undertake here: I merely hope to suggest that class-based affirmative action could be an effective policy solution that the DOE should take seriously.

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191. *Id.*

192. *See, e.g.,* U.S. Postal Serv. v. Gregory, 534 U.S. 1, 6–7 (2001) (courts may not substitute own determinations and judgment for the agency's interpretation); Marsh v. Oregon Nat'l Res. Council, 490 U.S. 360, 376 (1989) (concerned primarily with whether the agency actually had the necessary expertise to arrive at a conclusion).

A. *Evaluating the Regulatory Path and the Involvement of the Department of Education*

The answer as to *why* the Department should act is obvious—the Department should act because, arguably, it is supposed to.<sup>193</sup> If we agree that higher education is of federal concern and that limited access to higher education for low-SES students is a nationwide problem, then it follows that the Department has a vital role to play.

1. *The Merits of Affirmative Action as a Solution*

As Professors Hoxby and Avery concluded in their study of college application behavior among low-SES students, any solution intended to increase access to higher education must command wide-reaching, ideally nationwide attention.<sup>194</sup> Increased efforts to recruit low-SES students have proven ineffective for those colleges that have attempted such policies, mostly because it is impossible for even the most well-funded institutions to conduct outreach to every American high school.<sup>195</sup> Attempts to make elite colleges free (or very low-cost) for students of low-income have garnered considerable media attention but have also failed to make a large difference in enrollment, as have federal student aid schemes.<sup>196</sup> Hoxby and Avery assert—and I agree—that this is to be expected, given the tendency of low-SES students to undermatch and underestimate their educational opportunity, among other structural barriers discussed at length above in Part I.<sup>197</sup> In addition to the problem of undermatching and low self-expectation, students of low SES are systematically undermined on “objective” scales, such as standardized test performance and access to particular admissions criteria, like Advanced Placement classes and subject mat-

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193. See discussion *supra* Part II; 20 U.S.C. § 3402 (2011) (asserting that the purpose of the Department is “to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual”).

194. See HOXBY & AVERY, *supra* note 4, at 29.

195. See *id.*

196. See *id.* at 5 (reporting that Harvard’s policy of waiving tuition for families earning less than \$40,000 per year has added at most 15 low-SES students to a class of more than 1600 students).

197. *Id.* at 6 (“The pool of high-achieving, low-income students who apply to selective colleges is small: for every high-achieving, low-income student who applies, there are about fifteen high-achieving, high-income students who apply. Viewed another way, the admissions staff are too pessimistic: the vast majority of high-achieving, low-income students do not apply to any selective college. There are, in fact, only about 2.5 very high-achieving, high-income students for every high-achieving, low-income student in the population. The problem is that most high-achieving, low-income students do not apply to any selective college so they are invisible to admissions staff. Moreover, we will show that they are unlikely to come to the attention of admissions staff through traditional [geographically-limited] recruiting channels.”).

ter-specific tests. I put forward affirmative action as a solution that addresses both problems.

Affirmative action obviously addresses the systematic underperformance of low-SES students on “objective” measures of performance, and it can also account for a lack of access to Advanced Placement classes and other important admissions credentials. But affirmative action can also solve the problem that Hoxby and Avery identify—that even high-achieving students of low SES do not even apply to the best schools that they could attend.<sup>198</sup> A nationwide affirmative action scheme could send the message to students that they are expected to attend college, and that they have opportunities available to them that they may not have thought possible. This was indeed one of the driving forces behind instituting affirmative action for minority students, and it has worked: as one recent empirical study found, affirmative action policies have had the effect of encouraging achievement among many minority students.<sup>199</sup>

The Carnevale and Strohl study, discussed above, also considered the impact of race/ethnicity on SAT scores. It determined that race/ethnicity accounts for a sixty-point difference between white and African-American test-takers,<sup>200</sup> as compared to a significantly higher disparity between high- and low-SES test-takers.<sup>201</sup> Racial minorities, of course, represent the archetypal recipients of affirmative action,<sup>202</sup> despite the fact that the raw impact of race on test scores is relatively limited. Historically, the gap in test scores between white and African-American students was almost twice as large as the gap between low

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198. See generally *id.*

199. See Brent R. Hickman, Pre-College Human Capital Investment and Affirmative Action: A Structural Policy Analysis of U.S. College Admissions 2 (Mar. 2013) (unpublished manuscript), available at [http://home.uchicago.edu/~hickmanbr/uploads/AA\\_Empirical\\_paper.pdf](http://home.uchicago.edu/~hickmanbr/uploads/AA_Empirical_paper.pdf) (“[P]ractices in US college admissions narrow the gap between median SAT scores among minorities and non-minorities by 14% . . . encouraging students in the middle [of the score distribution] to score higher.”). The study also notes, however, that affirmative action has potentially had the effect of discouraging students at the extreme ends of the score distribution, but I would argue that this result goes to show that affirmative action encourages students to seek out positive educational outcomes. If students at the top of the SAT score distribution aren’t trying as hard as they could because they know that affirmative action policies will get them into college, we have at least solved the supply-side undermatching problem for those students, while also encouraging the rest of the students in the distribution to try harder and also stop undermatching.

200. *Id.*; see also RICHARD KAHLENBERG, A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL PREFERENCES, THE CENTURY FOUNDATION 5 (2012).

