

# A Class Act? Social Class Affirmative Action and Higher Education

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## I. INTRODUCTION

How much are people the products of their parents' genes, how much are they the products of their upbringings, and how much do they owe their successes and failures in life to their own efforts? These are notoriously, almost comically, unanswerable questions. But scarcely anyone doubts that nature and nurture—or at a minimum, nature *or* nurture—greatly affect who we are and what happens to us in life. And plainly, people are not morally responsible for their genes, nor—on the whole—for their upbringings. “Choose your parents wisely” is a wry but obvious truth.

One's parents' fate is not necessarily one's own, of course. Education has traditionally been a means to social mobility. The phrase “careers open to talent” was a byword of the Enlightenment struggle against

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hereditary privilege. Today, although less securely than in the recent past, education opens the way to careers. There is a strong correlation between education, earnings, and social status: the lifetime earnings of college graduates in the United States, on average, are nearly double those of high school graduates.<sup>1</sup> But heredity matters, in education as in other spheres of life. “Native intelligence” presumably has some part in educational success. Upbringing surely has as well. Although there are no guarantees of scholastic success for those whose parents are well educated, well connected, and well off, they start with obvious educational advantages. Scores on college admission tests go up, on average, with parental income, and college students, especially at prestigious universities, are disproportionately the children of financially comfortable families.<sup>2</sup>

Affirmative action in higher education on the basis of social class might therefore seem an attractive way to counteract, and at least partially to balance, the unearned caprices of birth. Barack Obama, as his campaign for the presidency got under way in 2007, implied that he might support affirmative action on the basis of class rather than on the basis of race. Asked whether his own daughters should benefit from affirmative action, Obama said they “should probably be treated by any admissions officer as folks who are pretty advantaged.”<sup>3</sup> But as for social class, “I think that we should take into account white kids who

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1. See SARAH R. CRISSEY, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2007, at 1, 10 (2009), *available at* <http://www.census.gov/prod/2009pubs/p20-560.pdf>; see also John E. Morton & Ianna Kachoris, *Foreword* to RON HASKINS ET AL., ECON. MOBILITY PROJECT, PROMOTING ECONOMIC MOBILITY BY INCREASING POSTSECONDARY EDUCATION 3, 4 (2009), *available at* [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/PEW\\_EM\\_Haskins%207.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/PEW_EM_Haskins%207.pdf) (discussing the impact of postsecondary education on economic mobility); Robert M. Hauser et al., *Occupational Status, Education, and Social Mobility in the Meritocracy* 1–2 (Ctr. for Demography & Ecology, Univ. of Wis.-Madison, CDE Working Paper No. 96-18), *available at* <http://www.ssc.wisc.edu/cde/cdewp/96-18.pdf> (suggesting that educational attainment corresponds to socioeconomic status). *But cf.* GLENN HARLAN REYNOLDS, THE HIGHER EDUCATION BUBBLE (2012) (marshaling evidence that many graduates’ employment prospects are sinking as their educational debt soars).

2. See DOUGLAS S. MASSEY ET AL., THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES 38–45 (2003) (discussing how children of higher-income families disproportionately attend the more selective colleges and universities); THE COLL. BD., 2010 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2010) (illustrating that college board scores correlate with parental income), *available at* <http://professionals.collegeboard.com/prof.download/2010-total-group-profile-report-cbs.pdf>; Catherine Rampell, *SAT Scores and Family Income*, *ECONOMIX* (Aug. 27, 2009, 1:01 PM), <http://economix.blogs.nytimes.com/2009/08/27/sat-scores-and-family-income/>.

3. *A Chronicle Q&A with Barack Obama*, THE CHRONICLE OF HIGHER EDUC. (Nov. 12, 2007), <http://chronicle.com/article/A-Chronicle-Q-A-with-Barack/42970/>.

have been disadvantaged and have grown up in poverty and shown themselves to have what it takes to succeed.”<sup>4</sup>

Senator Obama put the suggestion in terms that few could disagree with. But systematic affirmative action on the basis of social class would almost certainly mean more than seeking out college applicants from lower-class families or offering more “need-based” scholarships. It would mean more than informally making allowances for a promising applicant where there is genuine reason to think that a test score or other qualification understates the applicant’s ability. As with racial affirmative action, such measures would arouse little if any controversy. But realistically, class-based affirmative action would almost certainly mean systematic admissions preferences based on class, comparable to affirmative action as it now exists on many campuses on the basis of race: a program for admitting lower-class students with lesser academic qualifications over other applicants with higher qualifications.<sup>5</sup> Prominent authors have advocated such preferential programs, and several universities and colleges, including various divisions of the University of California, have instituted such class-based affirmative action in their undergraduate and graduate admissions.<sup>6</sup>

Class-based preferences are often suggested as a better or more acceptable alternative to conventional affirmative action on the basis of race, ethnicity, or sex.<sup>7</sup> After all, if affirmative action is meant to help the underprivileged, surely it is more straightforward to offer preferences to the underprivileged, rather than to racial groups whose members are not all underprivileged, while many underprivileged people are not members of such groups. Class preferences may be especially attractive

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4. Eugene Robinson, *Obama Cools on Affirmative Action*, TRUTHDIG (May 15, 2007), [http://www.truthdig.com/report/item/20070515\\_obama\\_cools\\_on\\_affirmative\\_action/](http://www.truthdig.com/report/item/20070515_obama_cools_on_affirmative_action/).

5. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

6. See generally RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) (arguing for a shift from race-based to class-based affirmative action); Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in *AMERICA’S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION* 101 (Richard D. Kahlenberg ed., 2004) (advocating the expansion of affirmative action programs to include class-based preferences).

7. See, e.g., Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 633 (2011) (“Policies implemented by both law schools and undergraduate colleges have shown that class-based preferences are feasible and effective in creating diversity, and they involve much smaller academic costs than do racial preferences.”).

to affirmative-action-minded colleges and universities in states where—as a result of statewide referenda or otherwise—it is illegal for public bodies to discriminate, or to prefer, on the basis of race, ethnicity, or sex.<sup>8</sup> Measures like California’s Proposition 209 undoubtedly permit preferential treatment based on social class, so long as it is not simply a disguise for preference based on race, ethnicity, or sex.<sup>9</sup>

But there are good reasons to think twice about class-based affirmative action. Some of the problems with class preference are common to any educational preference based on group membership rather than educational qualifications. But some of the most important reasons for caution are specific to preferences based on social class.

Comparing class preferences with racial preferences helps to point up some of the reasons for the allure of class preferences but also points up some of the problems. A crucial consideration is the question of who is to receive class preference. For example, what about immigrants and their children? In general, social class is difficult to define, and this very difficulty would confer great discretion and power on faculties and academic administrators who undertake to bestow class preferences: discretion that would be open to abuse for political, ideological, and other ends. Finally, there is the question of whether preferential treatment is necessary to increase educational opportunities for the less privileged or whether the call for class preferences reflects a mindset inimical to impartial standards and prone to preferences as a first rather than a last resort.

