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### Merit and Mobility: A Progressive View of Class, Culture, and the Law

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MERIT AND MOBILITY: A PROGRESSIVE VIEW OF CLASS, CULTURE, AND THE LAW  
Lucille A. Jewel

**Abstract**

*Rising income inequality and financial trauma in the middle class beg the question of whether social mobility, long a part of America's narrative identity, is truly available to Americans residing in the lower rungs of society. This paper addresses the connection between culture and social mobility, looking particularly at how culture impacts social outcomes in America's meritocratic educational system. Analyzing culture and cultural capital from a progressive perspective, this paper concludes that culture operates subtly, helping some retain or improve their existing position but interfering with the mobility of others. The rhetoric of individual merit, however, obscures the role that culture plays in reproducing existing social structures.*

*In the context of merit and mobility, this paper also analyzes class disadvantage as it relates to affirmative action. As the Supreme Court is set to decide another affirmative action case this term, we are reminded that barriers of disadvantage continue to prevent educational institutions from achieving acceptable levels of diversity. Often operating in tandem with economic and racial disadvantage, cultural disadvantage obstructs mobility in a powerful way. Accordingly, cultural disadvantage, captured using a robust set of socio-economic and race-conscious factors, should be something that institutions consider when formulating diversity plans. However, affirmative action plans, while necessary, cannot be the only solution to the problem. More radical and systemic solutions are needed to reboot social mobility in this country.*

*Part II of this paper provides a foundational understanding of progressive cultural theory, placing it in the context of the two opposing theories most often used to explain unequal outcomes in America: individual merit versus environmental/societal factors. Progressive cultural theory posits that unequal outcomes are not fully explainable by differences in individual merit. Rather, pre-existing cultural advantages help some advance, but for others, unequal structures produce cultural barriers that impede mobility. Relying upon recent social science research, Part III of this paper examines how culture and cultural capital interact with our merit based educational system; how cultural differences within the middle class impacts social mobility; and how culture interacts with pre-existing structures of racial inequality. As diversity within higher education mostly affects individuals in the middle class, Part IV analyzes what cultural disparities within the middle class mean for the affirmative action debate. Part IV concludes that the Supreme Court, in *Fisher v. University of Texas at Austin*, should reaffirm Justice O'Connor's diversity rationale for using race-conscious measures to achieve a critical mass of minority students but also argues that we should not be trapped into a false choice between racial diversity or class-based diversity.*

*In grappling with the issues of disadvantage and mobility within the affirmative action debate, I ultimately conclude that the entire merit and selectivity system should be collapsed. Thus, Part V offers some suggestions for making our merit system less insular and more inclusive, including the salvo that successful professionals who have “won” the merit game take a hard look at ourselves and ask whether we are contributing to the trend toward oligarchy.*

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## I. Introduction

The Occupy movement has brought attention to the unfulfilled promise of social mobility in America. The “great divergence”<sup>1</sup> trend in economics has resulted in the top one percent of the nation holding twenty-four percent of its wealth.<sup>2</sup> The one million or so of the households in the top one percent also earned about twenty percent of the income, about the same share of income as the bottom sixty percent (about sixty million households) put together.<sup>3</sup> The recurring theme here is that income inequality at this level makes it much more difficult for those on the bottom rungs to move up the ladder.<sup>4</sup>

The precarious position of the middle class is also a topic of concern within the Occupy movement.<sup>5</sup> As Barbara Ehrenreich and John Ehrenreich write, the Great Recession has struck the middle class hard:

Once-affluent people lost their nest eggs as housing prices dropped off cliffs. Laid-off middle-aged managers and professionals were stunned to find their age made them poison to potential employers. Medical debts plunged middle-class households into bankruptcy. The old conservative dictum—that it was unwise to criticize (or tax) the rich because you might yourself be one of them

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<sup>1</sup> Economist Paul Krugman has referred to this economic trend as the “Great Divergence.” TIMOTHY NOAH, *THE GREAT DIVERGENCE, AMERICA’S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT* 5 (Bloomsbury Press 2012).

<sup>2</sup> *Id.* at 4.

<sup>3</sup> Ajay Kaper, Niall Macleod, Narendra Singh, *EQUITY STRATEGY, PLUTONOMY: BUYING LUXURY, EXPLAINING GLOBAL IMBALANCES*, available at <http://cryptome.org/0005/rich-pander.pdf> cited in Don Peck, *Can the Middle Class Be Saved?*, ATLANTIC MAGAZINE, September 2011, at \*1-\*2, available at <http://www.theatlantic.com/magazine/archive/2011/09/can-the-middle-class-be-saved/8600/>.

<sup>4</sup> See Paul Krugman, *The Great Gatsby Curve*, THE NEW YORK TIMES, January 15, 2012, Opinion Section, available at <http://krugman.blogs.nytimes.com/2012/01/15/the-great-gatsby-curve/> (summarizing Alan Krueger’s statistical model, which correlates income inequality with weakened intergenerational mobility); but see Ross Douthat, *Are Inequality and Immobility Inseparable*, THE NEW YORK TIMES, January 18, 2012, Opinion Section, available at <http://douthat.blogs.nytimes.com/2012/01/18/are-inequality-and-immobility-identical/> (arguing that while there is a connection between income inequality and mobility, Krueger’s Great Gatsby Curve might overstate that connection).

<sup>5</sup> CHRISTOPHER HAYES, *TWILIGHT OF THE ELITES* 231 (Crown Publishers 2012) (noting that a large number of Occupy protesters were “middle- and upper-middle class young people with middle- and upper-middle class expectations that [were] being dashed.”).

someday—gave rise to a new realization that the class you were most likely to migrate into wasn't the rich, but the poor.<sup>6</sup>

Today's middle-class dual-income families have less discretionary income and savings than the single-income family in the 1970s.<sup>7</sup> Recent reports indicate that, as a result of the Great Recession and the devitalization of the United States manufacturing economy, thirty-eight percent of American families are now living paycheck to paycheck; forty-eight percent do not have enough savings to weather a financial emergency.<sup>8</sup>

Not only is the middle class more financially insecure, but it is also shrinking. “Almost one of every 12 white-collar jobs in sales, administrative support, and non-managerial office work vanished in the first two years of the [Great Recession]; one of every six blue-collar jobs in production, craft, repair, and machine operation did the same.”<sup>9</sup> The Great Recession, coupled with longstanding economic trends (such as globalization and the accretion of manufacturing and other middle class jobs that do not require a college degree) has shrunk the center of the middle class,<sup>10</sup> making it more difficult for Americans to climb up to higher positions in the social structure.<sup>11</sup>

In tandem with income inequality and the shrinking, struggling middle class, America's educational meritocracy continues to sort Americans into increasingly rigid tiers. A tiny elite cohort floats to the very top; an upper tier of college graduates and postgraduates likely radiate

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<sup>6</sup> Barbara Ehrenreich and John Ehrenreich, *The Making of the American 99 Percent and the Collapse of the Middle Class*, in THE OCCUPY HANDBOOK 304 (Janet Byrne ed. Back Bay Books 2012).

<sup>7</sup> ELIZABETH WARREN AND AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS PARENTS ARE GOING BROKE 8, 16-20 (New York Basic Books 2004) cited in NOAH, *supra* note 1, at 50. The Great Divergence, America's Growing Inequality Crisis and What We Can Do About It 50 Bloomsbury Press 2012.

<sup>8</sup> Khadeejah Saffar, *Living Paycheck to Paycheck is a Reality in Two out of Five Households Report*, THE HUFFINGTON POST, [http://www.huffingtonpost.com/2012/07/25/living-paycheck-to-paycheck-2012\\_n\\_1702347.html](http://www.huffingtonpost.com/2012/07/25/living-paycheck-to-paycheck-2012_n_1702347.html) (July 25, 2012 6:53 p.m.).

<sup>9</sup> Peck, *supra* note 3, at \*6.

<sup>10</sup> “One reasonable definition of the center of the middle class “can be arrived at by dividing the range of U.S. annual incomes between \$25,000 and \$74,999.” NOAH, *supra* note 1, at 76-77.

<sup>11</sup> *Id.* (noting the shrinkage of the middle class); Peck, *supra* note 3, at \*3-\*6 (remarking on the link between the shrinking middle class and the economic and cultural trend toward downward mobility).

upwards, but everyone else, including non-elite college graduates, high school diploma holders, and high school drop-outs, remain where they are or face the real possibility of falling backwards.<sup>12</sup> With income inequality increasing and social mobility in a holding pattern, Americans are concerned about what it takes to move up in society.

Some are concerned that the structure of American society is trending toward oligarchy. In *Twilight of the Elites*, Christopher Hayes argues that the increasing divergence in American society is not just about wealth, but also about the social distance between the “elites” who shape the policy of this country and “everyone else.”<sup>13</sup> While Hayes believes structural inequalities are producing the distance between elites at the top and everyone else, conservative thinker Charles Murray explains the social distance phenomenon as caused by the most intelligent people interbreeding and sequestering themselves away (residentially and culturally) from the rest of the American population.<sup>14</sup> From either perspective, the beginning of the narrative is the same: a new “cognitive elite” class has emerged and, in terms of wealth, residential location, and culture, this class is growing increasingly detached from the majority of Americans.<sup>15</sup>

In the recent past, class status was easy to discern through family background and consumption choices. In 1980, *The Official Preppy Handbook* amusingly listed clothing and other markers from which one could identify WASP<sup>16</sup> “preppies” (shorthand for upper-class

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<sup>12</sup> Peck, *supra* note 3, at \*6; *see also*, PEW CHARITABLE TRUSTS, PURSUING THE AMERICAN DREAM: ECONOMIC MOBILITY ACROSS GENERATIONS, *available at* [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/Pursuing\\_American\\_Dream.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Pursuing_American_Dream.pdf) [Hereinafter Pew Research Paper, PURSUING THE AMERICAN DREAM] (identifying a “stickiness” problem for social mobility, with Americans starting out in the bottom and top rungs of the wealth ladder more likely to stay there.).

<sup>13</sup> HAYES, *supra* note 5, at 142, 144-154.

<sup>14</sup> CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA 1960-2020 61, 68, 100 (Cox 2012).

<sup>15</sup> While both conservatives and progressives lament the problem of social distance, the way the two views resolve the problem differs drastically. Charles Murray would have elites engage in policy-making that reaffirms “founding virtues” of “family, vocation, community, and faith.” MURRAY, *supra* note 14 at 255. Christopher Hayes argues for progressive redistributive reforms and a commitment to improving equality of outcomes. HAYES, *supra* note 5 at 221-224.

<sup>16</sup> WASP is an acronym that refers to high-status persons of White Anglo-Saxon Protestant descent.



culture).<sup>17</sup> However, in 2011, this text was updated and revised, allocating preppy status to both President Obama and Henry Louis “Skip” Gates, indicating that persons from a diverse set of backgrounds can now achieve upper-class status, especially if they have elite credentials.<sup>18</sup> In today’s society, class is no longer determined by a WASP background and marked by an exclusive set of taste preferences.<sup>19</sup> Prestigious educational credentials are now the controlling factor for class status.<sup>20</sup> To obtain these valuable educational credentials, one must perform exceptionally well in America’s merit-based system of high-stakes educational and admissions testing.<sup>21</sup>

Not everyone, however, has access to the economic and cultural resources helpful for achieving success in America’s merit system. While legal theorists have devoted considerable attention to the relationship between economic advantage and performance in the merit system,<sup>22</sup> there is little analysis that unpacks the connection between cultural processes and the manufacture of merit. This Article examines how cultural capital, the internalized know-how and skills helpful for success in institutional settings,<sup>23</sup> helps produce the positive merit outcomes

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<sup>17</sup> See LISA BIRNBACH, *THE OFFICIAL PREPPY HANDBOOK* (Workman Publishing 1980).

<sup>18</sup> LISA BIRNBACH AND CHIP KID, *TRUE PREP* 18, 31 (Knopf 2011).

<sup>19</sup> See BIRNBACH, *supra* note 17, at 130, 141 (Izod Lacoste shirts); C. WRIGHT MILLS, *THE POWER ELITE* 62-63 (Oxford 200) (Brooks Brothers Suits).

<sup>20</sup> RICHARD L. ZWEIGENHAFT AND G. WILLIAM DOMHOFF, *DIVERSITY IN THE POWER ELITE* 6-7, 230, 233, 246 (Rowman & Littlefield 2006).

<sup>21</sup> HAYES, *supra* note 5, at 21-22, 31, 50.

<sup>22</sup> See HAYES, *supra* note 5, at 38-39, 54 (Discussing the connection between economic advantage and high merit test scores); Brian Z. Tamanaha, *Law Schools Fudge Numbers, Disregard Ethics to Increase Their Ranking*, *THE DAILY BEAST*, <http://www.thedailybeast.com/articles/2012/06/17/law-schools-fudge-numbers-disregard-ethics-to-increase-their-ranking.html> (June 17, 2012 4:45 a.m. EDT) (explaining that “well-off students tend to do better on the LSAT due to advantages throughout their education [including their ability to afford test prep courses that improve their LSAT score]”); see also, LANI GUINIER AND GERALD TORRES, *THE MINER’S CANARY* 68 (Harvard 2002) and Michael J. Higdon, *A Place in the Academy, Law Faculty Hiring and Socio-economic Bias* 17 (University of Tennessee Research Paper No. 176), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2007934](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007934) (explaining that high LSAT scores correlate with parental wealth).

<sup>23</sup> See, e.g., Annette Lareau and Erin McNamara Horvat, *Moments of Social Inclusion and Exclusion: Race, Class, and Cultural Capital in Family-School Relationships*, 72 *SOCIOLOGY OF EDUCATION* 37, 42 (1999) and Annette Lareau and Elliot B. Weininger, *Cultural Capital in Educational Research: A Critical Assessment*, 32 *THEORY AND SOCIETY*, 567, 569 (2003) (defining cultural capital).

integral for social mobility in the United States.<sup>24</sup> It also examines culture more generally, examining how cultural barriers emerge to reduce access to institutional rewards, a process that in turn produces differential outcomes in America's educational system, which in turn impacts individual mobility.

The social science studies discussed in Part III of this paper demonstrate how cultural background connects up with achievement outcomes. For instance, Annette Lareau's ethnographic study of the parenting style differences between upper-middle class and working-class/poor families highlights how upper-middle class culture influences a verbal parenting style that optimizes a middle class child's success in education, college, and professional environments.<sup>25</sup>

Moreover, the studies discussed below show how cultural capital instilled by upper-middle class parents remains valuable, even after a child obtains the credentials necessary to enter elite social echelons. Children reared in upper-middle class environments are better skilled at deploying their cultural capital and signaling a specific kind of interpersonal moxie that works in professional and business settings.<sup>26</sup> The value of being able to signal one's cultural capital becomes obvious upon reviewing studies that address workplace homophily, the tendency of individuals to hire workers with backgrounds similar to their own.<sup>27</sup> Thus, in settings like law firm interviews, it becomes important for applicants to signal that they are similar to the interviewer.