201. See *supra* note 25 and accompanying text.

202. See DALE, *supra* note 67 (discussing the history of affirmative action in the United States).

and high SES students; today, that trend has reversed.<sup>203</sup> Racial minorities have received affirmative action to remedy past discrimination,<sup>204</sup> but the Supreme Court has also espoused diversity in the educational context as a preferable rationale for affirmative action.<sup>205</sup>

This is not to say that race/ethnicity-based affirmative action is inappropriate, but rather to show that affirmative action is just as appropriate in considering SES. In settings where ninety percent of students come from the more privileged half of our country, low-SES students have a lot to offer with respect to diverse perspectives. Moreover, low SES and race/ethnicity—and attendant disadvantages—are closely linked: African-American children are three times more likely to be poor than white children, and African Americans are twice as likely to be unemployed or underpaid.<sup>206</sup> It is the very nature of affirmative action that it should bring the disadvantaged onto a level playing field with the advantaged—no more, no less.<sup>207</sup>

## 2. *The Strengths and Weaknesses of Alternative Solutions*

Of course, I would be remiss if I did not acknowledge that there are other ways, beyond affirmative action, for the DOE to increase equal access to educational opportunity for low-SES students. For instance, the Department should also act to improve high school counseling to make information about college access and readiness available to more students. There is no excuse for high school students not to know about standardized tests or about their options for col-

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203. Sean Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91 (2011) (observing that “the income achievement gap . . . between a child from a family at the 90th percentile of the family income distribution and a child from a family at the 10th percentile . . . is now nearly twice as large as the black-white achievement gap. Fifty years ago, in contrast, the black-white gap was one and a half to two times as large as the income gap.”). The diminution in the gap between white and African-American students owes at least in part to the favorable impact of affirmative action on student expectation, motivation, and achievement. See *supra* note 199 and accompanying text. The continued relative decline of low-SES vs. high-SES students, however, is unexplained except by reference to their ongoing and unremediated disadvantage.

204. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (allowing affirmative action policy in contracting that was meant to remedy past discriminatory conduct).

205. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (allowing race-based affirmative action to create a “critical mass” of minority students and to create diversity of perspective in the classroom).

206. *Ethnic and Racial Minorities & Socioeconomic Status*, AMERICAN PSYCHOLOGICAL ASS'N, <http://www.apa.org/pi/ses/resources/publications/factsheet-erm.pdf> (last visited Oct. 31, 2012).

207. See Alon, *supra* note 40, at 751.

leges. High schools could also be incentivized to offer optional college-prep courses or programs designed to make students more aware of their educational opportunities. These solutions have the appeal of directly addressing the supply-side problem of students lacking the ambition and inspiration to seek access to higher education without interfering with admissions policies at colleges. Similarly, the Department can ask colleges to increase outreach to rural students and low-SES students to match the outreach spent on minority students and students with unique talents. But this alternative has clear geographical and logistical restraints.<sup>208</sup> Scholarship funding for low-SES students could certainly be expanded and better publicized, but this alternative has also not yet enjoyed wide-spread success insofar as it has been attempted;<sup>209</sup> not even admissions officers expect increased aid to make much of a difference in growing the pool of low-SES applicants.<sup>210</sup>

Another approach could be to regulate how colleges spend financial aid money: could the DOE require that colleges spend a certain percentage of their aid dollars on need-based aid, above and beyond what the government provides? Perhaps so—as an additional condition of accepting federal money to provide for low-SES students under the HEA<sup>211</sup>—but would this provide the right incentive? It is easy to imagine that restricting financial aid autonomy would run quickly afoul of the ability of universities to court top students, or athletes, or other diverse groups. Where affirmative action disadvantages students at the lower-credentialed margin of applicants that would otherwise be accepted,<sup>212</sup> taking away autonomy over otherwise freely-allocable aid could impair a university's ability to court the *best* candidates.

None of these solutions, meanwhile, directly address the structural correlation of low SES with underperformance on standardized tests, while an admissions preference would not likely result in a “mismatch” of an underprepared student with a too-rigorous college.<sup>213</sup> Affirmative action has been conducted on behalf of minorities for decades to remedy a similar structural undervaluation of college prep-

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208. See *supra* note 195 and accompanying text.

209. See *supra* note 195 and accompanying text.

210. HOXBY & AVERY, *supra* note 4, at 6 (citing personal contacts at conferences for the Association of Black Admissions and Financial Aid Officers of the Ivy League and Sister Schools that “did not expect additional aid alone to affect matters much.”).

211. See *supra* notes 131–133 and accompanying text.

212. See, e.g., *Fisher v. Univ. of Texas*, 570 U.S. \_\_\_, (2013) (alleging complainant would have been admitted to the University of Texas with her objectively borderline credentials if not for affirmative action practices).

213. See discussion *supra* Part I.



aration, and in this case it does so without relying on the controversial, difficult-to-quantify quality of race. Ideally, low-SES students would perform better on the SAT as programs at their local schools improved with respect to preparing them for standardized tests, or as the number of honors and Advanced Placement classes increases. But the mere fact that this problem might resolve over the years (more likely, decades) is not a reason not to effect more immediate change.

Affirmative action is a crucial element in increasing access, and one that is most likely to make all the difference. As has been discussed above, colleges have attempted to indirectly increase access to college by increasing funding for low-SES students, but this has not made appreciable differences in actual college enrollment. Affirmative action can also naturally co-exist with other solutions, including financial aid: indeed, a class-conscious admissions policy could provide a means for admissions officers to identify students most in need of institutional aid. And certainly efforts to improve ambition, aspiration, and expectation are worthy ones—the ideal future scenario would not involve affirmative action, because students would not be disadvantaged by structural injustice because of their SES. We always hope, as Justice O'Connor explicitly does in *Grutter v. Bollinger*,<sup>214</sup> that affirmative action policies will not last forever. But immediate and aggressive action—to improve access to education *now*, and to set an example for the future—is better suited to make up for the incredible amount of lost ground that low-SES students face.

### 3. *A Case for a Federal Affirmative Action Scheme as a Means of Increasing Access*

Regulatory implementation of affirmative action by the Department (with or without the support of colleges) is not unprecedented, and I believe appropriate here, given the enormous and systemic disadvantage faced by low-SES students.<sup>215</sup> It would not be surprising if not all college admissions offices share this position.<sup>216</sup> It is for this

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214. 539 U.S. 306 (2003).