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8. See CAL. CONST. art. I, § 31(a) (prohibiting the state from discriminating against or granting preferential treatment to any individual or group on the basis of race, sex, or national origin in the operation of public education, employment, or contracting); see also MICH. CONST. art. 1, § 26 (banning racial preferences in all state public schools), *invalidated by* Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466, 491 (6th Cir. 2012), *cert. granted sub nom.* Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013) (mem.); NEB. CONST. art. 1, § 30 (banning discrimination based on race in public employment, contracting, and education); WASH. REV. CODE ANN. § 49.60.400 (West 2008) (banning discrimination based on race in public employment, education, and contracting); Fla. Exec. Order No. 99-281 (Nov. 9, 1999), *available at* [http://www.dms.myflorida.com/media/general\\_counsel\\_files/one\\_floridaexecutive\\_order\\_pdf](http://www.dms.myflorida.com/media/general_counsel_files/one_floridaexecutive_order_pdf) (banning race-based and sex-based preferences in public employment, education, and contracting).

9. CAL. CONST. art. I, § 31. For the text of Proposition 209 before it was passed in 1996, see CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION, November 5, 1996, at 30–33, *available at* [http://librarysource.uchastings.edu/ballot\\_pdf/1996g.pdf](http://librarysource.uchastings.edu/ballot_pdf/1996g.pdf).

## II. CLASS VERSUS RACE

Racial quotas and preferences, especially in higher education, have serious drawbacks, as even their supporters often acknowledge. The case against racial affirmative action is familiar. Racial preferences enhance race consciousness in a country—and world—in which racism has already done incalculable mischief.<sup>10</sup> They systematically mismatch minority students with institutions where their qualifications are significantly below average, hence maximizing these students' self-doubts and the likelihood that they will fail or perform poorly.<sup>11</sup> They stigmatize minority students and graduates as recipients of unearned favor.<sup>12</sup> They promote racial self-segregation, through the reluctance of minority students to expose themselves to embarrassment by their academically better-prepared fellows.<sup>13</sup> They diminish incentives, or create perverse incentives, by conveying to minority young people that they need not strive too hard to learn and to achieve.<sup>14</sup> They weaken academic standards because preferences ensure that minority students have lower qualifications on average, and faculties may be loath to maintain high standards at the price of conspicuous minority failure.<sup>15</sup> They may also encourage nihilism about the very idea of high academic standards.<sup>16</sup> And they are widely felt to be unfair, both because educational institutions are generally expected to judge by educational criteria, not by racial ones,<sup>17</sup> and because many of the beneficiaries of racial preferences are children of comfortable families, whereas many who are passed over despite their stronger academic achievements are themselves the children of less comfortable homes.<sup>18</sup>

Affirmative action based on social class would at least have the virtue of not being based on race. Racial animosity, which racial affirmative

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10. See Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3, 10–11 (2004).

11. *Id.* at 8–10; see generally RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT* (2012) (arguing that affirmative action admissions negatively affect the students they are intended to benefit).

12. Alexander & Schwarzschild, *supra* note 10, at 10.

13. *Id.* at 10–11.

14. *Id.* at 9–10.

15. *Id.*

16. *Id.* at 10.

17. *Id.*

18. KAHLENBERG, *supra* note 6, at 42–52.

action might be thought to aggravate, holds particular social and political dangers, a fact that is borne out by the history of racial conflict in America and in many other countries. And many of the drawbacks of racial affirmative action are enhanced by the conspicuous visibility of people's race. The stigma of having received preferential treatment is greatly enhanced if it is obvious at a glance. Even a minority student admitted on the merits, without any preference, might be assumed by others to have received preference and will know that others are making this assumption. For the same reason, the stigma of racial preference may persist throughout a person's professional life. And segregation, including self-segregation, is facilitated by obvious physical distinctions.

Beneficiaries of class preferences would not stand out in the same way: it would not be so obvious that a particular student might have received class preference. Hence, there would not be the same stigma in one's student years or beyond. Moreover, affirmative action based on social class—rather than race—might be less corrosive of academic standards, at least if faculties and administrators are less prone to dilute standards in order to disguise the failure or poor performance of those receiving class preference. After all, students preferred by social class rather than by race would be less conspicuous and cohesive. And if they were to succeed less well than their academically better-prepared fellows, at least it would not appear to replicate the painful American history of racial discrimination, with the scarcely tolerable spectacle of such a racial group being once again at the bottom.

Class preferences would also have the virtue of preferring the less privileged. Racial affirmative action, by contrast, often means preferential treatment for the children of middle class, or even wealthy and prominent, minority families. This is especially true given the minority "applicant pool" at elite colleges, universities, and professional schools: that is, given that the minority applicants with the strongest academic qualifications—although they still might not be admitted without preferential treatment—are often children of prosperous homes.<sup>19</sup> If colleges and universities can satisfy today's racial affirmative action "goals" by admitting minority applicants with the best academic qualifications, even if these are the most prosperous minority applicants, then the institutions are likely to do so, just as there is an obvious incentive to admit minority applicants who can afford to pay high tuition rates. Insofar as affirmative action is

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19. See *supra* note 2 and accompanying text.

meant to help the less privileged, class preferences would surely be a more direct and a more consistent way of achieving it.<sup>20</sup>

On the other hand, the moral urgency of class preference is far less clear than for racial affirmative action. The legacy of slavery and the history of racial segregation and discrimination in America are known to everyone; they are rightly sources of national shame and regret. Today there is broad national consensus for racial equality, for “equal justice under law,” and for the moral claims of the civil rights movement: hence the stature of Martin Luther King Jr. as a national hero. There is also a widely shared belief that racial stratification, with dramatically better or worse conditions of life depending on race, is dangerous for society, sowing the seeds of racial conflict. Whether preferential affirmative action is a just way toward racial equality and integration, or even whether it leads to these goals at all, is controversial. But as recompense for undeniable racial injustice and as a means to racial integration, the case for affirmative action is on its strongest ground.

As to class, by contrast, there is reason to feel that America has less to atone for, and possibly less to worry about for the future, than where race is concerned. Unlike many European countries, the United States has no hereditary aristocracy. Historically, class distinctions have been fewer and less rigid in America. Instead, America has been known, sometimes even disparaged, for its emphasis on upward mobility and its cult of success. This is not to suggest that America has ever been a “classless society.” Such a thing may not exist in nature. But America has been more a land of opportunity than most, a chosen destination for immigrants throughout the nineteenth and twentieth centuries. Has social mobility now slowed in America? Are there fewer opportunities today for those who start life without hereditary advantages? These are controversial questions that may be impossible to answer conclusively. There are academic studies—and widespread media reports—suggesting that relative mobility has diminished in America in recent years or decades: that there is less mobility than in the past between lower, middle, and upper income ranges.<sup>21</sup> Unsurprisingly, there is also criticism of the

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20. See KAHLENBERG, *supra* note 6, at 42–52 (providing extensive documentation that those granted preferences under racial affirmative action are often from more prosperous families than those who receive no preference).

21. For scholarly studies, see Greg J. Duncan et al., *W(h)ither the Middle Class? A Dynamic View*, in *POVERTY AND PROSPERITY IN THE USA IN THE LATE TWENTIETH CENTURY* 240, 240–71 (Dimitri B. Papadimitriou & Edward N. Wolff eds., 1993). For

statistical methods, and even of the tacit biases, of these studies and some evidence that even relative class mobility has not grown or shrunk, or at least not very much, over recent decades.<sup>22</sup> There is less controversy that absolute incomes have continued to rise on average in recent decades, at least until the most recent economic downturn. The rich may have gotten richer, as they proverbially do, but the poor have gotten richer too, albeit at a lesser rate than the rich. Historically, when the rich get richer more slowly, the poor often do not get richer at all. In short, there has been considerable—if far from perfect—class mobility in America in the past, and there is considerable economic and social opportunity in America today, with standards of living that at least until very recently have continued to rise on average.<sup>23</sup>

The rates of legal and illegal immigration to the United States and the eagerness with which many more seek to come also suggest that there is no present crisis of social opportunity in America, at least assuming that the present economic downturn is temporary.<sup>24</sup> Impressive numbers of people have “voted with their feet” that they can achieve a better life for themselves and their children in the United States despite arriving with few hereditary advantages of wealth, status, or position.<sup>25</sup>

If the moral and social urgency of class affirmative action seems less pressing than for race, the costs and dangers of class preferences, although perhaps less obvious than for racial preferences, are still considerable and for some of the same reasons.