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<sup>24</sup> See Pierre Bourdieu, *Forms of Capital*, in THE SOCIOLOGY OF ECONOMIC LIFE 96, 98-99 (Mark Granovetter & Richard Swedberg eds., 2d ed. 2001) (explaining within the context of education the role that cultural capital plays in the cultivation of talent and academic achievement); ANNETTE LAREAU, UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE 1-7 (2d Ed 2011) [Hereinafter LAREAU, UNEQUAL CHILDHOODS] (Explaining how upper-middle class parents are able to transmit valuable cultural capital to their children).

<sup>25</sup> See LAREAU, UNEQUAL CHILDHOODS, *supra* note 24, at 1-7.

<sup>26</sup> See *id.* at 2.

<sup>27</sup> See *infra* notes 218 - 240 and surrounding text.

Lareau's *Unequal Childhoods* ethnography also identifies a disturbing cultural trend that should figure into public policy debates about merit and education, as discussed more fully in Parts IV and V. Lareau's ethnography vividly describes the hyper-competitive game that upper-middle class parents engage in, marshaling their time and money to impart as many benefits onto their children as possible.<sup>29</sup> Working-class and poor parents, on the other hand, seem to treat education more as a public good, depending on institutions to carry the primary responsibility for the education of their children.<sup>30</sup> This attitudinal difference between private competitive action and reliance on public institutions might play a larger role in differential achievement outcomes than many realize.

Culture, a more general concept than cultural capital, also influences social outcomes. For instance, John Ogbu's cultural-ecological theory postulates that the success of some minority school children becomes imperiled when cultural norms emerge in response to unequal social structures and conflict with the range of behaviors rewarded by educational institutions.<sup>31</sup> In addition, there are other psychological and social factors, related to culture, that impact mobility. As the examples discussed below will show, because culture is profoundly intersectional, with lines that cut across income, wealth, environment, and race, it is impossible to divorce class from race.

Numerous social theories emphasize the role of culture and class, yet culture and class do not receive much attention in legal literature, particularly from progressive voices. One reason is

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<sup>29</sup> See *infra* notes 135 - 143 and surrounding text.

<sup>30</sup> See *infra* notes 141 - 144 and surrounding text.

<sup>31</sup> JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB 33, 45, 49 (Lawrence Erlbaum 2003) [Hereinafter OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB]; John U. Ogbu *Collective Identity and the Burden of "Acting White" in Black History, Community, and Education*, in MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 56-57 (John U. Ogbu ed. Routledge 2008) [Hereinafter Ogbu, *Collective Identity and the Burden of "Acting White"*]; John U. Ogbu, *Multiple Sources of Peer Pressures among African American Students*, in MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 89 (John U. Ogbu ed. Routledge 2008) [Hereinafter Ogbu, *Multiple Sources of Peer Pressure among African American Students*].

that the term “culture” is associated with conservative individualistic explanations of why certain groups fail to achieve success.<sup>35</sup> The other reason has to do with legal formalism’s preference for economic discourse and the use of clear categories for construing social disadvantage.<sup>36</sup> However, as Deborah Malamud points out, narrow economic categories do not provide the full story on how social inequality is lived on the ground level.<sup>37</sup> This Article seeks to reframe the rhetoric of culture, arguing that culture should not be exclusively viewed through an individualist lens, but rather, should be approached as a semi-autonomous entity that emerges in response to complex social and economic forces.

The relationship between culture, class, and merit also bears on the affirmative action debate, which is heating up as the Supreme Court is set to hear *Fisher v. University of Texas at Austin*<sup>38</sup> where it will reconsider the race-conscious affirmative action it narrowly approved in

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<sup>35</sup> See, e.g., Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1680-1680 (1997) [Hereinafter Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*] (summarizing Daniel Kahlenberg’s argument that inequality of individual outcomes results from differences between black culture and white culture); GUINIER & TORRES, *THE MINER’S CANARY*, *supra* note 22 at 35 (explaining how conservatives latch onto the concept of culture to construct individualistic explanations for black failure, positing that such outcomes arise out of a “black cultural deficit.”).

<sup>36</sup> See Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1890 (1996) [Hereinafter Malamud, *Class-Based Affirmative Action*] (explaining that legal formalism tends to prefer easily quantifiable economic categories and not recognize the structural complexity of how social and economic distinctions play out in real life). Noting the connections between culture and economic capital (income and wealth), Malamud defines economic disadvantage as encompassing cultural disparities. Deborah Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 453 (1997) [Hereinafter Malamud, *Assessing Class-Based Affirmative Action*] (defining “economic” to encompass both abstract and concrete goods); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 UNIV. OF COLO. L. REV. 939, 956 (1997) [Hereinafter Malamud, *Affirmative Action, Diversity, and the Black Middle Class*] (defining economic inequality as “inequality in all goods (abstract and concrete) that are valued in the society, and in the capacity to obtain, enjoy, and transmit them.”).

<sup>37</sup> As Malamud explains, the “return of the repressed” principle holds that social science quantitative methodology lacks the ability to take everything into context and accordingly, statistical controls do not capture everything that accounts for disadvantage in environment and opportunities. Deborah Malamud, *Assessing Class-Based Affirmative Action*, *supra* note 36, at 457-58. For instance, social work and law practice are vastly different occupations in terms of income and prestige. Yet in most quantitative social science analyses, these two jobs would be placed into the same “professional” category. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, *supra* note 36, at 975-76.

<sup>38</sup> 132 S. Ct. 1536 (Feb. 21, 2012). In a case arising out of the Fifth Circuit, plaintiffs are challenging the continuing strength of Justice O’Connor’s *Grutter v. Bollinger* holding that public higher education institutions may use race as a factor to achieve diversity.

*Grutter v. Bollinger*.<sup>39</sup> In weighing the continued vitality of affirmative action policies, an argument has emerged that instead of race, a better preference for achieving diversity should involve class, or socio-economic status (“SES”).<sup>40</sup> One of the most resonant criticisms of affirmative action is that it primarily benefits minorities with high SES indicators and does very little for anyone, minority or majority, from the lower rungs of the social hierarchy.<sup>41</sup> In response to this concern, race-blind affirmative action models that use SES factors to achieve diversity have gained traction. In response, this article argues that because of non-economic barriers, race cannot be separated from class and that context<sup>42</sup> is necessary to capture the greatest number of qualified applicants in our merit system. Fully agreeing with and expanding upon Deborah Malamud’s work on class and affirmative action,<sup>45</sup> this Article argues that class-

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<sup>39</sup> 539 U.S. 306 (2003).

<sup>40</sup> See, e.g., RICHARD D. KAHLENBERG, *THE REMEDY* (A New Republic Book 1996); Richard H. Sander, *Class in American Legal Education*, 88 DENVER U. L. REV. 631 (2011) [Hereinafter Sander, *Class in American Legal Education*]; Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL. EDUC. 473 (1997) [Hereinafter Sander, *Experimenting with Class-Based Affirmative Action*]; Amicus Brief, California Association of Scholars and Center for Constitutional Jurisprudence 21-23 filed in *Fisher v. University of Texas*, 132 S. Ct. 1536 (Feb. 21, 2012) (authored by Richard Sander) [Hereinafter Sander, *Fisher Amicus Brief*].

<sup>41</sup> See Richard H. Sander, *Class in American Legal Education*, *supra* note 40, at 632-633, 651-652, 637, 656 (noting the lack of SES diversity in legal education as well as the fact that affirmative action beneficiaries tend to be minorities from relatively high SES backgrounds); see also *infra* note 342 and surrounding text.

Using SES instead of race to achieve diversity offers practical appeal because, unlike race, economic disadvantage is not likely to be treated as a suspect class. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973) (rejecting suspect class status for a collection of comparatively poor households); see also Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Roles of Law, and Dialogic Default*, 630 FORDAM URBAN L.J. 629, 638-639 (2008) (discussing the Supreme Court’s framework that grants rational review to government classifications made in economics or social welfare fields) (citing *Dandridge v. Williams*, 397 U.S. 471, 487 (1970)). Accordingly, a diversity system using SES factors would only have to survive the rational basis test. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2105 (1995) (holding that the rational basis test would apply if a government contracts diversity program were to be based on economic disadvantage rather than race.).

<sup>42</sup> For compelling explanation of why the decontextualized and individualistic approach favored by legal formalism misses the mark in capturing justice see Regina Austin, *“Bad for Business”: Contextual Analysis, Race Discrimination, and Fast Food*, 34 J. MARSHALL L. REV. 207 (2000-2001) (“Though the role of individual agency should not be ignored, attention to context highlights the structural predicates that do not necessarily guarantee domination or subordination, but make them considerably more likely.”).

<sup>45</sup> The two themes in Professor Malamud’s work that this paper expands upon are (1) the shortcomings of a purely economic approach to class disadvantage and (2) the serious disparities within the middle class that justify preference systems that benefit one member of the middle class over another. See Malamud, *Class Based Affirmative Action*, *supra* note 36, at 1889 (“No easily administered, quantitative, composite index of the elements of economic inequality” will capture the complex ways that cultural and social forces interact to produce social status.) and Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, *supra* note 36, at 949 (the

based affirmative action could help achieve a valuable type of diversity, as envisioned by *Grutter*, but only if the conception of class is robust, intersectional, and takes race into account.

In the context of class and culture, this Article weighs in on the future of affirmative action, arguing that Justice O'Connor's diversity rationale (that diversity is a compelling governmental interest) should continue to stand. However, this paper also suggests that the civics theme<sup>46</sup> within O'Connor's diversity rationale should be expanded to account for the social and economic divergences we are seeing in America today. Given the way that political and cultural power stubbornly coalesce<sup>47</sup> around just a few individuals with strikingly similar backgrounds,<sup>48</sup> a recommitment to diversity is also a promise for a greater representativeness among the individuals who will lead America.

Ultimately, however, affirmative action is merely a band-aid that cannot stem the social harms flowing from the deeply flawed structure of opportunity in America. As argued by Richard L. Zweigenhaft and C. William Domhoff in *Diversity in the Power Elite*, diversity initiatives applied within the merit system have not really changed dominant social structures.<sup>49</sup> Generally speaking, as was true in years past, the persons who rise to the top of our social

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"relative disadvantage of the black middle class is a serious enough problem to justify the use of affirmative action.").

<sup>46</sup> O'Connor wrote that diversity in higher education is necessary for the "effective participation by members of all racial and ethnic groups in the civic life of our nation. . ." *Grutter*, 539 U.S. at 332.

<sup>47</sup> The way that power coalesces at the top could be an inevitable product of network "power laws." For an explanation of how social-network theory can predict outcomes in the competition for Federal clerkships, see Daniel M. Katz and Derek K. Stafford, *Hustle and Flow A Social Network Analysis of the Federal Judiciary*, 71 OHIO STATE L. J. 458 (2010).

<sup>48</sup> In 1956, C. Wright Mills wrote that members of America's "power elite" mostly came from the same privileged backgrounds – exclusive boarding schools and Ivy League colleges. MILLS, *supra* note 19, at 58-60, 63-64. Richard L. Zweigenhaft and C. William Domhoff continue in the tradition of C. Wright Mills and, in looking at the power elite today, write that while the power elite is now diverse today, its "core group continues to consist of wealthy, white Christian males, most of whom are still from the upper third of the social ladder" and that "those who are newly arrived to the power elite have been filtered through the same institutions as those who came before them." ZWEIFENHAFT AND DOMHOFF, *supra* note 20, at 6-7.

<sup>49</sup> ZWEIFENHAFT AND DOMHOFF, *supra* note 20, at 245.

structure were born into its higher ranks.<sup>50</sup> And, apparently, affirmative action has not changed this general trend.<sup>51</sup> Ultimately, more radical approaches may be the only way to solve the low-SES diversity problem in elite education. Although such an approach is difficult to envision (colleges and graduate schools would have to give up the selectivity cache that links up with a top U.S. News and World Report ranking), it may not be completely unrealistic to foresee radical action, particularly as the Occupy Movement's progressive strain of anti-elitism derives in large part from members of the middle class.<sup>52</sup>

The overarching thesis of this paper is that culture and cultural capital play an integral role in the way social relations are ordered in the United States, but rhetoric emphasizing individual merit obscures how cultural disadvantage works. In framing culture, the rhetoric of individualism misses the mark because individual choices do not produce culture; rather, culture propagates itself collectively in a semi-autonomous fashion. Moreover, culture cannot be detached from the external structures of opportunity that determine one's life chances in America.

Part II of this paper provides a foundational understanding of progressive cultural theory, placing it in the context of the two opposing theories most often used to explain unequal outcomes in America: individual merit versus environmental/societal factors. Relying upon recent social science research, Part III of this paper examines how culture and cultural capital interact with our merit based educational system, how cultural differences within the middle class impact social mobility, and how culture interacts with pre-existing structures of racial inequality.

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<sup>50</sup> *Id.* at 7.

<sup>51</sup> *Id.* at 244-245.

<sup>52</sup> Hayes, *supra* note 5, at 230-231.

As diversity within higher education mostly affects individuals situated in the middle class, Part IV analyzes what cultural disparities within the middle class mean for the affirmative action debate. Part IV concludes that Justice O'Connor's diversity rationale for using race-conscious measures to achieve a critical mass of minority students should be reaffirmed but also argues that we should not be trapped into a false choice between racial diversity or class-based diversity.

In grappling with the issues of disadvantage and mobility within the affirmative action debate, I ultimately conclude that the entire merit and selectivity system should be collapsed. Thus, Part V offers some suggestions for making our merit system less insular and more inclusive, including the salvo that successful professionals who have "won" the merit game take a hard look at ourselves and ask whether we are contributing to a trend toward oligarchy.

## **II. Progressive Cultural Theory**

This Article expands on my previous work applying the theories of French sociologist Pierre Bourdieu.<sup>53</sup> Culture and cultural capital are central to Bourdieu's sociological theory, which focuses on "[h]ow cultural resources, processes, and institutions hold individuals and groups in competitive and self-perpetuating hierarchies."<sup>54</sup> Bourdieu defines culture as "beliefs traditions, values and language [that] mediate[] practices by connecting individuals and groups to institutionalized hierarchies."<sup>55</sup> Bourdieu understands cultural capital to mean the possession and use of things like verbal ability, cultural awareness, institutional knowledge, and credentials to maneuver through institutions in the social world.<sup>56</sup>

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<sup>53</sup> See Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155 (2008).

<sup>54</sup> DAVID SWARTZ, *CULTURE AND POWER THE SOCIOLOGY OF PIERRE BOURDIEU* 6 (Univ. of Chicago 1997).

<sup>55</sup> SCHWARTZ, *supra* note 54 at 1.

<sup>56</sup> SCHWARTZ, *supra* note 54, at 78, 198, LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 24, at 361.



The habitus concept is also integral to Bourdieu's conceptualization of how social relations become ordered. Reflecting external social structures,<sup>57</sup> the habitus consists of a set of internalized cultural attitudes and behaviors that come to reside in individuals.<sup>58</sup> With the habitus mediating one's conduct and beliefs, an individual utilizes the capital at her disposal to maneuver through social spaces to reach her place in society.<sup>59</sup> Thus, for Bourdieu, culture is a large-scale concept that encompasses two primary concepts: cultural capital—the tools that individuals wield to gain advantages, and habitus—an internalized worldview common to similarly situated groups that is shaped by external social structures.<sup>60</sup>

Bourdieu's concept of culture is deeply structural,<sup>61</sup> constantly engaged with how external social structures interact with culture to impact an individual's life chances. In this way, Bourdieu's cultural theory counters the ascendant American theory of economic individualism,<sup>62</sup> which posits that social outcomes are a result of individual hard work, innate talent, and merit.<sup>63</sup> Bourdieu's approach to social outcomes theorizes that the outcomes an individual is able to achieve are bounded by the collective expectations internalized in her habitus and the amount of

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<sup>57</sup> PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 32 (Richard Nice trans., Cambridge Univ. Press 1977).