215. See discussion *supra* Part I. I take for granted in this argument that unequal access to education for low-SES students is unacceptable when this unequal access is due to forces largely beyond the control of such students. For further discussion to this effect, see discussion *infra* Parts III.b.2–3. But cf. Ronald Dworkin, *Why Bakke Has No Case*, N.Y. REV. BOOKS, Nov. 10, 1977, at 24 (arguing that colleges should be able to structure their admissions policies in whatever way advances the college's goals for their student body makeup, and that no student has a right to be admitted anywhere).

216. One commentator lambasted the idea of class-based affirmative action by claiming that “it is hard to imagine a more perfectly Marxist notion than favoring the children of the poor for admissions over more qualified children of the middle class

reason that—assuming the Department agrees that something must be done—the Department should act to bring all schools into line.

It might be argued that because most colleges<sup>217</sup> have voluntarily adopted race-based affirmative action policies (even where they have not been required to), colleges can be expected to adopt class-based affirmative action policies of their own design and on their own time. But class-based affirmative action has been a widely-discussed policy proposal for at least fifteen years,<sup>218</sup> well before the Supreme Court was widely expected to end race-based affirmative action in *Grutter v. Bollinger*. In spite of this, and in spite of wide-spread public support for class-based affirmative action,<sup>219</sup> class-based preferences at America's universities remain minimal to non-existent.<sup>220</sup>

The fact of the matter is that many colleges lack the incentives necessary to institute class-based affirmative action—or fail to perceive those incentives.<sup>221</sup> At the forefront of the minds of many college admissions directors are college rankings, which by-and-large do not take account of SES diversity,<sup>222</sup> but do take into account average test scores and average high school GPAs.<sup>223</sup> Insofar as colleges (and, as of now, the Department) have acted to increase access to low-SES

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... The absurdity of this system should be self-evident. It creates a perverse system of rewards for failure on the part of parents.” Richard Wozniak, *Class-based Affirmative Action Would Be Worse*, AM. THINKER (May 15, 2008), [http://www.americanthinker.com/blog/2008/05/post\\_86.html](http://www.americanthinker.com/blog/2008/05/post_86.html). As I alluded above, I present my argument in favor of increasing access to higher education for low-SES students for consumption by like-minded policy makers. I would also posit that Wozniak's assertion fails to recognize that affirmative action schemes do not create perverse incentives so much as normalize out-sized privileges and opportunities created by wealth. See *supra* discussion Part I.

217. See Bill Blakemore, *Schools Differ on Affirmative Action*, ABC NEWS (Jan. 16, 2003), [http://abcnews.go.com/WNT/story?id=129882&page=1#.UJMCm2\\_AcYs](http://abcnews.go.com/WNT/story?id=129882&page=1#.UJMCm2_AcYs).

218. See, e.g., RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1997) (proposing SES-based affirmative action as a replacement for race-based affirmative action); Malamud, *supra* note 75 (discussing class-based affirmative action and lessons learned from *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)).

219. Carnevale & Rose, *supra* note 2, at 125 (reporting that 80 percent of Americans support class-based affirmative action).

220. See Richard Sander & Stuart Taylor, Jr., *The Unraveling of Affirmative Action*, WALL ST. J. (Oct. 13, 2012), <http://online.wsj.com/article/SB10000872396390444799904578050901460576218.html>.

221. Richard Sander asserts that this is an issue especially in law school admissions, where law school certification by the American Bar Association can turn to some extent on racial diversity, but not on SES diversity. Sander, *supra* note 75, at 631 n.2.

222. But see *College Guide 2012*, WASHINGTON MONTHLY, [http://www.washingtonmonthly.com/college\\_guide/toc\\_2012.php](http://www.washingtonmonthly.com/college_guide/toc_2012.php) (last visited Nov. 1, 2012) (considering class diversity in rankings).

223. See, e.g., *Best College Rankings 2012*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/rankings> (last visited Nov. 1, 2012).

students, they have done so by increasing funding for need-based aid, but not by increasing admissions rates.<sup>224</sup> This maneuver does increase access in a literal sense without risking a reduction of average test scores or GPAs with the benefit of increasing diversity, but it has done little to actually increase access to students that did not already have it. On the other hand, colleges may not appreciate the value that SES diversity can bring to the depth of educational discourse by introducing more diverse perspectives in the classroom. They may also feel that the small cohorts of low-SES students that *are* present in their institutions are sufficient to achieve that end. Ultimately, even if some schools want to increase SES diversity, they may be hesitant to do so without the reassurance that their peer (read: competitor) institutions will do the same. Admissions officers may also worry—arguably wrongly<sup>225</sup>—that practicing affirmative action with respect to low-SES students would open the door to “higher risk” or underprepared students.

The Department can ensure that all schools *do* implement the same changes all at once, which would not upend the college rankings in any way. Federal action could ensure that low-SES students across the country would see the uniform improvement to access to education, avoiding disparate outcomes in different regions as could obtain if individual schools were to implement their own policies. Finally, the Department presents an immediate, swift solution to increasing diversity<sup>226</sup> in colleges in the event that race-based affirmative action is struck down by the Supreme Court.<sup>227</sup> A progressive executive branch dedicated to diversity in college classrooms<sup>228</sup> (and ready to regulate as soon as a decision is handed down) could provide a reassuring solution for diverse students currently in the midst of the college application process.

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224. Sander & Taylor, *supra* note 220 (discussing efforts to increase access at undergraduate level).