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news media reports, see Janny Scott & David Leonhardt, *Class in America: Shadowy Lines That Still Divide*, N.Y. TIMES, May 15, 2005, at 1, and *Meritocracy in America: Ever Higher Society, Ever Harder To Ascend*, ECONOMIST, Jan. 1, 2005, at 22.

22. See Chul-In Lee & Gary Solon, *Trends in Intergenerational Income Mobility*, 91 REV. ECON. & STAT. 766, 766–72 (2009) (providing statistical analysis suggesting little change in intergenerational social mobility in recent decades); Bruce Bartlett, *Class Struggle in America?*, 120 COMMENT., July–Aug. 2005, at 33, 33–38 (criticizing the *New York Times* series, Scott & Leonhardt, *supra* note 21); Daniel P. McMurrer & Isabel V. Sawhill, *Economic Mobility in the United States*, URB. INST. (Oct. 1, 1996), <http://www.urban.org/publications/406722.html> (concluding that there is little evidence that mobility has changed substantially over time).

23. See generally JOINT ECON. COMM., 102D CONG., INCOME MOBILITY AND THE U.S. ECONOMY: OPEN SOCIETY OR CASTE SYSTEM? (Comm. Print 1992) (written by Christopher Frenze & Ed Gillespie) (demonstrating income mobility in the U.S. economy); STEPHEN J. ROSE & SCOTT WINSHIP, ECON. MOBILITY PROJECT, UPS AND DOWNS: DOES THE AMERICAN ECONOMY STILL PROMOTE UPWARD MOBILITY? (2009) (suggesting that the American economy promotes upward economic mobility just as it did in the past).

24. See OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 5 tbl.1 (2012), available at [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois\\_yb\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf).

25. See *id.*



Racial conflict may be socially incendiary in any country unlucky enough to have it, but class conflict is scarcely less so. In various countries that have experimented with class preferences in education, these preferences have not only reflected but also aggravated class division and animosity. Perhaps the least edifying examples of class affirmative action in the twentieth century were in the USSR and in China under Mao Tse-tung. Universities were required to favor applicants with “good”—worker or peasant—class backgrounds and to disfavor or exclude applicants with “bad” class origins. These policies contributed to the thorough politicization of communist universities and to sharply declining academic and intellectual standards. In China during Mao’s Cultural Revolution, there was wholesale persecution of “bad classes,” and sons and daughters of alleged “landlords” were beaten to death on campuses.<sup>26</sup> Even before the Cultural Revolution, class was pervasive in selecting and indoctrinating students in China, at great cost to any possible academic integrity.<sup>27</sup> In Stalin’s Soviet Union, not only were workers’ children given preferential acceptance at institutes of higher education, but camp guards in the gulags who volunteered to work in especially undesirable concentration camps were offered the chance to have their children reclassified as “children of workers” for this purpose.<sup>28</sup>

India is another discouraging example. For many decades, India has had extensive preferences for lower-caste applicants in higher education, as well as for various government jobs and benefits.<sup>29</sup> Caste in India is not quite the same, of course, as class in other countries. Caste is rigidly hereditary; traditionally it reflected and determined one’s occupation and social status.<sup>30</sup> Upper castes also tend to be lighter-skinned and more Aryan, so there is something of a racial aspect too. Perhaps it is fairest to think of caste as being somewhere on a spectrum between race and class. In any event, caste affirmative action in India has been incendiary in the most literal sense: there have been cases of disfavored upper-caste

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26. ANNE F. THURSTON, *ENEMIES OF THE PEOPLE* 287 (1987).

27. See generally René Goldman, *The Rectification Campaign at Peking University: May–June 1957*, 12 CHINA Q. 138 (1962) (discussing political repression at universities in Communist China prior to the Cultural Revolution).

28. ANNE APPLEBAUM, *GULAG: A HISTORY* 264 (2003) (quoting DAVID J. NORDLANDER, *CAPITAL OF THE GULAG* 183 (1997)).

29. THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* 31–32 (2004).

30. See, e.g., Frank de Zwart, *The Logic of Affirmative Action: Caste, Class and Quotas in India*, 43 ACTA SOCIOLOGICA 235, 236 (2000).

university applicants publicly burning themselves to death in protest.<sup>31</sup> Caste preferences are widely acknowledged to have contributed to sharply declining academic standards, as well as to reinforcing caste enmity, which erupts in frequent and deadly riots, sometimes verging on caste warfare, in various parts of India.<sup>32</sup>

The United States is not India or China, to be sure. But there is little reason to think that class preferences in the United States would not promote class animosities, just as Indian caste preferences do and just as racial preferences in America may already tend to aggravate racial ill will.

Moreover, systematic class preferences on campus would create pressures to dilute academic standards, even if not to the same degree, or at least not in quite the same way, as racial preferences. With academically weaker students, classroom standards are almost inevitably lower. Class preferences weaken the academic ethos—the commitment of the institution and its faculty to academic seriousness—in more subtle ways as well. Preferences, at a minimum, convey a message that academic standards are not paramount for the college or university in question. Moreover, maintaining rigorous standards would tend to mean that students admitted with class preferences would cluster at the bottom of the class or fail entirely. Faculty and administrators might find this an unattractive prospect, even if not quite so unattractive as when the same thing happens with racial preferences. Diluting standards here too would be an easy solution. And students admitted with class preferences would have reason to band together as a kind of “victim” group, if only to press for looser standards under which they would not always tend to be at the bottom.

It is sometimes suggested that preferences do not really sacrifice academic merit because applicants who are given a preference—whether on account of race or class—have more potential than their academic qualifications suggest: social deprivation accounts for their lower entering grades and test scores, and given a chance in college or in graduate school, they will do better than predicted. Would that it were so. Studies of minority students show that they do not perform better; if anything they perform somewhat less well than their qualifications would predict. Minority students, that is, receive grades in college or in graduate school that are no better than their entering credentials would predict; in fact their grades after admission are slightly worse on average than those received by nonminority students with the same entering grades and test

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31. See, e.g., Associated Press, *6 Students Commit Suicide To Protest Indian Jobs Plan*, N.Y. TIMES, Oct. 9, 1990, at A14.

32. See SOWELL, *supra* note 29, at 23–28.

scores.<sup>33</sup> The “validity” of the SAT, especially when combined with high school grades—the correlation between SAT scores and high school grades on the one hand and subsequent college grades on the other—is strong, both for minority and nonminority students.<sup>34</sup> There is no evidence that tests like the SAT, or equivalent tests for graduate and professional schools, underpredict the academic performance of lower-class applicants any more than they do for minority students. Richard Kahlenberg, perhaps the leading advocate of class preferences, concedes that there could be only “a very minor” class preference if the preference were merely designed to correct, as he puts it, “the degree (if at all)” that entering academic credentials fail to predict the academic success of underprivileged students.<sup>35</sup> In short, preferring academically weaker university applicants because of their class backgrounds would mean academically weaker university students.