<sup>58</sup> I use the passive voice purposefully, as Bourdieu does not see the generation of the habitus as the product of individual choice. Rather, the habitus evolves based on external influences, which then become internalized in individuals. See Jewel, *supra* note 53, at 1161 (citing Loic J.D. Wacquant, *Toward a Social Praxeology: The Structure and Logic of Bourdieu's Sociology*, in AN INVITATION TO REFLEXIVE SOCIOLOGY 18, n.33 (Pierre Bourdieu & Loic J.D. Wacquant eds. 1992)).

<sup>59</sup> SWARTZ, *supra* note 54, at 8-9.

<sup>60</sup> See SWARTZ, *supra* note 54, at 1.

<sup>61</sup> From a sociological perspective, structuralism has many academic variations but all of them are generally concerned with studying the organizational forms that emerge from human interactions. See Bruce H. Mayhew, *Structuralism v. Individualism: Part I, Shadowboxing in the Dark*, 59 SOCIAL FORCES 335, 335-339 (1980). Structuralists are concerned with "identifying deeper, underlying . . . patterns that find expression in surface level cultural forms." John W. Mohr, *Introduction: Structures, Institutions, and Cultural Analysis*, 27 POETICS 57, 57 (2000). Susan Carle uses the term structural to refer to how social structures determine inequalities of power and resources that can in turn affect how lawyers approach advocacy for their clients. Susan Carle, *Structure and Integrity*, 93 CORNELL L. REV. 101, 114-116 (2008).

<sup>62</sup> Deborah Malamud writes that economic individualism Economic individualism "depicts the American economic order as completely open to economic mobility for those individuals with the gumption to pursue it." Malamud, *Class Based Affirmative Action*, *supra* note 36, at 1853. Lani Guiner and Gerald Torres have explained this theory as locating the individual in "an abstract universe of rights and preferences rather than within an obdurate social structure that may limit or even predetermine a person's choices." GUINIER & TORRES, *supra* note 22, at 38.

<sup>63</sup> GUINIER & TORRES, *supra* note 22, at 35; Malamud, *Class Based Affirmative Action*, note 36, at 1853.

cultural capital she possesses.<sup>64</sup> While Bourdieu's habitus theory is not completely deterministic (there is some room for individual agency),<sup>65</sup> the theory emphasizes external factors over individual action.

Bourdieu was highly concerned with the role that educational institutions play in replicating class inequality by "allowing cultural differences to shape academic achievement and occupational attainment."<sup>66</sup> In this vein, culture becomes currency in the realm of American education, particularly its emphasis on ability testing, as sociologist Christopher Jencks explains:

Culture is not merely a body of knowledge and skills. It is also a set of strategies for dealing with the unknown and with tasks that seem difficult. Culture can affect people's willingness to think about unfamiliar questions, their strategies for seeking answers that are not obvious, their motivation to persist in the face of frustration, their confidence that such persistence will be rewarded, and their interest in figuring out what the tester thinks in the right answer.<sup>67</sup>

Cultural capital can be understood as the kinds of skills and values children first learn from their parents in the home; it is most valuable when it is closely aligned with the skills and values expected by dominant institutions (such as schools).<sup>68</sup> In her studies of family/child interactions, Professor Annette Lareau theorizes that that upper middle-class parenting practices are more aligned with dominant institutional norms than the parenting styles of working-class and poor parents.<sup>69</sup> Accordingly, middle-class parents pass a more valuable form of cultural capital onto their children, advantages that working-class and poor children do not receive.

Misrecognition is another Bourdieusian concept relevant to educational attainment in a merit-based system. Misrecognition holds that those who do well in the system are unaware of

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<sup>64</sup> SWARTZ, *supra* note 54, at 8-9, 198, 199, 211-212.

<sup>65</sup> *See id.* at 211-212.

<sup>66</sup> *Id.* at 190.

<sup>67</sup> Christopher Jencks, *Racial Bias in Testing*, in THE BLACK-WHITE TEST SCORE GAP BLACK 69 (Jencks and Phillips eds. 1998) (internal citations omitted).

<sup>68</sup> LAREAU, UNEQUAL CHILDHOODS, *supra* note 24, at 362.

<sup>69</sup> *Id.* at 311.

their benefits and privileges and instead believe their success derives from intelligence, hard work, and talent employed in a fair system.<sup>70</sup> The narrative of merit masks the impact of pre-existing capital advantages and disadvantages, allowing winners the “supreme privilege of not seeing themselves as privileged.”<sup>71</sup> When we fully unpack the concept of merit, we see that social outcomes are not entirely explained by innate talent but are instead transmitted by families and institutions. Because the power to transmit cultural capital depends in great part on pre-existing social positions (determined by education and wealth) this process generally reproduces the status quo social structures.

For progressives seeking to theorize about social inequality and social change, “culture” has become somewhat of an anathema. The reason is that conservative theorists have imposed an individualistic (as opposed to collective) concept of culture, which holds that culture is something individuals freely choose to adopt.<sup>72</sup> The melding of cultural theory with a “blame the victim” approach stems from Daniel Patrick Moynihan’s 1965 poverty report, written when he was the Secretary of Labor in the Johnson Administration.<sup>73</sup> That report, influenced by the ethnographic sociology of E. Franklin Frazier, described blacks living in poverty in the inner city and emphasized weakness in family structure (the predominance of unmarried single motherhood) as the root of a “pathological” culture of poverty.<sup>74</sup> Conservatives seized on the descriptions in this report to blame poverty on defective individual cultural choices rather than

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<sup>70</sup> *Id.* at 36, 311.

<sup>71</sup> PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE 172-173, n.22 and Bourdieu & Patrick Champagne, *Outcasts on the Inside*, in THE WEIGHT OF THE WORLD: SOCIAL SUFFERING IN CONTEMPORARY SOCIETY 424 (Pierre Bourdieu et al. eds., Priscilla Parkhurst Ferguson et al., trans., Stanford Univ. Press 1999).

<sup>72</sup> See Douglas S. Massey and Nancy A. Denton, *American Apartheid, Segregation and the Making of the Underclass*, in SOCIAL STRATIFICATION, CLASS RACE AND GENDER IN SOCIOLOGICAL PERSPECTIVE (David B. Grusky Ed. Westview 2008) (explaining the theory that “lower class culture – with its limited time horizon, impulsive need for gratification, and psychological self-doubt – was primarily responsible for persistent urban poverty.”) (internal citations omitted); see also, note 35, and surrounding text.

<sup>73</sup> David Remnick, *Dr. Wilson’s Neighborhood*, THE NEW YORKER, April 29 & May 6, 1996, at 100.

<sup>74</sup> *Id.*

focusing on structural realities such as the exodus of manufacturing jobs from the inner city, the inner city's crumbling and still-segregated public schools, and a lack of advancement opportunities.<sup>75</sup> From the Nixon administration into the Reagan administration, as the rhetoric of the "welfare queen" propelled arguments in favor of a policy of "benign neglect" to reduce government intervention for poverty, progressives became wary of using the culture word to explain anything.<sup>76</sup>

Conservatives have also successfully created a negative cultural association for the term "elites," which equates the term with persons holding progressive views. Christopher Hayes traces the binary opposition between elite culture and non-elite culture back to the 1960s when George Wallace attacked civil rights advocates as "pointy-headed intellectuals."<sup>77</sup> Similarly, Richard Nixon's experience of being shut out of Whittier College's hip literary societies produced a vitriolic hatred of cultural snobbery that he used to his rhetorical advantage.<sup>78</sup> William Safire, writing Spiro Agnew's speeches, constructed a righteous animus against the "effete corps of impudent snobs" who made up the "media elite."<sup>79</sup> The point of this paper, when it discusses elites in the context of education and social mobility, is that progressives should also be concerned about the deepening chasm between the select few at the very top of the social structure and everyone else. Rather than stray away from discussions of culture and elitism, progressives should engage with these concepts and critically consider strategies for alleviating the extreme inequality (in terms of income and power) that afflicts American society.

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<sup>75</sup> William Julius Wilson, *The Ghetto Underclass*, in *THE GHETTO UNDERCLASS: ISSUES, PERSPECTIVES, AND PUBLIC POLICY 2* (William Julius Wilson ed. Sage Publications 1993).

<sup>76</sup> *Id.*

<sup>77</sup> Hayes, *supra* note 5, at 138.

<sup>78</sup> Richard Nixon, WIKIPEDIA, [http://en.wikipedia.org/wiki/Richard\\_Nixon](http://en.wikipedia.org/wiki/Richard_Nixon) (citing CONRAD BLACK, *RICHARD M. NIXON: A LIFE IN FULL* 24-25 (Public Affairs Books 2007)).

<sup>79</sup> HAYES, *supra* note 5, at 138.

Returning now to discussing a workable theory of culture, we've seen that competing progressive and conservative theories reflect the deep schism in American society (and legal discourse) between the dominant individualistic explanation for outcomes and the more contextual approach that emphasizes external, structural explanations. Conservatives tend to present social outcomes as "severed from the struggles and structural changes in society, the economy and polity. . . [and view societal] dislocations . . . as a self-imposed, self-sustaining phenomenon."<sup>80</sup> Progressives view social outcomes as deeply intertwined with the way that society is structured, in terms of opportunity, past and present discrimination, and existing hierarchy.

A progressive theory of culture, grounded in current sociological and anthropological research, emphasizes external and collective explanations for unequal social outcomes. Culture arises semi-autonomously out of collective forces and is influenced by the existing structure of society; accordingly, it cannot be easily predicted or controlled at the individual level.<sup>81</sup> Cultures arise "in relation to structural conditions in the larger society[.]" and these conditions are mediated through institutional experiences (such as education), but also through the lived experiences of individuals in their homes and communities.<sup>82</sup>

The theory of mimetic cultural reproduction, posited by Richard Dawkins and Daniel Dennett,<sup>83</sup> offers another perspective for understanding the semi-autonomous nature of culture. This theory holds that cultural ideas ("memes") follow the laws of natural selection and become

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<sup>80</sup> Loic J.D. Wacquant and William Julius Wilson, *The Cost of Racial and Class Exclusion in the Inner City*, in *THE GHETTO UNDERCLASS: ISSUES, PERSPECTIVES, AND PUBLIC POLICY* 26 (William Julius Wilson ed. Sage Publications 1993).

<sup>81</sup> Lois Weis, "Excellence" and Student Class, Race, and Gender Cultures, in *MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING* 241 (John U. Ogbu ed. Routledge 2008).

<sup>82</sup> *Id.* at 242.

<sup>83</sup> RICHARD DAWKINS, *THE SELFISH GENE* (Oxford Univ. Press 1976); DANIEL C. DENNETT, *DARWIN'S DANGEROUS IDEA* (Simon & Schuster 1995).

popular in a way that is analogous to genetic transmission.<sup>84</sup> Integral to this idea is that cultural ideas do not replicate themselves in order to provide value to humankind.<sup>85</sup> There are many instances of popular memes that are harmful to society as a whole—anti-Semitism and martyrdom being two examples.<sup>86</sup> The mimetic theory of culture, though it follows the laws of natural selection, leaves some room for human agency in explaining why certain ideas become popular. Because humankind values the memes that are the most helpful to it, the memes that advance the human condition are likely to achieve success in the replication process.<sup>87</sup> But sometimes the connection between human benefit and mimetic fertility becomes severed, resulting in the propagation of harmful cultural ideas.<sup>88</sup> So, we might say that the mimetic theory helps explain how culture operates outside of individual action.

Thus, the irony in analyzing the abstract individualist versus contextualized collective dichotomy is that the individualistic approach, in its crudest form, adopts a social Darwinist rationalization for the plight of the disadvantaged; people end up where they are because they are, or are not, genetic “winners.”<sup>89</sup> Social Darwinism applies a “survival of the fittest” theory to social relations, positing that where one ends up in society is a product of one’s genetically determined talent and cognitive ability.<sup>90</sup> Persons who achieve success and upper-middle class standing do so because they possess genetically determined intelligence, whereas persons that end up in the bottom rungs of society are there because they lack the innate ability to do any

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<sup>84</sup> DAWKINS, *supra* note 83, at 189. The gene analogue to culture is the meme, units of cultural transmission that get passed from “brain to brain.” *Id.* at 192. For a Dawkins influenced exposition of how legal concepts become popular, see Michael S. Fried, *The Evolution of legal Concepts: The Mimetic Perspective*, 39 JURIMETRICS 291 (1999).

<sup>85</sup> Dennett, *supra* note 83, at 363.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., MURRAY, *supra* note 14, at 60-61.

<sup>90</sup> See RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT 1860-1915* 174-175 (Oxford Univ. Press 1944).

better.<sup>91</sup> However, with a memetic understanding of culture, the Darwinistic concepts at work relate to the autonomous propagation of the culture, separate and apart from the individuals who are influenced by that culture.

The theories of Dawkins/Dennett and Bourdieu support the inference that individual choice is not the only factor that explains why cultures gain mass popularity through the transmission of attractive and “catchy” ideas, or memes. From Bourdieu’s habitus theory, we can say that individual choices might be bounded by internal expectations that conform to existing social structures.<sup>92</sup> With Dawkins/Dennett, we might look at culture as an independent external force that operates with a genetic logic.<sup>93</sup> If we accept that social structures influence individual interactions with a culture that at times operates independently of individuals, then culture becomes much less susceptible to a blame-the-victim approach.

The opposition between individualistic and contextualized explanations for outcomes also bears on social scientific approaches to legal policy and legal theory. Because the dominant discourse in law emphasizes abstract legal categories and individual explanations, attempts to bring in contextual explanations are usually met with skepticism.<sup>94</sup> Similarly, contextual explanations are sometimes disfavored in sociological and anthropological research. Most of the studies discussed in this paper employed qualitative methods, meaning that the scientists embedded themselves with the actors they were studying and compiled records of the social actions they witnessed. In contrast with qualitative research, quantitative research gives “priority

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<sup>91</sup> A Social Darwinism theme is discernible in Charles Murray’s book about class in America. Murray explains that children of the well-educated and affluent achieve at a higher rate because they have inherited more intelligence genes from their parents than children of less-educated and less-affluent (and apparently less-smart) parents. See MURRAY, *supra* note 14, at at 61.

<sup>92</sup> See *supra* notes 58- 65 and surrounding text.

<sup>93</sup> DAWKINS, *supra* note 83, at 192.