225. See *supra* notes 48–51 and accompanying text.

226. Studies indicate that class-based affirmative action can (and does) increase racial diversity to some degree, if not to the same extent as race-based affirmative action. See, e.g., Matthew Gaerter & Melissa Hart, *Considering Class: College Access and Diversity* (Univ. of Colo. Law Legal Studies Research Paper No. 12-18, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2137126](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2137126).

227. Though this outcome did not come to pass in the Supreme Court’s recent consideration of *Fisher*, the possibility survives that affirmative action could again be challenged and found inapposite to properly-applied strict scrutiny. See 570 U.S. \_\_\_ (2013).

228. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (discussing diverse student bodies as a permissible rationale for affirmative action).

*B. Developing and Defending Affirmative Action as a Means of Creating Equal Access*

If we accept that the Department of Education has an appropriate role to play in increasing access to higher education for low-SES students, and that affirmative action is an agreeable means of achieving that end, we must further consider what form a class-based preference would take in practice. A consideration of SES in admissions—namely one that systematically benefits the applications of lower SES students as a “plus-factor,” not unlike systems seen and endorsed in the race/ethnicity affirmative action context<sup>229</sup>—is a vital part of any effort to increase access to education for low SES students. I begin by considering what form a class-based affirmative action policy should take (including the question of how to operationalize SES). I then turn to the question of whether and how a class-based policy should interact with race-based policies and policies outside of the admissions context, concluding that class-based affirmative action must be but one element of a much larger plan to realize equal educational access for all Americans.

*1. Regulated Class-Based Affirmative Action: Practical and Constitutional Considerations*

*a. Debates in operationalizing SES*

Until now, this Note has approached SES by, generally discussing the disparities between students in the bottom quartile of income and students from the top quartile of income. However, any formal policy intended to increase access to low-SES students must confront the question of how to actually operationalize SES.

Of course, some consideration of the tailoring of a class-based affirmative action policy is necessary to ensure such a scheme would be politically acceptable and effective. With the discussion of operationalizing SES in mind, I make the following few suggestions. First, income levels have provided the basis for much of the information we have considered here, and demonstrate clear inequality of opportunity. According to Hoxby and Avery, nearly forty percent of “high-achieving students” (by test score) come from the bottom half of the income distribution, with seventeen percent coming from the bottom quartile,<sup>230</sup> while Carnevale and Rose suggest that only ten percent of students at the top schools come from the bottom half of the income

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229. See *id.* (allowing a racial “plus” factor in a holistic consideration of applicants to law school).

230. HOXBYP & AVERY, *supra* note 4, at 11.

distribution.<sup>231</sup> It is clear that the entire bottom half of the income distribution is underrepresented at elite institutions, and a case can be made for a policy offering preference to that entire group. Because disadvantage clearly increases as income decreases, I advocate a sliding-scale of preferential admissions, with a small boost for students in the bottom half and larger one for students in the bottom quarter, proportional to observable variation in SAT scores.<sup>232</sup> Given the significant representation of high-achievers (on standardized tests) even in the lowest income ranks, such a scheme would not prove particularly objectionable as a political proposal, at least as compared to the status quo: there is a clear mismatch between talented candidates and appropriate institutions. As such, while SES encapsulates much more than income and occupation, it goes without saying that income and occupation will prove crucial to operationalizing and justifying an SES-based admissions preference, and that the entire bottom half of income-earners deserves consideration under such a policy.

Second, it would be helpful if a better means of measuring the financial aspects of SES over the course of many years could be created. How exactly this could be accomplished is difficult to say, but one possibility could lie in a more specific or comprehensive FAFSA, which might incorporate information from a family's (or student's) tax returns over the past several years. This would provide a more complete picture of SES, beyond pure income from a single year. Voluntary disclosure of such information in each college's application could provide another approach.

Still, to employ a simple income quartile continuum will not suffice, as this methodology fails to capture any number of factors involved in SES and advantage vs. disadvantage. To name a few, differences in the cost of living, community resources, school quality, family composition, and accumulated wealth can be hugely important in addition to SES. This operation would simply redistribute the seats in a class from the weakest members of a high SES classification to the strongest of the next-lowest SES classification.<sup>233</sup> In other words, a simple income continuum would fail to reach the most underprivileged.

Instead, Richard Sander suggests, in his own advocacy for class-based affirmative action in law schools, SES might be measured by

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231. Carnevale & Rose, *supra* note 2, at 106.

232. See Carnevale & Strohl, *supra* note 6, at 170 (operationalizing SAT score correlations).

233. See Malamud, *supra* note 75, at 1865 (discussing questions of how to measure SES in class-based affirmative action and critiquing a "continuum" approach).

occupation, income, and education levels.<sup>234</sup> While these variables are each relatively measurable, they do not seem to capture a complete picture of SES: indeed, Sander explicitly foreswears the consideration of racial effects.<sup>235</sup> Deborah Malamud offers eight more holistic factors that can define SES: wealth, income, education, occupation, consumption, consciousness, the interaction of those elements of inequality, and outside social factors, such as race and gender.<sup>236</sup> Some of these factors—like consumption, consciousness, and interaction among factors—could prove difficult to operationalize on a college application, but I do not believe that they are impossible to capture.<sup>237</sup> But of course, this type of endeavor will always involve an imperfect science, and I do not purport to put forward a truly objective or operationalizable scheme, let alone a one-size-fits-all approach.

One element that is only indirectly emphasized by the aforementioned factors—race—should in particular be stressed, as it has huge impacts on how a person’s “status” and personal experience can be defined in society.<sup>238</sup>

I believe that factors similar to those proposed by Malamud can be captured in a college application: income and wealth are already measured in the FAFSA (albeit imperfectly, without a longitudinal sense of financial status), which admissions officers can consult; costs of living can be considered based on place of residence, the FAFSA, or a supplemental field about family expenses; occupation and family education can be easily reported; and students can be encouraged to file short, optional, supplemental statements about their SES. Prompts for such statements could be very open-ended, to allow students to

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234. Sander, *supra* note 75, at 633–34.