The extent to which class preferences would compromise academic quality depends in part on the scale of the preferences. Are there minimum credentials below which no one would be admitted, and if so, how low or high is the minimum for disadvantaged applicants? How large a boost would there be for being disadvantaged? What proportion of the entering class will be admitted with a preference: that is, how many disadvantaged students will be admitted who would not have been admitted on their merits? Once a formal program of class preferences gets under way, it is unlikely that it would be restricted to a small number of the “most disadvantaged.” There are proportionally few children of radically disadvantaged homes who could qualify, even by very relaxed preferential standards, for admission to elite or near-elite universities or graduate schools. Moreover, if the most disadvantaged are admitted on a lower standard but there is no academic concession for the next most disadvantaged, then the most disadvantaged are apt to be admitted at the expense of the somewhat disadvantaged: at the expense of applicants

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33. ROBERT KLITGAARD, CHOOSING ELITES 161 (1985); *see also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 88 (1998) (“At almost every college in our sample, black students are not only performing less well academically than whites but also performing below the levels predicted by their SAT scores.”).

34. *See* WAYNE J. CAMARA & GARY ECHTERNACHT, THE COLL. BD., THE SAT® I AND HIGH SCHOOL GRADES: UTILITY IN PREDICTING SUCCESS IN COLLEGE 9 (2000), available at <http://research.collegeboard.org/sites/default/files/publications/2012/7/researchnote-2000-10-sat-high-school-grades-predicting-success.pdf>.

35. KAHLENBERG, *supra* note 6, at 149.

whose qualifications are somewhat lower, on average, than those of “privileged” applicants but who are receiving no preference.

To avoid the apparent injustice of any such “cutoff” in preferences, there would be great pressure to have a sliding scale of preferences for degrees of disadvantage. Moreover, preferences might seem more palatable politically if they were available to a broader range of applicants: the bottom half of the socioeconomic ladder, say, rather than the bottom ten percent. After all, an argument can be made that the “injuries of class” affect all families below the median, not just the poorest in society.<sup>36</sup> Indeed, ninety percent of Americans are not in the country’s top ten percent. In practice, the very poorest would mostly not be qualified on any standard, so that a viable program of class preferences in higher education would mean preferences for the more moderately disadvantaged, a larger class of beneficiaries. Accordingly, when UCLA School of Law adopted a class preference policy shortly after Proposition 209 went into effect in California in the late 1990s, more than half the law school class was admitted with such preferences.<sup>37</sup> Richard Kahlenberg, too, advocates a preference for any applicant below the socioeconomic median: the median of the institution’s applicants, in fact, not the national median. He would therefore give class preferences to solidly middle class applicants, especially at elite universities where the average applicant is well off.<sup>38</sup>

The effect on academic standards might therefore be substantial. Preferences mean admitting academically weaker students. Racial preferences have some natural limit: the proportion of preferentially admitted minority students is unlikely to be greater, roughly, than the size of the minority in society. Class preferences have no such natural limit. If a university admits half or more of its students on a lower academic standard because of their “class origins,” the academic life of that university will almost inevitably suffer, relative to what it would have been with students admitted on their academic merits.

Racial and ethnic affirmative action is already strongly institutionalized on many campuses, at least where laws like California’s Proposition 209 do

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36. See ROBERT HICKEY ET AL., CTR. FOR HOUS. POLICY & CTR. FOR NEIGHBORHOOD TECH., *LOSING GROUND: THE STRUGGLE OF MODERATE-INCOME HOUSEHOLDS TO AFFORD THE RISING COSTS OF HOUSING AND TRANSPORTATION* 10–12 (2012), available at [http://www.nhc.org/media/files/LosingGround\\_10\\_2012.pdf](http://www.nhc.org/media/files/LosingGround_10_2012.pdf).

37. Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 472, 486 (1997).

38. KAHLENBERG, *supra* note 6, at 142 (arguing for preferences for those below the socioeconomic median “in the applicant pool”).

not limit it.<sup>39</sup> Class preferences are sometimes presented as an alternative to racial preferences. Richard Kahlenberg urges straightforwardly that class preferences should substitute for racial ones, both on the moral ground that preferences should be directed to the disadvantaged and on the prudential ground that class preferences would be politically and legally more palatable than racial ones.<sup>40</sup> Carol Swain and other advocates of class-based affirmative action have taken much the same view.<sup>41</sup> Supporters of racial affirmative action, however, respond that class preferences are no substitute: most of America's "disadvantaged" are not minority, and if class preferences replace racial ones, black applicants in particular will fare much worse than they do when there are implicit or explicit numerical "goals"—and preferential standards—based on race. There ought to be class preferences in addition to the racial ones, not instead of them, insist many defenders of affirmative action, including William Bowen, coauthor with Derek Bok of *The Shape of the River*, a standard text in support of affirmative action.<sup>42</sup>

Class preferences, in fact, would probably reinforce racial preferences rather than replace them in most states. After all, there is stronger moral and historical justification for affirmative action by race than by class. It is one thing to adhere to a principle that colleges and universities should judge on the academic merits, that preferential treatment is corrosive and wrong. But once it is conceded that class preferences are desirable, it would be difficult or impossible to resist the claims that racial affirmative action should continue as well, wherever it is permitted by law. America's racial history gives these claims special resonance, and there is well-organized support for the existing preferences, especially on campus. Any systematic program of preference tends to erode the principle of making academic judgments on an academic basis. If higher education is to have preferential treatment by social class, it will probably be in

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39. See *Affirmative Action: State Action*, NAT'L CONF. ST. LEGISLATURES (Nov. 2012), <http://www.ncsl.org/issues-research/educ/affirmative-action-state-action.aspx> (identifying states that have approved affirmative action measures).

40. KAHLENBERG, *supra* note 6, at 29, 86.

41. See generally CAROL M. SWAIN, *THE NEW WHITE NATIONALISM IN AMERICA: ITS CHALLENGE TO INTEGRATION* (2002); *RACE VERSUS CLASS: THE NEW AFFIRMATIVE ACTION DEBATE* (Carol M. Swain ed., 1996) (discussing various aspects of the affirmative action controversy and urging the benefits of class-based preferences).

42. BOWEN & BOK, *supra* note 33, at 50–51; see also WILLIAM G. BOWEN ET AL., *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* 183–86 (2005) (concluding that class-based preferences are not suitable substitutes for race-based affirmative action).

addition to the already institutionalized racial and ethnic affirmative action programs, not as a substitute for them.

### III. CLASS PREFERENCES AND OPEN BORDERS

Preferential treatment for college and university applicants from “less privileged” families would raise an obvious question of social fairness: What about immigrants and their children?