<sup>94</sup> Legal formalism’s skepticism toward context is best illustrated in the critiques of critical race theory’s contextualized approach, which questions the objectivity of core formalist concepts, such as knowledge and merit, often using narrative approaches. See Nancy Levit, *Critical of Race Theory, Race, Reason, Merit, and Civility*, 87 GEO. L.J. 795, 796-797 (1999).

to macro structures, often in the form of statistical regularities, which are rarely visible to the engaged actors and which must be constructed by the social scientist.”<sup>95</sup> Traditionally, quantitative methods are viewed as “more objective and scientific than interpretative [qualitative] methods.”<sup>96</sup> For this reason, the inductive<sup>97</sup> qualitative approaches discussed in this Article could be criticized as not being as rigorous as a quantitative approach.<sup>98</sup> However, “[c]ontext-bound, particularistic phenomena, [can] ‘slip through the matrix’ of quantitative analytical strategies, which typically attempt to minimize the number of variables to maximize the number of comparable cases.”<sup>99</sup> Thus, qualitative ethnographic research is able to capture nuances in values and attitudes with a specificity that is not possible with large-scale quantitative research (using abstracted survey data).<sup>100</sup> Because of its greater capacity for analyzing complexity in human interactions, qualitative ethnography’s inductive approach is useful for developing contextual and practical theories for solving social problems.

### III. How Cultural Capital Works

In order to become a “winner” and make one’s way to the top in America, one must perform abstract cognitive tasks in a high-stakes testing environment<sup>101</sup> and display a confident

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<sup>95</sup> SWARTZ, *supra* note 54, at 58.

<sup>96</sup> Linda Grant, Kathryn B. Ward and Xue Lan Rong, *Is There An Association Between Gender and Methods in Sociological Research?*, 52 AMERICAN SOCIOLOGICAL REVIEW 856, 857 (1987).

<sup>97</sup> Qualitative research is inductive in that the researcher typically compiles information from her observations and then generates a theory based on those observations.

<sup>98</sup> See Grant et al., *supra* note 96, at 857 (explaining that quantitative methods are generally regarded as more objective and scientific than more interpretative qualitative methods).

<sup>99</sup> *Id.*

<sup>100</sup> See John U. Ogbu, *Ways of Knowing The Ethnographic Approach to the Study of Collective Identity and Schooling*, in MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 64-67 (John U. Ogbu ed. Routledge 2008) (detailing the benefits of qualitative research and explaining that standard quantitative research sometimes falls short in accurately collecting social facts because subjective survey responses do not always reflect the truth, particularly because individuals tend to understate negative information).

<sup>101</sup> See GUINIER & TORRES, *supra* note 22, at 268.



interpersonal communication style in business environments.<sup>102</sup> Both of these skills—performance on evaluative tests and assertiveness in institutional environments—are linked to cultural capital. Merit test scores are a particularly stark example of how cultural advantage and disadvantage affect educational outcomes, which then impact opportunities for social mobility.<sup>103</sup> Moreover, even if one succeeds in the cognitive capital race and obtains high merit test scores, difficulties in signaling and displaying the other more intangible type of cultural capital can impede success.

The process of turning cultural capital into valuable educational credentials is markedly different, and messier, than a simple process of conversion. While there are links between a person's economic standing and his/her cultural resources, the process by which economic wealth gets converted into cultural capital is complex. Income and wealth play a role in the merit game, but a more nuanced explanation for the transmission of advantage centers on the immersive way parents transmit cultural capital to their children and deploy their own stores of cultural capital to help them succeed in institutional settings. Also relevant is the subtle ability to signal one's cultural capital in interpersonal institutional settings. Thus, cultural capital cannot be easily analogized to a commodity that can be purchased in a simple market transaction.

A common critique of America's merit system is an economic one: wealthier people can better afford test preparation services to raise the test scores of their children, which in turn increases their child's ability to matriculate at selective educational institutions.<sup>104</sup> While there

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<sup>102</sup> See LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 24, at 5.

<sup>103</sup> There is a cascade effect for merit test scores: racial and social disadvantages produce unequal children's test scores which in turn contribute to income gaps that carry through into adulthood. See Christopher Jencks and Meredith Phillips, *The Black-White Test Score Gap: Acknowledgements*, in *THE BLACK-WHITE TEST SCORE GAP* vi (Christopher Jencks and Meredith Phillips Eds. Brookings Institution Press 1998).

<sup>104</sup> See, e.g., *supra* note 22 and surrounding text.

is some truth in this line of thinking,<sup>105</sup> the argument overstates the role of economic capital and fails to account for differences in cultural capital (and deployment of that capital). The cost of the test prep courses may not be the controlling factor; rather, it might be the cultural norms that push children into so-called “shadow education.”<sup>106</sup> For instance, working class, middle class, and upper class East Asians have long taken advantage of small relatively low-cost “cram-schools” that operate in Asian enclave neighborhoods.<sup>107</sup> And, test preparation is certainly not the only factor that produces test score disparities. The exact “cause” of disparities in test scores cannot be confined to any one factor, but rather, it is likely a perfect storm of variegated social, biological, environmental, psychological, and cultural factors.<sup>108</sup> This section examines how culture, class, and race intersect to form unique barriers to social mobility, examining how families generate cultural capital in domestic settings and how individuals successfully deploy cultural capital in institutional settings.

#### ***A. The Transmission of Cultural Capital***

Rather than being available for purchase on the open market, individuals receive most of their cultural capital holdings from their parents. Parents impart valuable knowledge and skills

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<sup>105</sup> Claudia Buchmann, Dennis J. Condrón, Vincent J. Roscigno, *Shadow Education, American Style: Test Preparation, the SAT and College Enrollment*, 89 SOCIAL FORCES 435, 447, 456 (December 2010) (finding generally that “high-SES students in the United States are more likely to use shadow education than low-SES students”).

<sup>106</sup> Shadow education “encompasses behavior occurring outside of the formal school day for the purposes of ‘mastering curriculum, examinations, and earning grades for learning and skills used by schools to grant students further educational opportunities.’” *Id.* at 438 quoting David P. Baker and Gearld K. LeTendre, NATIONAL DIFFERENCES, GLOBAL SIMILARITIES: WORLD CULTURE AND THE FUTURE OF SCHOOLING 56 (Stanford Univ. Press 2005).

<sup>107</sup> See V. Louie, *The Model Minority Struggling in College: Voices of Working-Class Chinese Americans*, in MODEL MINORITY MYTH REVISITED 49 (Guofang Li and Leigh Wang eds. Information Age Publishing 2008); see also OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB, *supra* note 31, at 275 (citing THE COLLEGE BOARD, REACHING THE TOP: A REPORT OF THE NATIONAL TASK FORCE ON MINORITY HIGH ACHIEVEMENT (New York 1999)).

<sup>108</sup> See generally, THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks and Meredith Phillips Eds. Brookings Institution Press 1998) (offering an in-depth discussion of potential causes and solutions for the intransigent problem of disparities between minorities and whites on standardized tests).

in the home, arrange for outside activities that foster skill building, and activate their own cultural capital to bargain for institutional advantages for their children. In this process, upper-middle class parents provide their children with more cultural capital than do working-class and poor parents. *Unequal Childhoods*, Annette Lareau's Bourdieu influenced ethnography of twelve families in a Northeastern city, reveals how class distinctions in parenting styles produced different amounts of cultural capital, which in turn produced divergent social outcomes.<sup>109</sup> Lareau's study received national attention when Malcolm Gladwell referred to it in *Outliers*, his best-selling perspective on personal success.<sup>110</sup> The second edition, published ten years after the first edition, tracked the subjects' progress. While none of the children from the working-class and poor families had made any progress toward a college degree, all but one of the upper-middle class<sup>111</sup> children were in college, well on their way to successful lives.<sup>112</sup>

In her ethnography, Lareau broadly defines cultural capital as encompassing the "knowledge, skills, and competence" necessary to gain advantages in dominant institutional settings.<sup>113</sup> Lareau's formulation of cultural capital appears to be influenced by Michel Foucault's theory, which holds that social control is facilitated through "an infinitesimal

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<sup>109</sup> LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 24, at 361-364 (discussing the relevance of Bourdieu's theory of cultural capital to her study)

<sup>110</sup> MALCOLM GLADWELL, *OUTLIERS* 102-108 (2008)

<sup>111</sup> Lareau designated a subject family as either poor, working-class, or middle-class. Based on income levels and assets, the families that she designated as middle class are more precisely categorized as upper-middle class. *See id.* at 374-376, table C10 (showing income levels from \$85,000 to \$240,000 and residential homes worth between \$200,000 to \$240,000 for families designated as middle class). Moreover, some of the families she designated as working class, based on income and assets, should really be considered lower-middle class. *See id.* (showing two working class families as having incomes between \$35,000 to \$50,000). For a chart that lists commonly accepted income levels correlating with American class standings, see American Middle Class, WIKIPEDIA, [http://en.wikipedia.org/wiki/American\\_middle\\_class#cite\\_note-US\\_Census\\_Bureau.2C\\_distribution\\_of\\_personal\\_income.2C\\_2006-19](http://en.wikipedia.org/wiki/American_middle_class#cite_note-US_Census_Bureau.2C_distribution_of_personal_income.2C_2006-19). In any event, because I believe Lareau's observations likely cut across lines within the middle class, between the upper-middle, middle-middle, and lower middle classes (rather than a clear-cut division between the middle class and the working-class and poor), I use the term upper-middle class to refer to Lareau's middle-class families. I have made this distinction because differences between the upper-middle and other areas of the middle class become relevant in Part II's discussion of affirmative action, *infra*, as affirmative action primarily benefits individuals residing in the middle-class.

<sup>112</sup> LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 24, at 263-311.

<sup>113</sup> Lareau and Weininger, *supra* note 23, at 569.

distribution of power relations” in modern institutions.<sup>114</sup> Individuals able to successfully negotiate interactions involving these institutional “micro-processes” accumulate benefits that can be leveraged for greater social standing and power.<sup>115</sup>

Lareau’s observations indicate that upper middle-class parents verbally engaged with their children, using conversational reasoning on a frequent basis; actively directed their children’s leisure time, devoting a tremendous amount of time and resources to extracurricular experiences; and often intervened with educational institutions on their child’s behalf.<sup>116</sup> Lareau theorizes that the upper middle-class parents’ intensive use of reasoning and sophisticated dialogue produced greater vocabulary and verbal acuity in their children, which helps explain why vocabulary and verbal test scores align themselves along class lines.<sup>117</sup> The extra-curricular activities—team sports, piano lessons, gymnastics—benefited children by cultivating performative and teamwork skills, honed in a competitive setting.<sup>118</sup> The parents’ active interventions on behalf of their children produced other benefits; for instance, at one family’s insistence, a child was placed into the gifted program even though she did not initially qualify.<sup>119</sup>

This upper-middle class parenting style, which Lareau refers to as “concerted cultivation,” instilled a “sense of entitlement” in children that enabled them to confidently maneuver institutional settings and converse with adults, situating them for future success in business and professional environments.<sup>120</sup> This type of cultural capital derives its unique value from the fact that the upper-middle class parenting style imbues values and conduct that are

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<sup>114</sup> MICHEL FOUCAULT, DISCIPLINE AND PUNISH 216 (Vintage Books Edition 1979).

<sup>115</sup> Lareau and Weininger, *supra* note 23, at 569 (“Our [definition of cultural capital] emphasizes micro-interactional processes whereby individuals’ strategic use of knowledge, skills, and competence comes into contact with institutionalized standards of evaluation.”).

<sup>116</sup> LAREAU, UNEQUAL CHILDHOODS, *supra* note 24, at 3.

<sup>117</sup> For instance, there is a 150 point SAT gap between children whose parents received a college degree and children whose parents are high-school dropouts. *Id.* at 29.

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.* at 244.

<sup>120</sup> *Id.* at 2, 4-6.

closely aligned with the behavioral norms favored by institutions such as schools and businesses.<sup>121</sup> The result is that the children who are able to comport themselves with a sense of entitlement are better situated for success in schooling, higher education, and in their careers.<sup>122</sup>

Working-class and poor parents were much less conversational with their children, commanding their children with curt directives and sometimes resorting to corporal punishment.<sup>123</sup> Some poor families did not look each other in the eye when conversing and cautioned their children (living in a housing project) not to engage with strangers by making eye contact.<sup>124</sup> Lareau theorizes that the lessened verbal discourse in lower class homes likely results in lower class children having lower vocabulary scores and reading ability, lessened ability to signal confidence and assertiveness in institutional environments, and diminished ability to negotiate benefits or procedural changes from institutional actors.<sup>125</sup>

For the most part, the working-class and poor parents allowed their children a significant amount of autonomy to structure his/her play and entertainment, including the ability to watch unrestricted amounts of television.<sup>126</sup> In terms of extra-curricular activities, some lower class children played one organized sport, but for the most part, lower class children did not engage in structured organized activities outside of school.<sup>127</sup> Working-class/poor parents were also less successful in intervening on behalf of their child with educational institutions.<sup>128</sup> Some demonstrated an attitude that their child's education was the responsibility of the school and that, as a parent, it was not their responsibility to intensively assist in the process.<sup>129</sup> Other working-

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<sup>121</sup> *Id.* at 4, 237.

<sup>122</sup> *Id.* at 2-7.

<sup>123</sup> *Id.* at 3, 71, 95, 139, 147, 154-155, 160, 229.

<sup>124</sup> *Id.* at 5, 160.

<sup>125</sup> *Id.* at 29, 154, 160.

<sup>126</sup> LAREAU, UNEQUAL CHILDHOODS, *supra* note 24, at 73, 225, 242.

<sup>127</sup> *Id.* at 2-3, 224-225.

<sup>128</sup> *Id.* at 227, 243,

<sup>129</sup> *Id.* at 291-292.

class/poor parents tried to approach their child's school and resolve issues, but lacked the finesse to negotiate a solution to the problem, exhibiting anger and distrust rather than the cooperative and supportive style expected by the institution.<sup>130</sup> Other working-class and poor parents could be described as overly deferential in dealing with their child's educators; in interacting with school personnel, these parents allowed the teachers to control the conversation.<sup>131</sup>

In explaining the working-class/poor parenting style, which she refers to as the accomplishment of "natural growth," Lareau posits that working-class/poor children developed a "sense of constraint," a hesitant interpersonal style observable in institutional interactions with persons in authority.<sup>132</sup> Comparatively, the lack of assertiveness and practice with middle-class norms put working-class/poor children at a disadvantage in competitive institutional and business environments, which place a premium on so-called "soft-skills."<sup>133</sup> The lack of parental involvement in the educational process also disadvantaged the working-class/poor children, at least with respect to their upper-middle class counterparts. For instance, one impoverished child was enrolled in an honors program in high school but was abruptly informed that he was being shifted out of the program.<sup>134</sup> Parental intervention might have reversed this result.<sup>135</sup>

Although Lareau does not make these distinctions a large part of her analysis, her study shows how structural differences play into these cultural distinctions. The first connection is economic. The wealthier parents were able to devote a significant amount of monetary resources toward their children's activities—sports equipment, piano lessons, etc.<sup>136</sup> The working-class and poor families were, on the other hand, consumed with the day-to-day struggles involving

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<sup>130</sup> *Id.* at 227; see also, Lareau and Horvat, *supra* note 23, at 42-44.

<sup>131</sup> LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 24, at 157, 227-228.

<sup>132</sup> *Id.* at 6.

<sup>133</sup> *Id.* at 5-6, 244-245.

<sup>134</sup> *Id.* at 277.