235. See Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What’s in a Definition?*, 88 DENV. U. L. REV. 807, 816 (2011) (criticizing Sander for seemingly taking the position that race has a neutral effect on social status).

236. See Malamud, *supra* note 75, at 1870–90.

237. A hypothetical process in this realm could be vulnerable to the criticisms that it would be overly subjective, inconsistent across institutions, or simply ignored by colleges required to gather such information. Perhaps all of these criticisms could prove to be true, but at the very least there would be little harm in collecting information, and it seems fair to assume that at least some—if not most—institutions would use the information in good faith in making admissions decisions. Moreover, more easily operationalized facts would still be available and generalizable across institutions, and monitored by the Department.

238. See Onwuachi-Willig & Fricke, *supra* note 235, at 816 (“[R]acial status is highly important in American society, conferring both social and economic benefits and detriments.”). Just the same, race presents its own valuable element of diversity, deserving—in my view—of preference separate from SES, though it is an important component of such. See, e.g., discussion *infra* Part III.B.2.

include whatever they thought relevant, or could be more explicit, asking a question like “what kind of perspective do you think your socioeconomic status or family background lends you?” Related considerations, such as social and cultural capital, could be captured by optional essays asking students to thoughtfully reflect on whether and how they may feel “disadvantaged.” While self-reporting of such insights is highly subjective and difficult to quantify, there is already some degree of subjectivity in the existing college admissions process.

All of these factors present a seemingly daunting task to operationalize, especially the more holistic among them. Still, college admissions counselors already weigh an incredible number of inputs—GPA, class rank, test scores, classes, honors, schools, geography, race, gender, essays, recommendations, legacy status, interests, talents—that are not always easily or mechanically reduced. Sander suggests creating a score, ranging from 0–100, by giving different scores to different measures.<sup>239</sup> This type of approach could be adopted using the factors I have described above by lumping the softer or holistic factors together and to give them a share of such a score. In the same way that many schools consider optional test scores on such tests as Advanced Placement, International Baccalaureate, or SAT Subject exams, college counselors might integrate the “SES Disadvantage Score” into their analysis as a plus-factor. In this manner, Sander suggests, SES can be operationalized to benefit students in degrees, according to need.<sup>240</sup>

*b. The constitutional, political, and practical mechanics of a regulated affirmative action policy*

Before formulating a class-based affirmative action policy, it bears noting that the Equal Protection Clause of the Fourteenth Amendment requires that any form of unequal treatment of a certain class—be it benign, as in affirmative action, or malign<sup>241</sup>—through state action must be sufficiently tailored to a government purpose.<sup>242</sup> In the case of race, which has been identified as a “suspect classification,” the most stringent form of “strict scrutiny” is applied, requiring that the discriminating state action be “narrowly tailored to a compelling government interest.”<sup>243</sup> This stringent inquiry has time and again

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239. Sander, *supra* note 75, at 633–34.

240. *Id.* at 668.

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

242. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587 (1987) (concerning scrutiny levels afforded to different classes and the resulting tailoring vs. purpose analysis).

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

cast the fate of race-based affirmative action in an uncertain light, as challenges have asserted that policies are neither narrowly tailored enough<sup>244</sup> or serving insufficiently compelling as governmental interests.<sup>245</sup>

Socioeconomic status, however, is not a suspect classification, meaning that discrimination based on SES is permissible so long as it is “rationally related to a legitimate governmental interest.”<sup>246</sup> This standard of review is highly deferential, allowing almost all forms of discriminatory state action to be upheld.<sup>247</sup> To date, no classifications beyond religion, race, alienage, ethnicity, sex, and legitimacy of parentage have been consistently afforded a degree of scrutiny formally higher than this “rational basis” review by the Supreme Court, though some appellate courts have recently urged heightened scrutiny with respect to sexual orientation.<sup>248</sup>

However, some have recently argued that the courts have begun to apply a more exacting form of rational basis review—sometimes called “rational basis with bite”—when considering cases of discrimination against classifications of people that are devalued by society’s status hierarchies; again, the case of sexuality is illustrative.<sup>249</sup> This is a far-cry from the familiar, first-year law student example of discrimi-

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244. See *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating a “points system” awarding points to applicants for their minority statuses, where a certain score guaranteed admission).

245. *Adarand*, 515 U.S. at 238 (dismissing the cause of diversity in recipients of subcontracting jobs as insufficiently compelling).

246. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973) (applying rational basis review to SES discrimination).

247. See, e.g., *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (affording age discrimination only rational basis review); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (upholding an Oklahoma law making it illegal for anyone other than licensed optometrists or ophthalmologists to fit or replace lenses in glasses). But see *Romer v. Evans*, 517 U.S. 620 (1996) (striking down because anti-sodomy laws lacked rationale beyond animus against homosexuals); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (disallowing a city ordinance based on prejudice against the mentally handicapped).

248. See *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

249. See *Romer v. Evans*, 517 U.S. 620 (1996); Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2774 (2005) (critiquing the Supreme Court for claiming to apply rational basis review in considering sexual orientation and noting that “[r]ational basis with bite has been applied primarily, if not exclusively, in cases where the classification at issue inappropriately discriminated against a particular minority and the government’s asserted interests had no rational relationship to that discrimination.”); Jack M. Balkin, *The Constitution of Status* 2358–67 (Yale Faculty Scholarship Series, Paper 262, 1997) (discussing social hierarchy and identifying homosexuality as an immutable characteristic that places people in subordinate positions in hierarchy).



nating between opticians and ophthalmologists,<sup>250</sup> and begs the question: might class be subject to higher scrutiny, as well? Or at the very least, might rational basis with bite stand in the way of discriminating on the basis of class?