As of 2009, approximately 39 million people living in the United States were foreign-born, just over 12% of the population.<sup>43</sup> Of these 39 million, just under 17 million, roughly 43%, are naturalized American citizens.<sup>44</sup> As many as 11 million are estimated to be “unauthorized residents” illegally present in the United States.<sup>45</sup>

In states such as California, New York, Texas, and Florida, where over half the foreign-born live, there is a high concentration of immigrant families.<sup>46</sup> In 2009, more than one in four Californians were foreign-born, and in New York and New Jersey, the statistic was more than one in five.<sup>47</sup> There are growing numbers of immigrants in other regions of the country as well. The foreign-born population increased by over 150% in Georgia, Tennessee, and Wyoming from 2000 to 2007, and the numbers of the foreign-born more than doubled in six other states during the same period.<sup>48</sup>

The levels of education and income among the foreign-born are rather polarized. Nearly 29% of the foreign-born over twenty-five years of age never completed high school, compared with just 8% of native-born Americans; yet the percentage of the foreign-born with advanced graduate degrees is equal to that of native-born Americans at 11%.<sup>49</sup> The median annual earnings of the foreign-born are 66% of the earnings of natives, and noncitizens’ earnings are lower still, while 19% of foreign-born workers earned less than \$22,000 in 2009, compared with 14% of natives.<sup>50</sup>

The foreign-born are significantly more likely to be poor than the native-born. Nearly 19% of the foreign-born lived in households with

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43. CONG. BUDGET OFFICE, A DESCRIPTION OF THE IMMIGRANT POPULATION: AN UPDATE 1 (2011), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/121xx/doc12168/06-02-foreign-bornpopulation.pdf>.

44. *Id.*

45. *Id.*

46. *See* STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES, 2007: A PROFILE OF AMERICA’S FOREIGN-BORN POPULATION 7 (2007), *available at* <http://www.cis.org/sites/cis.org/files/articles/2007/back1007.pdf>.

47. CONG. BUDGET OFFICE, *supra* note 43, at 1.

48. CAMAROTA, *supra* note 46, at 9.

49. CONG. BUDGET OFFICE, *supra* note 43, at 15.

50. *Id.* at 23, 25.

income below the official poverty line in 2009, compared with 14% of natives.<sup>51</sup> Approximately 28% of natives and their children live in or near poverty, while just over 43% of immigrants live in such households.<sup>52</sup>

Immigrants and their children, in short, make up a significant and disproportionate share of the “underprivileged” in America, almost regardless of how *underprivileged* is defined. In states like California and New York, immigrants may be a third or more of the underprivileged. This should not be surprising and has undoubtedly been true throughout American history. Newcomers are obviously less apt to be “established” than families long settled in this country. And although immigrants are often ambitious people, they are typically without wealth or privilege: Otherwise, why emigrate?

America has attracted immigrants since the nation became independent and even before by offering something like equal opportunity. Not perfect equality, to be sure: the foreign-born can never be the President or the Vice President, and there have always been more workaday handicaps as well. But America has traditionally offered immigrants a fair chance to live and work, to be educated, and to compete and to succeed economically, on substantially equal terms with natives. Americans generally accept that this is fair, and immigrants have come willingly, even eagerly, and in extraordinary numbers on these terms.

If the underprivileged are to receive preferential treatment for college and university admissions and immigrants and their children are a substantial fraction of the underprivileged, there will be acute questions about who should receive these preferences.<sup>53</sup> Affirmative action is typically seen, at least in part, as a policy to compensate for past injustices. Immigrants or their ancestors may have suffered injustice but not in—or generally at the hands of—the United States. Throughout American history, immigrants and their children assimilated, and in many cases succeeded, without preferential treatment: indeed, in spite of headwinds, because they often faced social barriers of various kinds. Hence, American-born families might reasonably think it perverse now to give preferential treatment to immigrants and their children: “Immigrants

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51. *Id.*

52. CAMAROTA, *supra* note 46, at 26.

53. See generally HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA (2002) (discussing the interaction of American immigration and affirmative action policies and related issues).

come seeking equal treatment, and that's fair enough. But why penalize my children for the social capital our family has built up in America? If my children earn better grades and scores, why should they be rejected in favor of less qualified newcomers?"

In theory, various categories of people might be excluded from preference, but such discrimination would not necessarily be very palatable or even very practicable. Illegal immigrants would be obvious candidates for ineligibility. But enforcement would require scrutiny, presumably by college and university officials, of whether admissions applicants are lawful residents. In many American cities, even the police are reluctant to police compliance with the immigration laws.<sup>54</sup> In California, the state higher education law explicitly provides for illegal aliens who have attended three years of high school in California to be treated as state residents, who pay substantially less for public higher education than "out-of-state" American citizens and legal residents.<sup>55</sup> Eleven other states make similar allowances for illegal aliens in higher education.<sup>56</sup> Given such trends, it is difficult to imagine how universities could or would identify illegal aliens and disqualify them from preferences for the underprivileged. As for reserving class preferences exclusively for citizens of the United States, discriminating between citizens and lawful residents would seem even more invidious than discriminating against illegal aliens, and discriminating against lawful residents would almost certainly violate a variety of federal and state civil rights laws.<sup>57</sup>

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54. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1095–96 (2004) (noting the reluctance of many local police departments to enforce immigration laws); see also Laura Parker, *Police Departments Balk at Idea of Becoming "Quasi-INS Agents,"* USA TODAY, May 7, 2002, at 8a (discussing local police forces' hesitance to enforce federal immigration laws).

55. CAL. EDUC. CODE § 68130.5 (West 2012) (stating that persons "without lawful immigration status" are exempt from paying nonresident tuition at the California State Universities and the California Community Colleges, so long as they meet the statute's residency and affidavit requirements). This statute, by charging higher tuition to out-of-state U.S. citizens and legal residents than to illegal aliens in California, appears to flout a federal law that prohibits states from providing "any postsecondary education benefit" to "an alien who is not lawfully present . . . unless a citizen or national of the United States is eligible for such a benefit." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 505, 8 U.S.C. § 1623 (2006). The California Supreme Court nonetheless upheld the statute as constitutional in 2010. See *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855, 859–60 (Cal. 2010). However, similar cases are pending in other state courts. See Denise Oas, *Immigration and Higher Education: The Debate over In-State Tuition*, 79 UMKC L. REV. 877, 886–92 (2011); Ann Morse & Kerry Birnbach, *In-State Tuition and Unauthorized Immigrant Students*, NAT'L CONF. ST. LEGISLATURES (Nov. 28, 2012), <http://www.ncsl.org/default.aspx?tabid=13100>.

56. Morse & Birnbach, *supra* note 55.

57. The Civil Rights Act of 1964 forbids discrimination on the basis of "national origin" by public colleges, 42 U.S.C. § 2000c-6(a)(2) (2006), or by any program or



Moreover, what about the children of the foreign-born? Proportionally to their numbers, perhaps few illegal residents themselves seek higher education, although some surely do. Among the foreign-born in general, there are fewer young people of high school age—the age of the typical college applicant—than among the native-born: only 7% of the foreign-born are under eighteen compared with 27% of the American-born.<sup>58</sup> But children born in the United States, even to illegal aliens, are American citizens.<sup>59</sup> The birth rate, in fact, is higher among the foreign-born in America than among natives.<sup>60</sup> If there is to be preferential treatment for the children of underprivileged homes, one or both parents in a substantial fraction of such homes are apt to be immigrants, legal or otherwise.