<sup>135</sup> *Id.* at 297.

<sup>136</sup> *Id.* at 102, 239.

basic necessities—food, shelter, and transportation.<sup>137</sup> Secondly, differential work structures played a role. All of the upper-middle class parents enjoyed flexible work schedules that enabled them to take time off of work to attend to their children’s activities and intervene at school.<sup>138</sup> Working class jobs afford much less autonomy in terms of work structure, making it much more difficult to take an interventionist parenting role.<sup>139</sup> Moreover, the lived experiences of working class and poor parents have produced differing responses to the labor of parenting: white collar parents could easily apply their professional skills in a way that cultivated their children’s talents during leisure activities; working class parents, immersed in physical and routinized blue-collar or low-level service jobs (such as housekeeping, and house painting), did not have the luxury of an autonomous professional identity that could be applied in a domestic leisure setting.<sup>140</sup>

The final overarching trend stemming from Lareau’s work has to do with differences in how the parents conceived of education. The upper-middle class parents viewed education as having a significant private element, consisting of domestic skill-building and active engagement with institutions, whereas the working-class and poor parents entrusted the school with the primary responsibility for their child’s education.<sup>141</sup> In their frenetic marshalling of private resources (time and money) for the benefit of their children, the upper-middle class parents created a private sphere of influence that gave their children advantages over children whose parents took a more passive role, trusting that educational institutions, in and of themselves,

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<sup>137</sup> *Id.* at 248.

<sup>138</sup> *Id.* at 40-41, 49, 51.

<sup>139</sup> *Id.* at

<sup>140</sup> One might argue that a parent taking a conference call in the waiting area while his child takes a piano less is not “working.” Jason Linkins, *David Brooks Reads Some of Chris Hayes’ Book and All of the Predictable LOLs Ensue*, THE HUFFINGTON POST, [http://www.huffingtonpost.com/2012/07/13/david-brooks-chris-hayes\\_n\\_1671508.html?utm\\_hp\\_ref=mostpopular](http://www.huffingtonpost.com/2012/07/13/david-brooks-chris-hayes_n_1671508.html?utm_hp_ref=mostpopular) (July 13, 2012 5:17 p.m.).

<sup>141</sup> Annette Lareau, *Social Class Differences in Family-School Relationships: The Importance to Cultural Capital*, 60 SOCIOLOGY OF EDUC. 73, 82 (1987) and LAREAU, UNEQUAL CHILDHOODS, *supra* note 24, at 3 (observing that unlike middle-class and upper-class parents, working-class parents primarily depend on the teacher and school to educate their child and do not engage in interventionist strategies).

would be sufficient to get the job done.<sup>142</sup> Thus, the “helicopter” parenting styles that Lareau discusses reflect a broader societal trend in which the powerful have shifted reliance (and resources) away from public goods, depending more and more on strategies involving “isolation, individualism, and privatization.”<sup>143</sup> It seems that if a person models his/her conduct on a belief (conscious or otherwise) that government should play a nurturant role,<sup>144</sup> that person is bound to lose out on significant life chances.

Cultural capital transmission, by virtue of its hidden processes, masks the way that pre-existing differences replicate themselves in society. In her subjects, Lareau documents Bourdieu’s misrecognition phenomenon;<sup>145</sup> her upper-middle class subjects viewed their success as the result of hard work and effort (rather than the product of inherited advantages).<sup>146</sup> Familiar with Lareau’s work, David Brooks’ take on cultural capital de-emphasizes the arbitrary role of parental transmission of cultural (and economic) capital but lauds the work ethic of the upper-class families able to successfully inculcate their children.<sup>147</sup> “Could it be,” Brooks asks, “that the rich replicate themselves by dint of hard work and parental attention”?<sup>148</sup> In this way, Brooks imposes an individualistic framework on the transmission of cultural capital, not seeing (or choosing to see) the role that pre-existing positions plays in the process.

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<sup>142</sup> Need cite.

<sup>143</sup> KEVIN M. KRUSE, *WHITE FLIGHT ATLANTA AND THE MAKING OF MODERN CONSERVATISM* 59 (Princeton Univ. Press 2005). For a discussion of the public/private trend in the context of school desegregation, see *id.* at 125-127 (discussing how, in the context of the desegregation of the Atlanta public school system, overt segregationist and racist rhetoric gave rise to suburban policy strategies designed to delimit government resources for public goods [such as the newly integrated schools and parks] and shift responsibility for these goods into the private realm.).

<sup>144</sup> See GEORGE LAKOFF, *THE POLITICAL MIND* xvi (Penguin 2009 (discussing that a progressive theory of government sees government having a moral mission of protection and empowerment, analogous to that of a nurturant family)).

<sup>145</sup> See *supra* notes 70-71 and surrounding text.

<sup>146</sup> LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 24, at 285.

<sup>147</sup> David Brooks, *Why Our Elites Stink*, *THE N.Y. TIMES*, July 12, 2012, at A23, *available at* [http://www.nytimes.com/2012/07/13/opinion/brooks-why-our-elites-stink.html?\\_r=1&hp](http://www.nytimes.com/2012/07/13/opinion/brooks-why-our-elites-stink.html?_r=1&hp) (arguing that elite credentials are the product of “ambitious and disciplined” individuals fostered by “organized families.”).

<sup>148</sup> David Brooks and Gail Collins, *Redefining What It Means to Work Hard*, *THE CONVERSATION*, <http://opinionator.blogs.nytimes.com/2010/04/07/redefining-what-it-means-to-work-hard/> (April 7, 2010 2:27 p.m.).



In terms of understanding how Bourdieu's theory of cultural capital works to replicate existing class advantages in America's merit system, Lareau's book is invaluable. Test scores correlate with class; children of college educated parents score 150 points higher on the SAT than children whose parents are high-school dropouts.<sup>149</sup> Lareau's ethnography describes with particularity the upper-middle class parenting practices that are believed to play such a large role in these differential merit test outcomes.<sup>150</sup> These distinctions are best explained as differences between upper-middle and upper-class parenting practices on the one hand and middle-middle, lower-middle, working, and poor parenting practices on the other.<sup>151</sup> Moreover, to the extent that this interventionist parenting style seems to have taken hold within upper-middle class families in the Northeast,<sup>152</sup> it is unclear from Lareau's narrow qualitative sample how many other middle-class families have adopted these strategies. In fact, there is some reason to believe that regional (and perhaps political) differences may play a role in perpetuating the older "children should be seen and not heard" style of parenting.<sup>153</sup> Because most parents adopt child-rearing practices that reflect their own upbringing, it can take more than one generation for

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<sup>149</sup> LAREAU, UNEQUAL CHILDHOODS, *supra* note 24, at 29.

<sup>150</sup> See e.g., Christopher Jencks and Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in THE BLACK-WHITE TEST SCORE GAP 21, 24 (Christopher Jencks and Meredith Phillips Eds. Brookings Institution Press 1998) [Hereinafter, Jencks and Phillips, *The Black-White Test Score Gap: An Introduction*] (In terms of reducing the gap between black and white test scores, "middle class parenting practices seem . . . the most likely to increase children's cognitive skills).

<sup>151</sup> Unfortunately, Lareau's study focused more on upper middle-class families rather than those in the middle-middle or lower-middle. See LAREAU, UNEQUAL CHILDHOODS, *supra* note 24, at 374-376, table C10. However, two of the families that Lareau identified as working-class would be more accurately labeled as lower-middle class, supporting the argument that these parenting practices are more of a distinction between the upper-class and upper-middle class, on one hand, and the middle-middle, lower-middle, working- and poor- classes, on the other. See *id.*

<sup>152</sup> Lareau's study took place in a large Northeastern city. LAREAU, UNEQUAL CHILDHOODS, *supra* note 24, at 15.

<sup>153</sup> See, e.g., Laura Hibbard, *Texas Calls for Abstinence Only Sex Ed and Corporal Punishment in Schools*, THE HUFFINGTON POST, [http://www.huffingtonpost.com/2012/06/27/texas-republican-party-2012-platform-education\\_n\\_1632097.html](http://www.huffingtonpost.com/2012/06/27/texas-republican-party-2012-platform-education_n_1632097.html) (June 28, 2012 9:11 a.m.). In its Education platform, the Texas Republican party has apparently codified preferences for corporal punishment and an aversion to "higher-order-thinking skills." *Id.* The aversion to teaching higher-order thinking skills is based on a belief that this type of instruction could harm the balance of authority between parent and child. *Id.*

families (even middle-class families) to adopt the interventionist strategies that Lareau documents.<sup>154</sup>

In the context of affirmative action, because there are differing levels of disadvantage within the middle class and because the middle class is already in so much trouble,<sup>155</sup> Lareau's observations lend weight to the argument that diversity measures should compensate for disadvantages experienced by members of the middle class as well as lower income individuals. Although affirmative action for individuals residing in median zones lacks a certain narrative appeal,<sup>156</sup> measures implemented to increase diversity in higher education should be designed to capture promising individuals whose parents lacked the leisure time, work flexibility, and cultural finesse to engage in the cutthroat race for cultural capital.

Finally, given that the observed outcomes cut more heavily across class than race lines,<sup>157</sup> Lareau's study counters the argument that blacks do less well on merit tests because of differences in innate ability. Rather, Lareau's study supports the position that any racial differences in merit performance<sup>158</sup> are due to environmental factors, of which culture is a part.<sup>159</sup> However, it would not be accurate to suggest that race and cultural capital do not interact at all. As the below section explains, race and culture collide to play an important role in the process of cultural capital accumulation, hindering many children from achieving their full potential.

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<sup>154</sup> Jencks and Phillips, *The Black-White Test Score Gap: An Introduction*, *supra* note 150, at 24.

<sup>155</sup> See, e.g., NOAH, *supra* note 1 at 31, 34, 50, 54 (generally discussing the precarious economic position of the middle class and the real danger of sliding backwards into less advantageous SES positions).

<sup>156</sup> See Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, 88 DENVER UNIV. L. REV. 729, 731 (2011) [Hereinafter, Malamud, *Class Privilege in Legal Education: A Response to Sander*] (recognizing that affirmative action assistance for "middling" candidates does not have as much rhetorical resonance as the idea of helping low SES individuals).

<sup>157</sup> LAREAU, UNEQUAL CHILDHOODS, *supra* note 24, at 241.

<sup>158</sup> See generally, note 108 and surrounding text.

<sup>159</sup> In fact, one of the black upper-middle class children, Alexander Williams, earned the highest SAT score of any child in the book (an impressive 1350). LAREAU, UNEQUAL CHILDHOODS, *supra* note 24, at 271.

## ***B. Race and the Accumulation of Cultural Capital***

A disturbing undercurrent beneath the policy debate surrounding affirmative action is that black children continue to lag behind white children in accumulating one of the most valuable forms of cultural capital, the ability to perform on standardized tests.<sup>160</sup> The gap cannot be fully explained by economic disadvantage; controlling for standard socio-economic differences only explains a small portion of the gap.<sup>161</sup> The test scores for affluent black children remain behind those of their affluent white counterparts.<sup>162</sup> Social scientists have struggled to explain this most harmful and intransigent form of inequality. The standard conservative explanation posits that the gap is a product of defective culture or genes.<sup>163</sup> In response, progressive social scientists have mobilized to instantiate a host of external factors responsible for the gap.<sup>164</sup> Though these theories are rarely discussed in legal scholarship,<sup>165</sup> the literature on the topic illuminates how race, in addition to class, intersects with culture to interfere with social mobility.

John Ogbu's cultural-ecological theory (more popularly known as oppositional culture theory) ardently seeks to explain why American black students perform worse than white students in educational outcomes.<sup>166</sup> Professor Ogbu's oft misunderstood and misapplied<sup>167</sup>

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<sup>160</sup> Jencks and Phillips, *The Black-White Test Score Gap: An Introduction*, *supra* note 150, at 1.

<sup>161</sup> *Id.* at 9.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (explaining the prevailing conservative theories for this gap); *see also*, RICHARD J. HERRNSTEIN AND CHARLES MURRAY, *THE BELL CURVE* 270 (Free Press 1994) (positing the genetic difference theory).

<sup>164</sup> *See generally*, Christopher Jencks and Meredith Phillips, *Acknowledgements*, in *THE BLACK-WHITE TEST SCORE GAP V* (Brookings Institution Press 1998) (explaining how they formulated this book as a response to Murray and Herrnstein's *The Bell Curve*).

<sup>165</sup> *See* Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, *supra* note 36, at 978 (Professor Malamud employed these social science theories in the context of establishing that the black middle class is significantly more disadvantaged than the white middle class). For a discussion of these theories in the context of analyzing black public educational progress fifty years after *Brown v. Board of Education*, see Regina Austin, *Back to Basics: Returning to the Matter of Black Inferiority and White Supremacy in the Post-Brown Era*, 6 J. APP. PRAC. & PROCESS 79, 89-95 (2004).

<sup>166</sup> John U. Ogbu, *Collective Identity and the Burden of "Acting White," supra* note 31.

theory interposes a distinction between voluntary minorities—minorities who have immigrated to a country for better chances—and involuntary minorities—groups who were forcefully brought to a country or colonized and who collectively experienced longstanding unequal social structures, discrimination, and disenfranchisement.<sup>168</sup> Compellingly, Ogbu’s theory is comparative. He documents similar academic performance gaps outside of the United States, such as differences between the Baraku minority and the Ippan majority in Japan.<sup>169</sup> In the context of the United States, Ogbu positions blacks and the original Mexicans in the Southwest as involuntary minorities.<sup>170</sup> Though Ogbu posits that oppositional culture emerged out of the collective experiences of involuntary minorities, other scholars have drawn upon Ogbu’s theory to situate oppositional culture more broadly, in disenfranchised groups such as Latino/as<sup>171</sup> and working class whites.<sup>172</sup>

Ogbu posits that involuntary minorities sometimes develop an “oppositional” culture in response to lived experiences that are at odds with the idea that dominant institutions (such as schools) provide a certain path toward advancement.<sup>173</sup> Under Ogbu’s theory, oppositional

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<sup>167</sup> Many have misunderstood this theory in too-simplistic terms, believing that it posits that black students do not perform well in school for fear of “acting white.” See *id.* at 56 (discussing the overly reductive versions of his theory).

<sup>168</sup> *Id.* at 52.

<sup>169</sup> *Id.* at 33.

<sup>170</sup> *Id.* at 49.

<sup>171</sup> See, e.g., George Farkas, *Quantitative Studies of Oppositional Culture*, in MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 337 (John U. Ogbu Ed. Routledge 2008); Angela Valenzuela, *Ogbu’s Voluntary and Involuntary Minority Hypothesis and the Politics of Caring*, in MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 498-499 (John U. Ogbu Ed. Routledge 2008).

<sup>172</sup> Roslyn Arlin Mickelson, *The Structure of Opportunity and Adolescents’ Academic Achievement Attitudes and Behaviors*, in MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 360 (John U. Ogbu Ed. Routledge 2008); Weis, *supra* note 81, at 242-243. The explanation for this is that sometimes other disenfranchised groups develop cultural affinities for involuntary minorities. OGBU, BLACK STUDENTS IN AN AFFLUENT SUBURB, *supra* note 31, at 51.