Neither possibility seems likely at this time. It seems very unlikely that SES will come to be understood as a classification entitled to heightened scrutiny, primarily because it does not meet the Supreme Court's test in *Bowen v. Gilliard*, which affords heightened scrutiny for groups that have (1) suffered a history of discrimination, (2) are defined by immutable characteristics distinguishing membership in that discrete group, and (3) are politically powerless minority groups.<sup>251</sup> Socioeconomic status, while perhaps cause for some discrimination, is certainly not permanent or immutable, and cannot be truly considered a politically powerless minority: SES is a spectrum that all Americans exist on. Rational basis with bite, similarly, seems to search for societal animus, which contributed in large part to recent rulings in favor of sexual minorities.<sup>252</sup> As Justice O'Connor wrote in her concurrence in *Lawrence v. Texas*, "[w]hen a law exhibits such a desire to harm a politically unpopular group, [we have] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."<sup>253</sup> While I do not doubt that some degree of societal animus exists against the poor, the Court has not evidenced an inclination to apply a "more searching form of rational basis review" in considering class.<sup>254</sup>

In this case, I argue that class-based affirmative action clearly bears a rational connection to the legitimate government end of increasing access to education to an underserved half of the income scale. As such, even if affirmative action is disallowed with respect to

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250. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

251. 483 U.S. 587, 602–03 (1987).

252. See *Lawrence v. Texas*, 539 U.S. 558, 580 (O'Connor, J., concurring).

253. *Id.*

254. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911))). See also 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, 683–84 (2007) (discussing standard of review for possible class-based affirmative action policies).

race, it will almost certainly remain permissible to institute affirmative action based on SES.<sup>255</sup>

With that said, existing and attempted affirmative action policies offer insight into possible forms Department-regulated class-based policy could take. Below, I consider a series of alternative approaches.

**Mandatory Collection:** One approach would be to simply mandate the collection of SES-related information, as almost all colleges already do with respect to racial and ethnic information.<sup>256</sup> We have already considered how to operationalize SES, including how SES could be measured on college applications.<sup>257</sup> A Department regulation could require something as simple as the collection of SES-related information, presumably with the hope that colleges would somehow make use of that information. Of course, this regulation would have little guaranteed effect.

**Plus-Factors:** In *Grutter v. Bollinger*, the Supreme Court allowed the University of Michigan Law School to consider race as a “plus-factor” in the holistic consideration of an application package.<sup>258</sup> A similar approach could integrate the “SES Disadvantage Score” discussed above<sup>259</sup> as a plus-factor, giving more and more weight to an application as the score “increases.” The most obvious shortcoming of regulated, holistic “plus-factor” analysis is that it is amorphous—it would be very difficult to ensure compliance with a mandated “plus-factor” analysis. While some schools would comply, and the representation of low SES students at those schools would rise (exposing those schools that do not), how many low-SES students are enough? Is it sufficient to take many students with some disadvantage, or a handful with severe disadvantages? The monitoring and enforcement strategy that would be involved here begins to look like a quota based on accumulated “points” of SES disadvantage.

**Disadvantage Quotas:** *Regents of the University of California v. Bakke* considered—and rejected—a quota based on race.<sup>260</sup> But what is impermissible with respect to race can be entirely valid with respect to class, and could be an effective solution in this case. In fact, “points” of SES disadvantage seem to provide a compelling means of

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255. For a more thorough discussion on this score, see Malamud, *supra* note 75, at 1860.

256. Some states, of course, do not allow the consideration of race in admissions policies, making public schools in those states obvious exceptions. *See, e.g., CAL. CONST.* art. I, § 31.

257. *See* discussion *supra* Part III.B.1.a.

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

259. *See* discussion *supra* Part III.B.1.a.

260. 438 U.S. 265 (1978).

setting a quota, avoiding the problem posed by differing degrees of SES and how to count increased access in terms of students of different SES enrolled. This solution immediately poses a new problem, however, as the most “efficient” way for a school to meet an “SES Disadvantage Score” quota would be to admit a relatively small number of the very most disadvantaged students, without much focus on less-disadvantaged—but still low SES—students. This would allow schools to focus the rest of their attention on students with the highest credentials, in order to maintain high rankings.

This approach would be vulnerable to the criticism that it simply may be providing a proxy for race, in the event that race is disallowed as a permissible basis for affirmative action. But as is discussed below, race- and class-based affirmative action does not perfectly overlap. And as discussed above, operationalizing SES does not necessarily involve accounting for race.

**Disadvantaged Student Quotas:** Simply adopting a quota for low-SES students may be a better approach, and one possible tweak would be to break “SES Disadvantage Scores” into tiers, such as “disadvantaged,” “more disadvantaged,” and “most disadvantaged.” Within each of these tiers, there would be mandatory quotas, ensuring access to education to students of all levels of disadvantage. Achieving the correct balancing would be a challenge, and this scheme in particular is vulnerable to criticism as over-formalistic.

**Low SES, High Class Rank:** The scenario presented by *Fisher v. University of Texas* presents yet another creative attempt at increasing diversity: the so-called “Texas Ten Percent Plan.”<sup>261</sup> At the University of Texas, three-fourths of admitted students are drawn—automatically—from the top 10% (or so) of each graduating class in Texas. To ensure a diverse freshman class, the remaining twenty-five percent of offers go to students (from any part of the country) using a holistic process that considers race. This process guarantees a degree of diversity—both racial and with respect to class—by admitting students from *all* Texas high schools, including the majority-minority and poor ones. A similar approach could be adapted here. Because studies show that class rank is more predictive of college success than standardized tests,<sup>262</sup> colleges could be instructed to systematically devalue SAT scores and increase the influence of class rank as SES dis-

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261. *Fisher v. Univ. of Texas*, 570 U.S. \_\_\_ (2013); see also Adam Liptak, *Race and College Admissions, Facing a New Test by Justices*, N.Y. TIMES, Oct. 9, 2012, at A1.