Immigration policy is a volatile political topic in America today, as it often has been in the past. Many Americans are inclined toward relatively open borders and a welcoming attitude: “Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!”<sup>61</sup> But opposition to immigration runs strong, especially when the numbers of immigrants increase dramatically, as they have in recent decades.<sup>62</sup> If significant numbers of immigrants, or their children, are known to

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activity receiving federal financial assistance, *id.* § 2000d. Although these provisions do not refer explicitly to legal aliens, other federal statutes do, including the Immigration and Nationality Act, 8 U.S.C. § 1324b(a)(1) (2006), which forbids employment discrimination against legal aliens. In general, state government—which includes public colleges and universities—may not discriminate against legal aliens except where authorized or required by federal law. *See Graham v. Richardson*, 403 U.S. 365, 377–80 (1971). Even the federal government may not discriminate invidiously against legal aliens, although the courts are usually deferential to federal immigration and nationality laws. *See Mathews v. Diaz*, 426 U.S. 67, 78–84 (1976); *see also* CAL. CIV. CODE § 3339(a) (West 2012) (entitling aliens to all employment remedies under the state civil rights laws).

58. ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, *THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010*, at 6 (2012), available at <http://www.census.gov/prod/2012pubs/acs-19.pdf>.

59. U.S. CONST. amend. XIV.

60. CONG. BUDGET OFFICE, *supra* note 43, at 14 (explaining that, on average, foreign-born women between the ages of fifteen and forty-nine had given birth to 2.6 children, compared with 2.0 children for U.S.-born women in that age group).

61. BETTE ROTH YOUNG, *EMMA LAZARUS IN HER WORLD: LIFE AND LETTERS* 3 (1995).

62. *See* Haya El Nasser & Kathy Kiely, *Immigration Grows, Reaching Record Numbers*, USATODAY.COM (Dec. 12, 2005, 3:37 PM), [http://usatoday30.usatoday.com/news/nation/2005-12-12-immigration\\_x.htm](http://usatoday30.usatoday.com/news/nation/2005-12-12-immigration_x.htm); *US Census Data Reveals 16% Immigration Increase in 5 Years*, WORKPERMIT.COM (Aug. 17, 2006), [http://www.workpermit.com/news/2006\\_08\\_17/us/census\\_data\\_increase.htm](http://www.workpermit.com/news/2006_08_17/us/census_data_increase.htm).

receive preferential treatment in college and university admissions on grounds of being underprivileged, it is surely foreseeable that opposition to immigration—and ill will toward immigrants—would be strengthened, and a liberal public policy toward immigration would be less politically viable than it is today.

#### IV. PREFERENCE FOR WHOM? THE ELUSIVE DEFINITION OF CLASS

If applicants of lower social class are to receive preference in college and university admissions, social class will have to be defined in order to decide who is eligible. Racial affirmative action confronts this problem too, but in most cases there is broad agreement in America about who meets the rough-and-ready standards of being white, African-American, or Hispanic. About 2.9% of Americans identified themselves as multiracial in the 2010 Census.<sup>63</sup> The multiracial category is growing quickly, and nearly 8% of married couples are now interracial;<sup>64</sup> racial intermarriage is growing especially quickly among better-educated Americans.<sup>65</sup> But more than 90% of whites and blacks still marry within their groups.<sup>66</sup> Throughout American history, there have been individuals who have “passed” as members of another race, but there are still relatively few white college applicants who could plausibly claim to be black. Although there may be more “borderline” cases of who is Hispanic, in the great majority of cases—at least up to now—there is no dispute.

At first blush, it might be thought that social class could easily be defined by family income: a college or university applicant would be entitled to class preference if the applicant’s family income were below a certain threshold. If a sliding scale were wanted, there might be a greater preference—a more relaxed standard of admissions—the lower

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63. KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 8 fig.2 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> (citing U.S. CENSUS BUREAU, 2010 CENSUS REDISTRICTING DATE (PUBLIC LAW 94-171) SUMMARY FILE 6-21 to 6-23 tbl.P1 (2011), available at <https://www.census.gov/prod/cen2010/doc/pl94-171.pdf>).

64. See Hope Yen, *Interracial Marriage in the U.S. Climbs to New High, Study Finds*, HUFFINGTON POST (Feb. 16, 2012, 7:13 AM), [http://www.huffingtonpost.com/2012/02/16/interracial-marriage-in-us\\_n\\_1281229.html](http://www.huffingtonpost.com/2012/02/16/interracial-marriage-in-us_n_1281229.html). But cf. Jamilah King, *Census: Interracial Marriage May Be on the Decline*, COLORLINES (May 26, 2010, 11:00 AM), [http://colorlines.com/archives/2010/05/census\\_interracial\\_marriage\\_may\\_be\\_on\\_the\\_decline.html](http://colorlines.com/archives/2010/05/census_interracial_marriage_may_be_on_the_decline.html) (noting that growth in the number of interracial marriages may be slowing).

65. See *Interracial Marriage and Relationships: A Fact Sheet*, NAT’L HEALTHY MARRIAGE RESOURCE CENTER (Jan. 1, 2009), <http://www.healthy marriageinfo.org/download.aspx?id=395>.

66. Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriage*, 60 POPULATION BULL., June 2005, at 3, 12, available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>.

the income. But for various reasons, many of them cogent, supporters of class preferences do not wish to define class simply and straightforwardly by income.

For one thing, average cash incomes differ depending on geographic location. A given income might seem “underprivileged” in an expensive urban area, less so in a smaller city, and positively middle class in a rural area. This would be an obvious problem for universities with applicants from across America, but even for institutions drawing primarily from a particular state, there are wide intrastate variations in the standards of living that a given income might represent in different areas.

Average incomes also vary by age: most people’s income rises as they get older, then falls when they retire.<sup>67</sup> If class preferences were based purely on parents’ income, applicants with younger parents would have an arbitrary advantage over those whose parents are older and hence earning more, regardless of anything else about the applicants’ family lives. By the same token, if income were the only criterion, children whose parents are retired would also tend to be preferred.

It is also quite possible to have a modest income but substantial capital. A family living on the return from private capital might have the same income as a working family, without being of the same social class by any reasonable standard. Indeed, if college admission standards depended on only income, it might be worthwhile for parents with private capital to decrease their earnings deliberately, by shifting temporarily to investments with lower yield but higher long-term gain.

There are also problems of disclosure and fraud, which may be particularly acute if class is measured—and preference granted—on any single criterion, such as income. For example, a family might fairly easily defer or hide income, whereas the family’s social class, judged on a wider array of criteria, would not at all correspond to the disclosed income.

In fact, it is a commonplace that money and social class are not necessarily the same thing. In the 1930s, George Orwell wrote,

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67. *Income and Assets of the Elderly and Near Elderly*, NAT’L BIPARTISAN COMMISSION ON FUTURE MEDICARE, <http://thomas.loc.gov/medicare/dowdall.html> (last visited July 30, 2013) (“The youngest age group is just beginning their working years and tend to have entry level jobs with low wages. Income increases as people gain experience and some of those in the age group enter mid- and upper-level positions. In the oldest age groups, income declines as people retire.”).

[T]he essential point about the English class-system is that it is *not* entirely explicable in terms of money. Roughly speaking it is a money-stratification, but it is also interpenetrated by a sort of shadowy caste-system; rather like a jerry-built modern bungalow haunted by medieval ghosts. . . . Probably there are countries where you can predict a man's opinions from his income, but it is never quite safe to do so in England; you have always got to take his traditions into consideration as well. A naval officer and his grocer very likely have the same income, but they are not equivalent persons and they would only be on the same side in very large issues such as a war or a general strike—possibly not even then.<sup>68</sup>

The particulars of class differences in twenty-first-century America are not what they were in Orwell's England. But if class is a measure of unearned hereditary advantage—or its absence—there probably has to be more nuance about it than mere cash income. At a minimum, one would want to take capital into account as well as income: savings, investments, property holdings, trust funds, and so on.