<sup>173</sup> Ogbu, *Collective Identity and the Burden of “Acting White,” supra* note 31, at 52-55.

cultures do not develop through individual action but emerge collectively in response to deep-seated forces of subjugation.<sup>174</sup>

Because of the dissonance between past and present lived experience and the cultural norms that dominant institutions seek to instill, oppositional culture distances itself from certain behaviors—e.g., using correct English, doing homework, participating in class, and matriculating in advanced courses.<sup>175</sup> The symbiotic relationship between oppositional culture and opportunity structures is accurately captured in the following question: “should I commit myself to achieve and work hard in school, even if I cannot predict if and under what circumstances I will be recognized and rewarded for my efforts?”<sup>176</sup>

Angela Valenzuela explains oppositional culture as the formation of a self-identity that serves as a buffer from “the more psychologically damaging elements in schools and society that are associated with the dominant, individualistic model of social mobility.”<sup>177</sup> Public educational systems, “[s]teeped in a logic of technical rationality,” reduce students to unequal objects; as a coping mechanism, oppositional strategies emerge that divert students from mastering mainstream skills.<sup>178</sup>

As a unifying theory that explains differential performance between black students and white students, oppositional culture theory shows promise. However, in terms of quantifying its existence and its impact on student performance, the evidence is somewhat thin. Ogbu developed his theory through intensive ethnographic research; his interview transcripts reveal multiple examples of a clear norm of academic disengagement among black students.<sup>179</sup>

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<sup>174</sup> *Id.* at 56.

<sup>175</sup> *Id.* at 57 and John U. Ogbu, *Multiple Sources of Peer Pressure Among African American Students*, *supra* note 31, at 89.

<sup>176</sup> Mickelson, *supra* note 172, at 368.

<sup>177</sup> Valenzuela, *supra* note 171, at 503.

<sup>178</sup> *Id.* at 498, 503.

<sup>179</sup> See generally, OGBU, BLACK STUDENTS IN AN AFFLUENT SUBURB, *supra* note 31, at 17-18, 23.

Quantitative scholars have disputed Ogbu's research, finding no evidence of academic disengagement from survey responses in national longitudinal studies.<sup>180</sup> Roslyn Mickelson theorizes that the lack of empirical evidence for oppositional culture derives from the fact that survey respondents are likely to identify with dominant values when asked to answer questions about abstract attitudes about education (the type of survey questions captured in the longitudinal studies).<sup>181</sup> But when tasked with identifying concrete attitudes relating to "essential material realities, in which education may or may not lead to status maintenance or upward mobility," oppositional attitudes are more likely to be captured.<sup>182</sup> Mickelson's study found oppositional attitudes among both blacks and whites.<sup>183</sup> She also found that oppositional attitudes were strongest for those students whose parents had the least education.<sup>184</sup> George Farkas has found that oppositional culture "contributed significantly to the lower reading performance of all children who experienced it, but it only explained a modest proportion of the low-income, Black, and Hispanic reading deficits by comparison with middle-income and White children."<sup>185</sup>

In his response to the study conducted by Phillip J. Cook and Jens Ludwig, which raised doubts about the existence of oppositional culture, Harvard researcher Ronald Ferguson writes that perhaps the quantitative scholars are seeking answers to the wrong question.<sup>186</sup> While

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<sup>180</sup> See, e.g., Philip J. Cook and Jens Ludwig, *The Burden of "Acting White": Do Black Adolescents Disparage Academic Achievement?*, in *THE BLACK-WHITE TEST SCORE GAP 375* (Christopher Jencks and Meredith Phillips Eds. Brookings Institution Press 1998); Douglas B. Downey, *A Funny Thing Happened on the way to Confirming Oppositional Culture Theory*, in *MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING 307* (John U. Ogbu ed. Routledge 2008).

<sup>181</sup> Mickelson, *supra* note 172, at 352.

<sup>182</sup> *Id.* at 352.

<sup>183</sup> *Id.* at 360.

<sup>184</sup> *Id.* at 360.

<sup>185</sup> Farkas, *supra* note 171, at 343.

<sup>186</sup> Ronald Ferguson, *Comment to Philip J. Cook and Jens Ludwig, The Burden of "Acting White": Do Black Adolescents Disparage Academic Achievement?*, in *THE BLACK-WHITE TEST SCORE GAP 376* (Christopher Jencks and Meredith Phillips eds. Brookings Institution Press 1998).

oppositional culture may not fully explain the gaps in achievement between black and white students, it does offer a compelling theory for why the gap is not closing faster.<sup>187</sup>

Oppositional culture theory, thoroughly documented through qualitative research but somewhat weak on the quantitative side, explains how culture acts as a barrier to achievement and mobility. Properly understood, it sits in alignment with a Bourdieusian theory of culture—it is produced collectively, in a semi-autonomous way, and in response to external social forces.<sup>188</sup> Because it holds that culture can develop on its own, without regard for whether a particular norm or belief carries value for humankind, a mimetic<sup>189</sup> explanation is also helpful for understanding the phenomenon. Systemic conditions, arising out of de jure and de facto discrimination against blacks—in education, finance, housing, and work—produced a fertile breeding ground for oppositional culture. Because oppositional culture emerged in response to deep-seated structural inequality, we cannot expect the culture to change without also changing the underlying systemic factors that gave rise to its production.<sup>190</sup>

Finally, oppositional culture seems particularly useful for explaining why middle-class black students perform at a lower level than white students in their cohort.<sup>191</sup> Middle-class blacks, besides being more economically disadvantaged in comparison to middle-class whites,<sup>192</sup> are vulnerable to unique cultural forces that inhibit success in the merit game. Progressive theorists should reject conservative theories that situate culture in the realm of agenic

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<sup>187</sup> *Id.*

<sup>188</sup> See *supra* notes 61-65, 81-82 and surrounding text.

<sup>189</sup> See *supra* notes 83-89 and surrounding text.

<sup>190</sup> Weis, *supra* note 81, at 252.

<sup>191</sup> Civic and educational leaders in Shaker Heights, Ohio (an affluent Cleveland suburb) invited Professor Ogbu to study its high school, considered one of the best in the nation, in an effort to determine why its affluent black students were under-performing. OGBU, BLACK STUDENTS IN AN AFFLUENT SUBURB, *supra* note 31, at xi.

<sup>192</sup> See MELVIN L. OLIVER AND THOMAS M. SHAPIRO, BLACK WEALTH WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 15-17, 19-20, 21, 94-95 (Routledge 1995) (tracing the roots of black middle class disadvantage [in wealth accumulation and asset worth] to redlining, restrictive covenants, mortgage discrimination, sub-prime lending).

individualism, and appreciate that cultural disadvantage flows from enduring and systemic structures of inequality, structures that have yet to be fixed. Instead of an individualistic framework, we must consider the “impact of relational, organizational, and collective processes that embody the social structure of inequality.”<sup>193</sup>

In addition to culture, related psychological factors intersect with race to hinder the acquisition of academic cultural capital. Claude Steele’s stereotype threat theory and Ronald Ferguson’s work on differential teacher expectations are two such examples.<sup>194</sup> In a study involving Stanford undergraduate students, Professor Steele documented how black students, when informed that a test was a measure of cognitive ability, performed more poorly than whites (after controlling for SAT scores).<sup>195</sup> The gap in performance disappeared when the test was framed as a “laboratory problem-solving task.”<sup>196</sup> In another study conducted by Steele, black student performance suffered when they were “primed” and asked to record their race before the exam.<sup>197</sup> Black study participants who did not receive the race priming, performed at a higher level.<sup>198</sup> Steele’s study establishes how internalized racial stereotypes make it more difficult for blacks (and likely other minorities) to acquire cultural capital in the form of high test scores.

Differential teacher expectations, based partially on experience and partially on racial stereotypes, may also inhibit black academic performance.<sup>199</sup> Professor Ferguson, in reviewing the literature on this topic, points out that teachers, expecting less of their black students

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<sup>193</sup> William Julius Wilson, *The Role of the Environment in the Black-White Test Score Gap*, in *THE BLACK-WHITE TEST SCORE GAP* 508 (Christopher Jencks and Meredith Phillips eds. Brookings Institution Press 1998).

<sup>194</sup> Steele and Aronson, *supra* note 33, at 401-422; Ferguson, *Teachers’ Perceptions and Expectations and the Black-White Test Score Gap*, *supra* note 32, at 273-311.

<sup>195</sup> Steele and Aronson, *supra* note 33, at 405-408.

<sup>196</sup> *Id.* at 405-407.

<sup>197</sup> *Id.* at 418-421.

<sup>198</sup> *Id.*

<sup>199</sup> The problem is complex. Ferguson notes that “teachers’ and students’ behaviors might be both causes and consequences of racially disparate perceptions and expectations regarding achievement, and might therefore contribute to perpetuating the black-white test score gap.” Ferguson, *supra* note 32, at 275.



(consciously or unconsciously), provide less positive feedback and less encouragement to black students.<sup>200</sup> Teachers might also withdraw support for black children, based on perceptions that black children create more difficulties in the classroom.<sup>201</sup> They may unconsciously allow white children to speak more in class.<sup>202</sup> These micro-processes in the classroom could very well “affect the degree to which black students disengage from the pursuit of excellence, or alternatively, stay engaged and aim for mastery.”<sup>203</sup> Although these two theories relate more to psychology than cultural theory, they are certainly connected to widely held cultural attitudes about black educational performance.

Although this Article has primarily focused on the role of culture, other environmental factors play a prodigious role in shaping unequal outcomes in the acquisition of cultural capital. In a recent study on the black-white test score gap, which shows that black kindergarteners have made significant cognitive gains in math and reading (in comparison with previous studies),<sup>204</sup> statisticians were able to erase the test score gap completely, after controlling for just a few environmental and socio-cultural variables.<sup>205</sup> The environmental variables included the child’s age, birth weight, WIC participation, and mother’s age at first birth.<sup>206</sup> The socio-cultural factors

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<sup>200</sup> *Id.* at 294 (citing Marylee Taylor, *Race, Sex, and the Expression of Self-Fulfilling Prophecies in a Laboratory Teaching Situation*, 6 PERSONALITY AND SOCIAL PSYCHOLOGY 897-912 (1979)).

<sup>201</sup> *Id.* at 300.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> The study authors theorize that their higher scores (in comparison to an earlier study using the Children of the National Longitudinal Survey of Youth) are most likely due to more random sampling and better co-variables, but also because of “real gains by recent cohorts of blacks.” Ronald G. Fryer, Jr. and Steven D. Levitt, *Understanding the Black-White Test Score Gap in the First Two Years of School*, 86 THE REVIEW OF ECONOMICS AND STATISTICS 447, 448 (2004). For the earlier study, which was only able to reduce the black-white gap by two-thirds, after controlling for an extensive socio-economic and environmental variables, see Meredith Phillips, Jeanne Brooks-Gunn, Greg J. Duncan, Pamela Klebanov, and Jonathan Crane, *Family Background, Parenting Practices, and the Black-White Test Score Gap*, in THE BLACK-WHITE TEST SCORE GAP 121-126, Table 4-5 (Meredith Phillips and Christopher Jencks eds. Brookings Institution Press 1998).

<sup>205</sup> Fryer and Levitt, *supra* note 204, at 447, 450, table 1.

<sup>206</sup> *Id.* at 447, 450, table 1. I refer to these measures as environmental factors because they are mostly aimed at capturing physical and biological aspects of the child’s environment. But obviously, WIC participation (a nutrition program aimed at low income mothers and children) correlates with both the environment and SES factors. *Id.* at 45-451.

included an SES status measure and the number of children's books in the home.<sup>207</sup> This study shows the difficulty in disconnecting environmental factors with cultural factors. For instance, in terms of the quantifiable attributes of a child's home environment, the number of books in a home could be viewed as environmental. But the emphasis that parents place on purchasing and using books in the home is also a socio-cultural factor.

Although the black kindergartener study participants with similar backgrounds as the white kindergartener participants started school with similar test scores, gaps emerged between the start of kindergarten and the start of first grade.<sup>208</sup> The only explanation for which the authors could find any empirical support was that there were appreciable environmental differences in the schools that black and white children attended.<sup>209</sup> The authors noted that when looking at traditional indicators of school quality—average class sizes, teacher education, technological resources—the quality of schools did not differ for black and white children.<sup>210</sup> But when analyzing subjective survey responses from school principals about their school's quality, questions directed toward a school's gang problems, loitering, litter around the school, and percentage of students eligible for free lunches, the presence of these factors was much higher for black schoolchildren than for white schoolchildren.<sup>211</sup> Although difficult to capture quantitatively, these qualitative differences in school environment could correlate with a more negative cultural and institutional environment for learning.<sup>212</sup> As Angela Valenzuela points out,

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<sup>207</sup> *Id.* at 450. The SES measure included parental education, parental occupation, and household income. *Id.* Again, the books in the home measure could also be viewed as environmental and not connected to SES, illustrating the difficulty in separating the environmental from the socio-cultural.

<sup>208</sup> *Id.* at 447, 455.

<sup>209</sup> *Id.* at 457.

<sup>210</sup> Fryer and Levitt, *supra* note 204, at 457.

<sup>211</sup> *Id.* at 457-458. The authors caution that, statistically, the impact of these school quality differences on student outcomes can only be viewed as suggestive. *Id.* at 458.

<sup>212</sup> See Valenzuela, *supra* note 171, at 496, 498, 503-504 (describing the institutional environment of a low-income Houston school as treating students and their families like objects on an assembly line).

the bureaucratic institutional culture that is often found in troubled low-income schools could very well be a Petri dish for oppositional culture.<sup>213</sup>

To conclude this section, both home and school environments bear on the competition to accumulate cultural capital. Cultural, psychological, and environmental barriers, built from and shaped by the structure of inequality, place blacks and other disadvantaged minorities far behind the starting gate. These impediments have been observed in middle class, affluent, and elite spaces. As examples of differential disadvantages that likely contribute to unequal outcomes, the theories discussed here justify small-scale intervention in the merit system to achieve diversity, even if these measures primarily benefit middle-class individuals.<sup>214</sup> In addition to the barriers that obstruct the accumulation of cultural capital, as the next section shows, there can also be interference with the deployment of cultural capital.

### *C. Signaling Cultural Capital in Institutional Settings*

In the merit game, not only is it necessary to *accumulate* cultural capital for use in the educational process, the *display* and *deployment* of that capital in institutional settings is equally important. As with the accumulation of cultural capital, class and race can negatively interfere with the deployment of cultural capital, compounding pre-existing disadvantages in cultural capital holdings and contributing, again, to unequal outcomes. As Lareau points out in her ethnography, cultural capital operates in two settings: (1) when parents employed home-based strategies to instill skills in their children, allowing them to accumulate cultural capital; and (2)

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<sup>213</sup> *Id.* at 503-504.