262. Niu & Tienda, *supra* note 50, at 2. SAT scores, the researchers conclude, are much more correlated with high school quality and other resources than class rank is. *Id.*

advantage increases. This plan meets two main problems: first, it may present an issue for low-SES students in richer school districts, where they are likely to still be out-shone by students of higher SES; second, it revives the problem of unverifiable compliance.<sup>263</sup>

**Test Score Boost:** Finally, *Gratz v. Bollinger* inspires a “points system” approach to affirmative action.<sup>264</sup> In that case, the Supreme Court struck down a scheme where applications were given scores, and above a certain threshold, all applications were offered admission. Race was associated with a substantial number of points that arguably correlated with the amount of disadvantage being overcome. In this case, SES could be directly imposed upon SAT scores (and/or class rank), adjusting the score up to correlate with the associated level of disadvantage. Because so much evidence about the cost of low SES is measured according to SAT scores, this solution seems appropriate, and it could perhaps even be implemented relatively mechanically: schools could be required to calculate and report “adjusted SAT scores” for all applications. In fact, if the College Board—which administers the SAT—were convinced to participate, it could collect SES information from students registering for the SAT and calculate adjusted SAT scores automatically, reporting both raw and SES-adjusted scores (or just SES-adjusted scores) to schools.

A hypothetical critic, sympathetic to the cause of class-based affirmative action but skeptical of the approach, might ask why low-SES students would receive an un-earned adjustment upward in score. Perhaps it would be more appropriate to adjust *down* students of high SES, accounting for their un-earned advantages. I would urge that it is not necessarily true that high-SES haven’t earned their higher SAT scores or grades. Even if a high-SES had rigorous prep courses and various other advantages, it is hard to know when a brilliant but privi-

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263. In light of *Fisher*, and of concerns that case has raised about the question of whether the Texas admissions policy can be considered truly holistic, consider: race-based affirmative action has been maintained through holistic processes, following lessons of *Grutter* and *Bakke*. If a strictly numerical or non-holistic process is adopted in a class-based affirmative action scheme, would it subsequently undermine the stability of a race-conscious admissions policy? Put another way, does a non-holistic class-based scheme preclude a holistic race-based scheme from operating in the same admissions office? I would argue that it would not: considering and “discriminating” on the basis of SES, I contend, is akin to considering and discriminating on the basis of SAT score, as SES and scores are not suspect classifications. Universities have permissibly exercised “SAT-based affirmative action” alongside race-based affirmative action for decades; the simple fact that we attach the term “affirmative action” to a non-holistic scheme does not mean that an admissions policy that concurrently and separately embraces an holistic affirmative action policy is no longer holistic for the purposes of *Grutter*.

264. 539 U.S. 244 (2003).

leged student has earned his or her perfect test score versus when a less-gifted student has matched that score through hand-holding and outside help. One suggestion that could normalize test scores better would be to locate an “expected” score for students based on their SES, and to compare actual scores to expected scores, generating a sort of “expected-versus-actual score” coefficient. That coefficient could, in many ways, stand in for or supplement an actual test score on College Board reports.

A final consideration to keep in mind with this approach is the comparison that could be drawn to “race-norming”, which adjusts scores of minority candidates upwards systematically, and was banned in the employment context by the Civil Rights Act of 1991.<sup>265</sup> This may make this policy suggestion less politically tenable than others in the eyes of critics who opposed such adjustments.

Ultimately, I operate from the principle that structural factors that systematically act to limit student success in school and on standardized tests must contextualize (and potentially undermine or redefine) the primacy of hard numbers in college admissions. At base, affirmative action should operate to correct for structural barriers that limit the capacity of students to compete. I believe that the approach of boosting SAT scores does this in the most mechanical way possible, and in a way that is directly tailored to our evidence of disadvantage—and overcoming that disadvantage. Still, I appreciate the value of holistic admissions processes. While I do not think a holistic process is incompatible with the score-boosting approach I describe, I also like to hope that colleges could be trusted to actualize a more purely holistic approach, as well.

## 2. *Considering the Interaction with Existing Affirmative Action Policies: the Case for Maintaining Race-based Preferences*

Finally, I must make clear that I do not advocate replacing race-based affirmative action with a class-based scheme, if the Supreme Court allows us that choice. Class is not a perfect proxy for race,<sup>266</sup> and even with race-based affirmative action in place, racial minorities are underrepresented at the top colleges.<sup>267</sup> Under the Texas Ten Percent Plan, researchers have determined that narrowly-tailored race

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265. See Steven A. Holmes, *Job Test Score Fixing Banned*, CHICAGO TRIBUNE, Dec. 14, 1991, available at [http://articles.chicagotribune.com/1991-12-14/news/9104220402\\_1\\_test-scores-general-aptitude-test-battery-race-norming](http://articles.chicagotribune.com/1991-12-14/news/9104220402_1_test-scores-general-aptitude-test-battery-race-norming).

266. See Carnevale & Rose, *supra* note 2, at 102–03, 153 (advocating that solving SES and race underrepresentation in colleges requires both SES and race preferences).