More broadly, as Orwell suggests, money is only one element of hereditary good or bad fortune. In America, as in every society, class is a subtle and many-faceted—if not many-splendored—thing, which is why it is so inexhaustible a topic in literature. A privileged or underprivileged childhood might depend not only on one's parents' income and capital but also on their education and culture, their occupational status, whether they were married and stayed married, what sort of home and neighborhood one grew up in, and what sort of schools one attended. And this is to consider only the more tangible, and hence potentially measurable, elements of class; it leaves aside one's parents' values, styles, tastes, and connections, which might be important elements too but which are scarcely quantifiable at all.

Colleges and universities that have experimented with class preferences have actually considered some of the more tangible factors, and advocates of class preference urge that they do so. UCLA School of Law, for example, has questioned applicants about their fathers' and mothers' level of education, parents' income and net worth, and the applicant's home address while in high school.<sup>69</sup> No applicant was required to answer these questions, but class preferences were only available to those who did.<sup>70</sup> In calculating preferences, the law school considered the proportion of single-parent households in the applicant's home neighborhood; the proportion of families in the neighborhood receiving welfare; and the proportion of young adults who had not graduated from

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68. GEORGE ORWELL, *THE ROAD TO WIGAN PIER* 154 (1937).

69. Sander, *supra* note 37, at 481–82, 483 tbl.2.

70. *Id.* at 481 & n.19.

high school.<sup>71</sup> Richard Kahlenberg urges that seven factors be taken into account: parents' education; parents' income; parents' net wealth; parents' occupation; the family structure—including whether the parents were married, whether they divorced, and mother's age when the applicant was born—the quality of the schools the applicant attended; and the quality of the applicant's neighborhood.<sup>72</sup>

The emphasis on home neighborhood as a criterion of class may be motivated in part by the fact that blacks and Hispanics, in particular, tend to live in neighborhoods that are "worse"—in terms of numbers of single-parent households, families receiving welfare, and so forth—than whites with similar incomes, and a desire on the part of the advocates and designers of class preferences to include as many blacks and Hispanics as possible among those who will benefit from the preferences.<sup>73</sup> Deliberate racial gerrymandering of these criteria, to be sure, would violate the provisions of laws that forbid racial preferences by state institutions and authorities, like Proposition 209 in California.<sup>74</sup>

It will be noticed, of course, that there are a variety of criteria of class here that might or might not be taken into account. UCLA School of Law did not take account of parents' occupation, family structure, or the quality of the applicant's secondary school, for example, although Richard Kahlenberg urges that these should be considered. Some of the criteria require further decisions about what should be considered: for example, "family structure" might or might not include whether the applicant's parents were married and at what age, whether they divorced, whether a single mother was divorced or instead had never married, and so forth. Other criteria would also call for detailed judgment: for example, how to rank parents' occupation, how to rank the quality of an applicant's secondary school, and how to rank the quality of parents' education—if the status of the parents' schools or colleges, for example, were to be considered and not just how many years of schooling they had.

Choosing criteria of class, in short, entails a lot of discretion, far more discretion than deciding who is eligible for racial preferences, at least so long as most people's racial identification is easily settled. Moreover, there is further discretion in deciding how much weight to give each of

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71. *Id.* at 485 tbl.3.

72. KAHLENBERG, *supra* note 6, at 132–36.

73. RICHARD H. SANDER, FAIR HOUSING IN LOS ANGELES COUNTY: AN ASSESSMENT OF PROGRESS AND CHALLENGES, 1970–1995, at 74 (1996).

74. *See supra* note 9 and accompanying text.

the criteria once they are chosen. For example, to score an applicant's class, what relative importance should be given to parents' income, parents' net wealth, parents' education, the residential neighborhood, and so forth? Class is a nebulous enough concept that there is no uniform standard of how to define it, nor is it easy to imagine how there could be.

UCLA School of Law's emphasis on residential neighborhood is probably an example of choosing a criterion—and giving it a lot of weight—in order to steer class preferences in a particular direction: in this case, to racial minorities. If so, it may violate the provisions of Proposition 209 in California. But other plausible criteria might be chosen, or given more weight, if one wanted to favor rural applicants, labor union families, Evangelicals, or other groups. Almost any change in the criteria, or variation in how they are weighed, will change the profile of those eligible for preferential treatment. Faculties and administrators could adapt and change the criteria over time, depending on the results from a particular formula. For example, there have not only been different formulas for class preferences at different campuses of the University of California but different formulas at various schools and programs on the same campuses, and the formulas have also changed from year to year.<sup>75</sup>

It might be said that colleges and universities make discretionary decisions all the time: about whom to hire as faculty, whom to admit as students, what to teach, how to teach it, and so on. What is so special about their defining social class and granting preferences accordingly?

But these other discretionary decisions are, at least in principle, academic decisions decided on academic criteria. That colleges and universities have academic expertise is—or at least has been—generally accepted: hence the acceptance and respect accorded to academic degrees conferred by these institutions. It is less obvious that academic institutions have any particular expertise in social engineering or in deciding which individuals or groups in society should receive preferential treatment on grounds of class or hereditary disadvantage.

The discretion involved in defining class and disadvantage would be open to political pressures of various kinds. Depending on what criteria a college or university uses—and how it weights these criteria—different racial and ethnic groups would receive greater or lesser preference, for example. At state universities, which are controlled by the state legislatures, well-organized ethnic groups would be in a position to lobby for criteria that would favor them. Private universities receiving public funds would be open to similar lobbying pressures, as well as to pressures from

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75. Sander, *supra* note 7, at 661–64.

private donors who might be interested in promoting the interests of one or another group.

Deciding who is to receive how much preference would also be open to ideological favoritism. This might simply take the form of ideological preference for some minority groups over others. It might also take the form of shading the criteria in order to give a boost to applicants with particular political views. American colleges and universities are already widely perceived to have become more politicized in recent decades. Studies of university faculties and administrators reveal a heavy tilt to the political left, very disproportionately to the country as a whole and amounting to virtual unanimity on many campuses.<sup>76</sup> Consciously or otherwise, faculties and administrators might be inclined toward definitions of class disadvantage that would maximize admissions preferences for students with congenial political views—at the expense, for example, of rural or Evangelical applicants whose views might, on average, be less congenial.

Thus, when UCLA School of Law created a preference program based on class, the school was evidently concerned that preferences should not go to “highly talented applicants” with low family incomes who might be the children of “highly educated missionaries.”<sup>77</sup> This might reflect a legitimate judgment that missionaries’ children are not unlucky by birth or upbringing, but it might also reflect a degree of political or religious prejudice. Along the same lines, Richard Kahlenberg, probably the most widely read supporter of class preferences, explicitly sees preferences as a step that will “help reforge the coalition required to sustain much-needed social programs”—in other words, as a way to strengthen the political left.<sup>78</sup>

In the absence of any uniform definition of class or of social disadvantage, each college or university giving class preferences would be free—indeed, obliged—to fix its own definition. Class preferences, accordingly, would

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76. See Daniel B. Klein & Charlotta Stern, *Political Diversity in Six Disciplines*, 18 ACAD. QUESTIONS 40, 48 (2005) (noting voter registrations indicate as much as a 10:1 ratio of Democrats to Republicans among college and university faculty in humanities and social science disciplines—“pretty much a one-party system”); see also John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1170 (2005) (showing that 80% or more of law professors who contribute to political campaigns contribute wholly or mostly to Democrats; the ratio is even more lopsided at many elite law schools).