<sup>214</sup> Professor Malamud convincingly makes this argument in terms of differential economic disadvantage between the black and white middle classes. See Malamud, *Assessing Class-Based Affirmative Action*, *supra* note 36, at 467 and Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, *supra* note 36, at 949 (arguing that because blacks are systematically worse off with regard to “housing, occupational advancement, income and income security, wealth, educational opportunity, the intergenerational transmission of middle class status, and the enjoyment of the public dignity that customarily both defines and accompanies membership in the middle class” affirmative action is justified).

when parents deployed their own cultural capital on behalf of their children in institutional settings.<sup>215</sup> In looking at this second institutional setting, beyond the context of parental intervention, we will see that the subtle game of signaling similarity and competence masks the ways that pre-existing advantages produce unequal outcomes. In a nutshell, culture produces differences in interpersonal behaviors and attitudinal differences (or, in Bourdieusian terms, differences in habitus<sup>216</sup>) that get translated and abstracted into institutional norms (such as being a good organizational “fit” and having appropriate soft skills), which in turn impact a person’s chances at institutional advancement.

It used to be that individuals were selected for elite jobs based on their WASP social class status.<sup>217</sup> Being from the right kind of family mattered more than test scores. As meritocracy has ostensibly been democratized, test scores and selectivity of educational institutions matter more than one’s family background. However, subtle interpersonal forces can still play an implicit role in the allocation of status positions within institutions.

Homophily is perhaps the most easily accessible explanation for how advancement opportunities open up to individuals who possess cultural assets, mirroring the kind of cultural capital held by institutional decision-makers.<sup>218</sup> Similar to how cultural disparities interact with race to impact educational outcomes, cultural homophily also interconnects with race to structure

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<sup>215</sup> LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 24, at 2-13.

<sup>216</sup> *See supra* notes 57 - 60 and surrounding text.

<sup>217</sup> See generally, MILLS, *supra* note 19, at 58-60 (describing “establishment” families as being white, protestant, and the same privileged social background); ERWIN O. SMIGEL, *THE WALL STREET LAWYER* 72 (Indiana Univ. Press. 1969) (describing how the first corporate lawyers all hailed from similar privileged WASP backgrounds).

<sup>218</sup> Northwestern Business School professor Lauren Rivera documents homophily (the tendency of individuals to link up with others with similar characteristics) in her work on corporate hiring practices, where homophily is translated into such practical sounding concepts like being “a good fit” with the firm. Lauren A. Rivera, *Cultural Reproduction in the Labor Market: Homophily in Job Interviews*, 7, 9, 14, 19, working paper, available at [http://www.wjh.harvard.edu/~hos/papers/Lauren\\_Rivera.pdf](http://www.wjh.harvard.edu/~hos/papers/Lauren_Rivera.pdf).

opportunity in the business world.<sup>219</sup> For instance, David Wilkins and Mitu Gulati theorize that homophilic cultural preferences exercised by white corporate law firm partners explain the paucity of black lawyers at the partnership level at large law firms.<sup>220</sup> Homophily causes white partners to select mostly white associates for informal mentoring (on the basis of potential for growth), leaving black associates out of this valuable skill-building process.<sup>221</sup>

In terms of interpersonal communication style, cultural homophily might also operate more subtly to impact institutional outcomes. Recent communication psychology studies indicate that lower class individuals utilize different conversational styles, showing more engagement (eye contact, head nods, and laughs) than individuals from wealthier backgrounds (less eye contact, doodling, and self-grooming).<sup>222</sup> In another study, observers noted these subtle differences in behavior and, within a few minutes, were able to make a better than random estimation as to the subject's class background.<sup>223</sup>

Homophily might also produce subtle preferences for individuals who share similar attitudinal outlooks (or habituses). Communication psychology studies indicate that class distinctions crossover from mere nonverbal displays and connect up with deeper worldview differences.<sup>224</sup> Scientists theorize that lower-class individuals feel less of a sense of control and therefore, are more likely to exercise a contextual perspective (one that emphasizes external

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<sup>219</sup> See generally, David Wilkins and G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 565-568 (May 1996).

<sup>220</sup> *Id.* at 565-568.

<sup>221</sup> *Id.*

<sup>222</sup> See Paul K. Piff, Michael W. Kraus, Stephane Cote, Bonnie Hayden Cheng, Dacher Keltner, *Having Less, Giving More: The Influence of Social Class on Prosocial Behavior*, 99 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 771, 771-772 (2010) [Hereinafter, Piff et al., *Having Less, Giving More*]. One caveat here is that these experiments were conducted in laboratory settings; the class differences may not play as great a role in a job interview, for instance, where both actors are incentivized to show engagement.

<sup>223</sup> See generally, Michael W. Kraus and Dacher Keltner, *Signs of Socioeconomic Status: A Thin-Slicing Approach*, 20 PSYCHOLOGICAL SCIENCE 99 (2009); Michael W. Kraus, Paul K. Piff and Dacher Keltner, *Social Class as Culture: The Convergence of Resources and Rank in the Social Realm*, 20 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 246-250 (2011) [Hereinafter Piff and Kraus et al., *Social Class as Culture*].

<sup>224</sup> See Michael W. Kraus, Paul K. Piff, and Dacher Keltner, *Social Class, Sense of Control, and Social Explanation*, 97 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 992, 998, 1001 (2009).

forces) to explain outcomes.<sup>225</sup> Wealthier individuals, on the other hand, are more likely to adhere to a dispositional perspective (one that relies on individual agency) to explain outcomes.<sup>226</sup> Lower status individuals are generally “more attuned to the social context and invested in their interactions with others”<sup>227</sup> than wealthier individuals for whom the “pursuit of self interest is a more fundamental motive.”<sup>228</sup>

The “other-oriented” worldview of lower-class individuals apparently makes them more prone to being pro-social and charitable<sup>229</sup> than wealthier individuals, who, because of “greater resources, freedom, and independence . . . [adopt] self-focused social cognitive tendencies.”<sup>230</sup> For instance, in a series of studies, upper class drivers were more likely to cut off other vehicles and pedestrians in crosswalks than lower class drivers.<sup>231</sup> Upper class subjects showed more greed-oriented conduct. When told that laboratory credits could be redeemed for cash, the wealthier study participants kept more credits than lower class subjects.<sup>232</sup> After study administrators explained that a jar of candy was earmarked for children in an adjoining laboratory but gave participants permission to take some pieces, wealthier study participants took more candy than poorer participants.<sup>233</sup> Finally, in the context of playing a game, upper class individuals were more likely engage in cheating than lower class individuals.<sup>234</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 992, 1001.

<sup>227</sup> Piff et al., *Having Less, Giving More*, *supra* note 222, at 771, 772.

<sup>228</sup> Paul K. Piff, Daniel M. Stancato, Stephane Cote, Rodolfo Mendoza-Denton, and Dacher Keltner, *Higher Social Class Predicts Increased Unethical Behavior*, 109 PNAS 4086, 4089 (2012) [Hereinafter Piff et. al., *Higher Social Class Predicts Increased Unethical Behavior*].

<sup>229</sup> Given that LSAT and socio-economic status are correlated, this could explain why law graduates with lower LSAT scores are more inclined to engage in pro-bono legal service. See Richard O. Lempert, David L. Chambers, and Terry K. Adams, “*Michigan’s Minority Graduates in Practice: The River Runs Through Law School*,” 25 LAW & SOCIAL INQUIRY 395, 496-497 (2000) cited in *GUINIER & TORRES*, *supra* note 22, at 269-270.

<sup>230</sup> Piff et. al., *Higher Social Class Predicts Increased Unethical Behavior*, *supra* note 228, at 4086.

<sup>231</sup> *Id.* at 4087.

<sup>232</sup> *Id.* at 4086.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 4088.

Given what we know about implicit bias and thin slicing,<sup>235</sup> it is not unreasonable to assume that in institutional interactions with individuals in power, homophily could create more opportunities for persons who exhibit less altruistic and more dispositional behaviors. For instance, implicit racial bias can manifest itself in nonverbal communication cues that express (on the interviewer's part) discomfort and trust.<sup>236</sup> These cues then cause a mirroring effect, creating interactions that are perceived (by the interviewer) as being awkward and disjointed.<sup>237</sup> The end result is that the interviewer comes away from the interview with the homophilic reaction that the interviewee does not have the "right fit" for the position."<sup>238</sup> Given that socioeconomic differences translate into nonverbal cues that can also be the subject of thin-slicing,<sup>239</sup> it follows that a self-fulfilling process could operate between upper-class interviewers and lower-class interviewers.<sup>240</sup> That these micro-interactions might reward greedy and self-interested attitudes over more pro-social attitudes is not good news for our institutions. Again, with an individualized conception of meritocracy, these forces are largely hidden from view.

When we add racial differences into this complex psycho-social mix, the effect is compounded. The soft skills concept presents hidden opportunities for institutional actors to use class and race as proxies for job-related skills: for example, interactions with clients, co-workers, and supervisors; motivation; enthusiasm; and having a "go-getter" or "self-starter"

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<sup>235</sup> For an explanation of the neuroscience theories related to thin slicing, implicit bias, and the implicit association test, see Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 SOUTHERN CALIF. INTERDISCIPLINARY JOURNAL 237, 260-263 (2010).

<sup>236</sup> *Id.* at 261, note 207 (citing MALCOLM GLADWELL, *BLINK* 85-86 (Back Bay Books 2005); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 961-962 (2006) (citing Carol O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. Experimental Soc. Psychol. 109 (1974))).

<sup>237</sup> *Id.* at 261-262.

<sup>238</sup> *Id.*

<sup>239</sup> See *supra* note 223 and surrounding text.

<sup>240</sup> Professors Piff and Kraus, the scientists behind most of the communication psychology studies relating to class, predict that persons from disadvantaged SES backgrounds might fare worse in institutional environments composed predominantly of individuals from wealthier backgrounds. Piff and Kraus et al., *Social Class as Culture*, *supra* note 223, at 249.

attitude.<sup>241</sup> Sociologists Phillip Moss and Chris Tilly conducted a qualitative study of employers and sought to uncover connections between racially biased attitudes and the soft skills concept.<sup>242</sup> When employers were asked to disclose their general perceptions of blacks' soft skills, the employers verbalized offensive stereotypes, framed in soft-skills business parlance, that blacks were generally too hostile and too defensive.<sup>243</sup> Other polled employers described potential black employees as unmotivated and unskilled at communicating meaning to others.<sup>244</sup>

Soft skills, a professional management concept, hides racism in action and insulates it from civil remedies. But the soft skills concept also masks how differences in cultural capital holdings intersect with class and race to impact actors competing in institutional settings. In terms of disadvantage having both a racialized and cultural component, William Julius Wilson writes that while impoverished blacks adopt many success strategies useful for traversing harsh inner-city landscapes, these cultural strategies are not aligned with the middle class behaviors that business institutions expect from employees.<sup>245</sup> Outside of poverty and in the context of competition for elite law jobs, David Wilkins and Mitu Gulati suggest that homophilic reliance on subjective concepts like soft-skills explains the underrepresentation of blacks in large corporate law firms.<sup>246</sup> Linda Davila makes this connection to explain the underrepresentation of Hispanics in large law firms.<sup>247</sup>

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<sup>241</sup> Phillip Moss and Chris Tilly, *"Soft" Skills and Race*, in RACE CLASS AND GENDER 300 (Margaret L. Andersen and Patricia Hill Collins eds., Seventh Edition, Wadsworth Cengage Learning 2010).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 302.

<sup>244</sup> *Id.* at 303-304.

<sup>245</sup> William Julius Wilson, *Jobless Poverty, A New Form of Social Dislocation in the Inner-City Ghetto*, in SOCIAL STRATIFICATION, CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 342, 344, 347 (David B. David B. Grusky Ed. Westview 2008) [Hereinafter Wilson, *Jobless Poverty, A New Form of Social Dislocation*].

<sup>246</sup> Wilkins & Gulati, *supra* note 219, at 499, 547, 557-559.

<sup>247</sup> Linda E. Davila, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 STAN. L. REV. 1403, 1413 (1987) cited by Kevin R. Johnson and Angela Onwuachi-Wilig, *Cry Me A River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools"*, 7 AFR.-AM. L. & POL'Y REP. 1, 24, notes 121 and 122 (2005).



Another way to think about race and cultural capital deployment is to understand that being white functions as a kind of cultural capital that is not available to members of disadvantaged minorities because, in defusing harmful stereotypes and monitoring institutions for discriminatory impact, minorities must do more work to successfully deploy their cultural capital.<sup>248</sup> In a study that pre-dated her *Unequal Childhoods* book, Annette Lareau and Erin McNamara Horvat observed that in negotiating on behalf of their children with educational actors, black parents came to the table with a realistic cynicism, grounded in past experiences with de jure and de facto racial discrimination, and were compelled to vigilantly monitor institutions to ensure that their children were treated fairly.<sup>249</sup> Ensuring equal treatment for their children was not a task that the white parents had to deal with. The heavier institutional weight lifting cut across class lines and posed a challenge for black parents from all class sections.<sup>250</sup>

While all black parents faced additional challenges in the competition to accumulate cultural capital for their children's benefit, middle-class and upper-class blacks demonstrated more success in these institutional settings.<sup>251</sup> In order to succeed in negotiating advantages, black parents were required to hide their concerns about disparate racial treatment and display a deferential and supportive attitude toward the institutional actors.<sup>252</sup> For instance, Lareau describes one middle class black family who successfully deployed their cultural capital in asking for their child to be tested for the gifted program.<sup>253</sup> The strategy worked because the family was able to comply with institutional norms to make their request in a colorblind way and

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<sup>248</sup> See Lareau and Horvat, *supra* note 23, at 37, 49.

<sup>249</sup> *Id.*

<sup>250</sup> For instance, in *Unequal Childhoods*, Lareau observed that the upper-middle class black parents were constantly monitoring their children for signs of racial exclusion and discrimination at the hands of peers and institutions. LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 24, at 120-124, 240.

<sup>251</sup> Lareau and Horvat, *supra* note 23, at 42-44.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

in a way that subtly flattered the school administrators.<sup>254</sup> On the other hand, a working class family who aggressively expressed criticism about racial imbalance in the school's curriculum and in its extra-curricular activities (not spending much time on Martin Luther King day) were dismissed by educators as destructive, illegitimate, and "most upsetting."<sup>255</sup> Lareau and Horvat argue that in the context of these micro-level interactions with institutional actors, "[w]hiteness represents a largely hidden cultural resource that facilitates white parents' compliance with the standard of deferential and positive parental involvement in school."<sup>256</sup>

The Asian-American experience offers another example of the complex intersection between race and culture in institutional settings. The "model minority" narrative for Asian-Americans holds that Asian-Americans exhibit exceptional merit and drive. With test scores that exceed most other ethnic groups, Asian-Americans are highly represented in elite educational institutions.<sup>257</sup> As discussed in Part III, Asian-American immigrant culture embodies striving norms and many Asian-American enclave neighborhoods contain locally operated "cram-schools" that offer opportunities for rigorous practice on merit tests.<sup>258</sup> In this aspect of the model minority story, Asian-Americans benefit from increased access to cultural capital, which contradicts a simple economic explanation of cultural capital, as Asian-American accumulation of cultural capital does not necessarily link up with high SES status.<sup>259</sup>

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 43-44.

<sup>256</sup> *Id.* at 49.