267. *Id.* at 106.

preferences are much more effective in achieving racial diversity than focusing purely on class rank.<sup>268</sup> Moreover, even though the disadvantages faced by racial minorities are largely due to income and resources, it is not a perfect correlation (hence my insistence above that race be included in a calculation of SES). Another reason to maintain race- and class-based affirmative action policies in concert lies in the reasoning of *Grutter*, which acknowledged that diversity in the educational context depended on “critical mass,” which is necessary to prevent “tokenism,” or the feeling that a minority student is so alone in a setting that he or she cannot feel comfortable expressing his or her perspective. The same problem can face low-SES students—whose brand of diversity is not completely mutable,<sup>269</sup> especially in the most elite institutions, where upper-class students are the norm—and class-based affirmative action is ill-equipped to ensure these critical masses of minority students.<sup>270</sup>

Accepting the argument that low-SES students should be given equal opportunity in light of the disadvantages they face, it would be discriminatory to insist that minorities are not also entitled to equal opportunity in spite of the race-specific disadvantages<sup>271</sup> they face. With this in mind, supporters of affirmative action must not rely entirely on a diversity rationale for race-based affirmative action: as Deborah Malamud observes, to do so is to grow complacent with respect to inequality and structural social injustice.<sup>272</sup> It is my hope that a constitutional class-based affirmative action scheme devoted to a rationale of relieving inequality can, to some extent, inject inequality

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268. Marta Tienda, *Equity, Diversity and College Admissions: Lessons from the Texas Uniform Admission Law*, in *EQUAL OPPORTUNITY IN HIGHER EDUCATION: THE PAST AND FUTURE OF PROPOSITION 209* (Eric Grodsky & Michal Kurlaender eds., 2010).

269. See Joyce Sterling, Catherine E. Smith, *Foreword: Social Class, Race, and Legal Education*, 88 DENV. U. L. REV. 631, vii–ix (2011) (presenting a survey of scholarship criticizing Sander’s assertion to the contrary).

270. See Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DENV. U. L. REV. 631, 734–35 (2011) (discussing critical mass and the implications for it posed by Sander’s proposals).

271. See generally NATIONAL POVERTY CENTER, *THE COLORS OF POVERTY: WHY RACIAL AND ETHNIC DISPARITIES PERSIST* (Ann Chih Lin & David R. Harris eds., 2009) (drawing on theories of group identity, poverty, and disparity to examine how race and poverty interrelate and how race makes people more vulnerable to disadvantage).

272. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 954–55 (1997) (“Upon closer examination, what appears to be the advantage of the diversity rationale—its movement away from issues of social justice—becomes its disadvantage . . . . Reliance on the diversity rationale is dangerous if no effort is made to account for the reason why the black middle class cannot compete using traditional merit criteria.”).

back into the conversation about affirmative action. Richard Sander objects that class-based affirmative action focuses entirely on individual circumstances, rather than bestowing benefits upon students because of “group membership.”<sup>273</sup> But this misses the point that groups—in this case, racial minorities—can suffer systemic social injustice just as an individual can. Sander does not acknowledge, or is not unsettled to know, that within SES strata whites still earn more than blacks.<sup>274</sup> To ignore this and to espouse the virtues of class-based affirmative action in the manner that this Note has would be completely inconsistent.

Two other attempts to dissociate race-based affirmative action from class-based schemes must be addressed. First, Sander claims that race-based affirmative action is responsible for underprepared students, and he asserts that affirmative action is responsible for doubling bar exam failure rates for law school graduates.<sup>275</sup> Second, Richard Kahlenberg objects that simultaneous preferences for race and class result in racial minorities overwhelming non-minority low-SES students.<sup>276</sup> My response to these criticisms is simple: neither of these projections must necessarily come true.

Sander argues that beneficiaries of race-based affirmative action overmatch into schools and programs that they are unprepared for, but doesn’t seem to worry that the same would be true of beneficiaries of class-based affirmative action. I certainly agree that we should not worry about low-SES beneficiaries: as investigated in Part I, the assertion that class-based preferences would admit underprepared students to college is overstated.<sup>277</sup> Above a certain average level of achievement (particularly an SAT score of 900–1000 out of 1600), graduation rates for low-SES students are found to normalize with those of all other SES categories.<sup>278</sup> Schools are free to develop whatever minimum SAT cutoff they prefer: there is no need to admit students scoring below 900 if schools are not doing so already. But it courts ruin to assert that what is true of low-SES students cannot be true of racial minorities, especially those that are also part of the low-SES cohort. Why should racial minorities be less likely to succeed, once admitted, than low-SES students with the same test scores?

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273. Sander, *supra* note 75, at 664.

274. Malamud, *supra* note 272, at 940.

275. Sander, *supra* note 75, at 666.

276. See KAHLENBERG, A BETTER AFFIRMATIVE ACTION, *supra* note 200, at 22–25.

277. See generally discussion *supra* Part I; see also Niu & Tienda, *supra* note 50, at 25 (arguing that concerns about propensity of low achieving, low-SES students to fail is exaggerated, based on observations in the Texas Ten Percent Plan context).

278. See *supra* note 51 and accompanying text.

As to the argument that race-based preferences will swamp class-based preferences, the problem is one of structure: an adequately-designed scheme simply does not need to afford race the degree of weight necessary to swamp class considerations, especially if it is acknowledged that low SES and race are so intricately interrelated. A system that allows race to swamp class would likely double-adjust for disadvantages associated with SES and race.

#### CONCLUSION

Back to Adam. His achievements, given his SES, are considerable, and deserve to be appreciated during his college application process. As things stand today, he will be lucky if he is credited at all for doing so much to rise above expectations and do as well in school as he has. If he is unlucky, he will be the victim of the structural inequalities that make students like him desperately unrepresented at our nation's best colleges, even where they are qualified. Or he will end up attending a school that is beneath his abilities because he doesn't know any better.

The Department of Education owes it to students like Adam to recognize the intractable problems that face students from socioeconomically-disadvantaged backgrounds. The Department can and must realize the full extent of its statutory authority to fulfill its very purpose: "to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual." It must gather the courage and conviction to put that untapped potential to work in changing the future for literally *half* of this country: namely, the bottom half. If it does, the Department will have popular opinion and the Constitution on its side.



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