77. Sander, *supra* note 37, at 473, 478.

78. KAHLENBERG, *supra* note 6, at 180.

confer great power and discretion on the faculties and administrators undertaking to bestow them. The decisions about preferential treatment would not be made on academic criteria, which is where these institutions' expertise is thought to be: preferences are avowedly a departure from such criteria. Moreover, because colleges and universities are protective of the confidentiality of their admissions decisions, the precise criteria of class disadvantage—and especially the all-important weightings of these criteria—would certainly not be made public. Indeed, no institution so far that has adopted such preferences has revealed this information. Without public transparency, such preferences would be open to political pressures of various kinds. They would be open to ideological gerrymandering as well. Perhaps class admissions preferences would be attractive if colleges and universities were widely trusted to make nonacademic social policy decisions and if preferential treatment were the only way to expand educational opportunity. Neither is the case.

## V. OPENING THE DOORS WITHOUT PREFERENTIAL TREATMENT

In recent decades, economic barriers to educational opportunity have grown in at least two ways. First, the cost of higher education has risen sharply, both at private and at public institutions, far ahead of the rate of inflation.<sup>79</sup> Second, there has been a movement away from need-based scholarships toward merit scholarships, regardless of need.<sup>80</sup> Moreover, reflecting federal aid policies, colleges and universities have moved away from scholarship grants in general toward student loans; students relying on “financial aid” must often incur very substantial debt.<sup>81</sup>

The movement away from need-based scholarships is easily explained. Colleges and universities compete for the most highly qualified students. Enrolling such students is an important factor in widely publicized rankings

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79. Tuition at public and private colleges and universities rose at an average rate of 5.6% per year beyond the rate of inflation from 2000 to 2010. See THE COLL. BD., TRENDS IN COLLEGE PRICING 2010, at 13 (2010), available at [http://trends.collegeboard.org/sites/default/files/CP\\_2010.pdf](http://trends.collegeboard.org/sites/default/files/CP_2010.pdf); see also Ronald G. Ehrenberg, *The Economics of Tuition and Fees in American Higher Education* 5–6 (Cornell Univ. ILR Sch., Working Paper No. 67, 2007), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1068&context=workingpapers> (discussing the rise of tuition and fees in higher education in comparison to inflation rates).

80. See Fay Vincent, *No Merit in These Scholarships*, POL'Y PERSP., June 2005, at 2, 2; see also Robert H. Frank, *Intense Competition for Top Students Is Threatening Financial Aid Based on Need*, N.Y. TIMES, Apr. 14, 2005, at C2 (discussing the shift from need-based to merit-based financial aid).

81. See Lawrence E. Gladieux, *Federal Student Aid Policy: A History and an Assessment*, FINANCING POSTSECONDARY EDUC.: FED. ROLE (Oct. 1995), <http://www.ed.gov/offices/OPE/PPI/FinPostSecEd/gladieux.html>.



of colleges and universities, such as in *U.S. News & World Report*, which in turn affect the prestige and competitive standing of these institutions. Many institutions therefore offer scholarship grants to applicants with the very highest test scores and other credentials, regardless of need, instead of directing their aid budgets toward other fully qualified, but needier, applicants.<sup>82</sup>

The dramatic rise in tuition costs in recent decades is less easily explained. Colleges and universities surely enjoyed a strong market position, with higher education much in demand, especially given the economic advantages of being a graduate. Various fixed costs to the institutions may have risen during those years, perhaps faster than the rate of inflation. But at many colleges and universities, it is also clear that faculty salaries rose very generously in recent years, especially for senior, tenured faculty. In a national survey of 115 colleges and universities, including smaller colleges, full professors' salaries now average over \$100,000 a year.<sup>83</sup> At the more prestigious institutions and on the faculties of professional schools, the average salaries for full professors are much higher still.<sup>84</sup> At the same time, tenured professors' teaching loads have decreased, and the numbers of administrators and the quality of the physical facilities have increased.

If the goal is to increase educational opportunity, a straightforward way of doing it would be to ensure that scholarship aid is offered on the basis of need—to applicants admitted on their merits—rather than to bid for “star” students regardless of need. The academic cost to the college or university of a need-based policy would be minimal, although it might indeed preclude a certain amount of jockeying for position in the *U.S. News* rankings.

More controversially, if higher education is to be more accessible to poorer families, greater effort could be made to control costs. This might mean some sacrifice by tenured professors by way of how much their salaries rise or in terms of their teaching loads. It might mean fewer academic administrators or less lavish buildings. But it would not

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82. See Matthew Quirk, *The Best Class Money Can Buy*, ATLANTIC MONTHLY, Nov. 2005, at 128, 128 (noting “enrollment management” and the “cutthroat quest for competitive advantage” among colleges and universities).

83. See Andrew Hacker, *The Truth About the Colleges*, N.Y. REV. BOOKS, Nov. 3, 2005, at 51, 54.

84. See *id.*

entail the compromise of academic quality and integrity that is inherent in preferential lowering of standards based on students' class origins.

Perhaps it is understandable that senior professors, including those who express the most fervent commitment to educational equity, might not wish to make any sacrifice in their salaries or teaching loads; that institutions prefer to use scholarship grants to enhance their rankings rather than to aid needy students; and that controlling costs is not a priority when market forces do not compel it. Social class affirmative action, by contrast, requires no sacrifices along these lines, whatever its costs in academic integrity. Indeed, such affirmative action would only increase the power and prerogatives of faculty and administrators, deciding at their discretion who is to receive preferential treatment.

The mystique of affirmative action, moreover, is very strong among academic faculty and administrators. With the passage of Proposition 209 in California and similar initiatives and laws elsewhere and with the looming possibility prior to the Supreme Court's judgment in *Grutter v. Bollinger*—and again more recently while the Supreme Court considered *Fisher v. University of Texas at Austin*—that racial preferences might be declared unconstitutional in public colleges and universities,<sup>85</sup> class affirmative action may have won academic adherents on the basis that “we are committed to preferences, and if we can't do it by race then let's do it by class.” The affirmative action outlook, by its very nature, tends to be inimical to impartial academic standards and tends to view preferential treatment, not as a last resort, but as something nearer to a first resort.

There is surely good reason to be concerned about educational equity in America and about making careers genuinely open to talent. Everyone knows that life is not a level playing field. Accidents of birth and upbringing differentiate people and their prospects in life, including their educational prospects. There is an element of injustice, perhaps of tragedy, certainly of inequality, in all this. But there are reasonable things that can be done to mitigate educational inequality. If primary and secondary public education were more academically rigorous, it would reduce the competitive advantage of growing up in a cultured and well-read home. More immediately, colleges and universities could choose to allocate their scholarship budgets on the basis of need. And they could make greater efforts to control their tuition costs.

Class preferences, by contrast, would tend to corrode the quality of higher education, to introduce a new element of arbitrariness and unfairness,

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85. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

and to mark a quantum jump in politicizing academic life in the United States. In a world economy in which prosperity and growth depend increasingly on education and knowledge and social mobility in turn depends on prosperity and growth, burdening American higher education in this way might threaten social mobility rather than promote it. Some cures are worse than the disease. Perhaps class preference might be justifiable as a last resort. There are many first resorts that ought to be resorted to first.