<sup>257</sup> The success of East-Asians can be seen in their numbers in New York City's elite public high schools such as Stuyvesant and Hunter. See Wesley Yang, *Paper Tigers*, NEW YORK MAGAZINE, May 8, 2011, at \*3, <http://nymag.com/news/features/asian-americans-2011-5/> (Stuyvesant High School is 73.6% Asian); HAYES, *supra* note 5, at 36 (Hunter High School is 48.5% Asian). Asians make up approximately 5% of the American population. Demographics of the United States, WIKIPEDIA, [http://en.wikipedia.org/wiki/Demographics\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Demographics_of_the_United_States). Asians represent approximately 25% of the students at elite universities. Peter H. Huang, *Tiger Cub Strikes Back: Memoirs of an Ex-Child Prodigy About Parenting and Legal Education* 21 (University of Colorado Legal Research Paper 11-17), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1958366](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1958366).

<sup>258</sup> See *supra* notes 105-107.

<sup>259</sup> See *id.*

However, the percentage of Asian-Americans who have made their way to the top of elite corporate institutions is at odds with their success in gaining entrance to elite educational institutions. While Asians make up approximately 5% of the American population at large, Asians only hold .3% of corporate officer positions and less than 1% of corporate board positions.<sup>260</sup> One of the explanations for this vast underrepresentation has to do with cultural stereotypes that Asians are too deferential and unassertive.<sup>261</sup> This stereotype, which may have some basis in cultural differences,<sup>262</sup> plays out in corporate decision-making that passes over-qualified Asians on the basis that they do not have the right fit or the appropriate kind of soft skills.<sup>263</sup> In a *New York* magazine article, written against the backdrop of Amy Chua's *Tiger Mother* confessions,<sup>264</sup> Wesley Yang laments that there are no cram-schools for networking, self-promotion, and self-assertion for Asians and documents an entire industry devoted to teaching Asian-Americans more aggressive leadership styles.<sup>265</sup> Again, relying on the model minority narrative for Asians, cognizant of the potential for harmful essentialization, it seems that cultural capital works in favor of Asians in one way (gaining entry into elite educational institutions) but

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<sup>260</sup> See Yang, *supra* note 257, at \*7.

<sup>261</sup> Frederick Ti.L. Leong and James A. Grand, *Career and Work Implications of the Model Minority Myth and Other Stereotypes for Asian Americans*, in MODEL MINORITY MYTH REVISITED 101 (Guofang Li and Lihshing Wang eds. Information Age Publishing 2008).

<sup>262</sup> *Id.* at 103 (citing J. Morishima, *Special Employment Issues for Asian Americans*, 10 PUBLIC PERSONNEL MANAGEMENT, 384-392 (1981)).

<sup>263</sup> *Id.* at 101.

<sup>264</sup> Amy Chua, *Why Chinese Mothers Are Superior*, THE WALL STREET JOURNAL, JANUARY 8, 2011, at C1, available at <http://online.wsj.com/article/SB10001424052748704111504576059713528698754.html#printMode>. Chua described her parenting style as follows:

Chinese parents demand perfect grades because they believe that their child can get them. If their child doesn't get them, the Chinese parent assumes it's because the child didn't work hard enough. That's why the solution to substandard performance is always to excoriate, punish and shame the child. The Chinese parent believes that their child will be strong enough to take the shaming and to improve from it.

<sup>265</sup> For a feminist critique of Yang's *New York Magazine* article, see Nina Rastogi, *A Response to Wesley Yang's "Paper Tigers,"* BROWBEAT, [http://www.slate.com/blogs/browbeat/2011/05/10/a\\_response\\_to\\_wesley\\_yang\\_s\\_paper\\_tigers.html](http://www.slate.com/blogs/browbeat/2011/05/10/a_response_to_wesley_yang_s_paper_tigers.html) (May 10, 2011). The author asks whether Wang is talking about Asian culture in general or simply documenting the woes of "dweeby" male losers, Asian and Non-Asian alike. See *id.*

works against their favor in institutional business settings, where one is expected to display a complex mix of self-interested, assertive, and risk-taking conduct. In this way, the Asian-American experience demonstrates how culture impacts differently situated groups in divergent ways. And, in terms of explaining educational outcomes, the Asian-American experience illustrates that cultural factors are just as dispositive as economic factors.

#### **IV. Affirmative Action in the Context of Race, Class, and Culture**

As this Article has sought to demonstrate, class position is much more complex than simple economic measures (income and wealth) are able to show. Cultural capital is integral to social mobility, but an individualized focus on merit obscures the processes that govern its transfer from one generation to the next and masks barriers that obstruct both its accumulation and deployment. This Article has also demonstrated that there is an unequal division of cultural resources within the middle class—between the upper-middle class and its lower positions as well as between middle class whites and middle class blacks. This uneven distribution of cultural capital has contributed to the extreme social divergence—the chasm between the top of the social structure and everyone else—that has come to characterize class structure in America today. These observations are relevant to the ongoing policy debate concerning affirmative action and the goal of achieving diversity in educational institutions.

Affirmative action, merit, and class are receiving increased legal attention today, as the Supreme Court granted certiorari in *Fisher v. University of Texas at Austin*,<sup>266</sup> and will reconsider the vitality of race-conscious affirmative action that it narrowly approved in *Grutter v.*

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<sup>266</sup> 132 S. Ct. 1536 (Feb. 21, 2012).

*Bollinger*.<sup>267</sup> This section will first summarize the relevant Supreme Court jurisprudence on affirmative action in higher education and then describe the relevant portions of the Fifth Circuit's decision in *Fisher*. This section will then suggest a potential approach the Court could take in affirming the *Fisher* case and revitalizing Justice O'Connor's reasoning in *Grutter*. And finally, this section will explain why, from a policy perspective, an affirmance of the University of Texas's diversity program is responsive to some of the disturbing social trends toward distance and divergence we are seeing in society today. The last subsection remarks on the fact that because race and class cannot be disentangled, race-neutral diversity programs cannot, in effect, achieve a bona fide level of diversity, from a class or racial perspective.

#### ***A. The Supreme Court's Affirmative Action Jurisprudence***

To briefly summarize the relevant jurisprudence, in 1978, in *Regents of the University of California v. Bakke*,<sup>268</sup> the Supreme Court reviewed an affirmative action program used at the Medical School at the University of California at Davis. The program utilized separate admissions track for minority students, insulated these students from other applicants, and employed a quota system—a set number of spaces in the class—to be filled through the separate minority admissions program.<sup>269</sup> The *Bakke* decision was fractured, producing six different opinions, with Justice Powell casting the deciding vote to overturn the program on the basis that it impermissibly used race, in violation of the Fourteenth Amendment's Equal Protection clause.<sup>270</sup>

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<sup>267</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>268</sup> 438 U.S. 265 (1978).

<sup>269</sup> *Id.* at 274-276.

<sup>270</sup> *Id.* at 319.

As a threshold matter, all racial classifications, regardless of benign intent, are subject to the strict scrutiny standard.<sup>271</sup> Strict scrutiny, in this context, requires that “all racial classifications to be narrowly tailored to further compelling governmental interests.”<sup>272</sup> The strict scrutiny inquiry encompasses a two-pronged approach, with the first prong focused on whether or not there is a compelling government interest in classifying individuals by their race and the second prong centered on whether or not the particular classification scheme is “narrowly tailored” to meet the government’s goal.

In *Bakke*, while analyzing the four possible state interests the U.C. Davis Medical School offered to justify its race-conscious affirmative action program, Justice Powell accepted that “the attainment of a diverse” student body was a constitutionally permissible interest.<sup>273</sup> However, in applying strict scrutiny’s narrow tailoring test, Justice Powell held that the Medical School’s system violated the Equal Protection clause because it used race as an exclusive controlling factor and, through its special tracking system, totally excluded non-minorities from competing for the admission seats.<sup>274</sup> Nonetheless, Justice Powell left open the possibility that a race-conscious affirmative action program could satisfy the strict scrutiny standard, indicating approval of a holistic system that considered race as simply one factor and did not insulate minority candidates from competition with other candidates.<sup>275</sup>

For twenty-five years, the impact of *Bakke* remained in question,<sup>276</sup> given that no other Justice had concurred with Justice Powell’s diversity rationale or his endorsement of a holistic

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<sup>271</sup> *Id.* at 290-291; *Grutter*, 539 U.S. at 326.

<sup>272</sup> *Grutter*, 539 U.S. at 326.

<sup>273</sup> *Bakke*, 438 U.S. at 311-312.

<sup>274</sup> *Id.* at 319.

<sup>275</sup> *Id.* at 317.

<sup>276</sup> For instance, in 1996, the Fifth Circuit held that diversity in education was not a compelling government interest. *Hopwood v. Texas*, 78 F.3d 932, 935-938 (5th Cir. 1996). The Supreme Court declined to grant certiorari on the *Hopwood* case. The mandate of the *Hopwood* case gave rise to the race-neutral Top Ten Percent program employed

factor-based program.<sup>277</sup> In 2003, the Supreme Court decided two affirmative action cases involving the University of Michigan; *Gratz v. Bollinger*<sup>278</sup> involved a challenge to the affirmative action program at the University of Michigan's undergraduate college of Literature, Science, and the Arts, and *Grutter v. Bollinger*<sup>279</sup> concerned the affirmative action program at the University of Michigan's Law School. In *Gratz*, the Supreme Court struck down Michigan's undergraduate affirmative action program, holding the school's practice of automatically allocating twenty admissions points to all minority candidates failed strict scrutiny because it subverted individual consideration and utilized race as a decisive, controlling factor.<sup>280</sup>

In *Grutter*, Justice O'Connor and four other justices endorsed Justice Powell's diversity rationale from *Bakke* and held that the University of Michigan School of Law had a compelling interest in achieving diversity through a critical mass of minority students within its student body and that the school's holistic use of race as a factor in its law school admissions was narrowly tailored to achieve this interest.<sup>281</sup> One of O'Connor's rationales for adopting Justice Powell's diversity rationale relates to the fact that elite educational institutions function as a pipeline for future leaders in our society.<sup>282</sup> Diversity in selective educational institutions is a compelling interest in part because "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."<sup>283</sup> In applying<sup>284</sup> strict scrutiny to determine if the Michigan Law School program was

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by the University of Texas and at issue in the Fisher case. See *Fisher v. University of Texas at Austin*, 631 F.3d 213, 224-225 (5th Cir. 2011).

<sup>277</sup> See *Grutter*, 539 U.S. at 321, 325.

<sup>278</sup> *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

<sup>279</sup> *Grutter*, 539 U.S. at 311-312.

<sup>280</sup> *Gratz*, 539 U.S. at 270-276.

<sup>281</sup> *Id.* at 330-332, 325, 337.

<sup>282</sup> *Grutter*, 539 U.S. at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.").

<sup>283</sup> *Id.* at 332.

narrowly tailored toward its interest in diversity, O'Connor found that the Law School's program met the narrow tailoring requirement primarily because it mirrored Justice Powell's approved program in *Bakke*, using race in a holistic fashion, as one factor out of many that was taken into consideration.<sup>285</sup>

### ***B. The Fisher Decision***

In *Fisher*, two white plaintiffs, denied admission to the University of Texas at Austin, challenged its race-conscious affirmative action program.<sup>286</sup> The core distinction between the system employed by the University of Texas in *Fisher* and the University of Michigan Law School's admissions process in *Grutter* is that the University of Texas utilizes both a race-conscious program and a race-neutral program to achieve diversity.<sup>287</sup> The race-neutral program consists of neutral academic and personal achievement indexes, scholarship programs, and Texas's Top Ten Percent Law, which grants all Texas high school seniors in the top ten percent

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<sup>284</sup> The level of deference available to a university seeking to use race to implement a diversity plan has become an issue of contention in the *Fisher* case. In *Grutter*, in conducting the first prong of the strict scrutiny test, Justice O'Connor afforded some deference to the Law School's judgment that diversity was a compelling interest. *Grutter*, 539 U.S. at 328-329. Both Justice Kennedy's dissent in *Grutter* and Judge Garza's dissent in the Fifth Circuit's decision not to rehear the decision en banc, both concede that some deference is available for a university's determination that diversity is an important governmental interest. *Id.* at 388 (Kennedy, J., dissenting); *Fisher v. University of Texas at Austin*, 644 F.3d 301, 305, n.5 (5th Cir. 2011) (on petition for rehearing en banc) (Garza, J., dissenting).

There is some dicta from Justice Powell's *Bakke* opinion that supports the view that deference can be allocated to the university in performing the second prong of strict scrutiny, the narrow tailoring test. 438 U.S. at 318-319 ("[A] court would not assume that a university, professing to employ a facially non-discriminatory policy, would operate as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases."). However, based on Justice Kennedy's dissent in *Grutter*, which criticized the use of any deference in strict scrutiny's narrow tailoring test and challenged O'Connor's application of the test as too permissive (*Grutter*, 539 U.S. at 588), it seems safe to assume that the Fifth Circuit Panel's (in *Fisher*) application of deference in applying the narrow tailoring test (*Fisher v. University of Texas at Austin*, 631 F.3d 213, 232 (5th Cir. 2011)) will not be affirmed at the Supreme Court level. Indeed, the University of Texas, in its brief at the Supreme Court, has conceded that no deference is available for the inquiry into whether the second prong of strict scrutiny has been satisfied. Brief of Respondent at 48, *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345).

<sup>285</sup> *Grutter*, 539 U.S. at 334-340.

<sup>286</sup> *Fisher v. University of Texas at Austin*, 631 F.3d 213, 217 (5th Cir. 2011) rehearing en banc denied 644 F.3d 301 (5th Cir. 2011) certiorari granted 132 S. Ct. 1536 (Feb. 21, 2012).

<sup>287</sup> *Id.* at 216.



of their class automatic admission into any Texas state university.<sup>288</sup> Despite the relative success<sup>289</sup> of the Top Ten Percent program in the percentage of minority students, after conducting a campus study, the University of Texas determined that additional measures were needed to combat racial isolation within the university, finding that in 90% of its classes, there was only one or zero African American students and in 43% of its classes, there was only one or zero Hispanic students.<sup>290</sup> Moreover, a significant amount of racial isolation appeared to be developing in segments of the University; the College of Social Work and the College of Education housed large numbers of blacks and Hispanics, but the College of Business Administration had much less representation among these groups.<sup>291</sup> Thus, the University of Texas posited the necessity of using additional race-conscious measures to achieve a critical mass<sup>292</sup> of minorities within each department in the university.<sup>293</sup>

The Fifth Circuit held, drawing upon Justice O'Connor's opinion in *Grutter*, that the University of Texas demonstrated a compelling state interest in "obtaining the benefits of diversity"<sup>294</sup> and that additional race measures were necessary because "from a racial, ethnic, and cultural standpoint, students at the University [were] being educated in a less-than-realistic

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<sup>288</sup> *Id.* at 223-224.

<sup>289</sup> In 2004, the last year of Texas's race-neutral program (relying on the Top Ten Percent law and a race-neutral admissions process for the remaining seats), the entering class at the University of Texas at Austin was 4.5% black, 16.9% Hispanic, and 17.9% Asian American. *Id.* at 224. After Texas instituted a race-conscious program for the spots in the class left after filling seats through the Top Ten Percent law, the number of blacks in the entering class doubled, the number of Hispanics increased approximately 1.5 times and the number of Asian-Americans increased by nearly 10%. *Id.* at 226.

<sup>290</sup> *Id.* at 225.

<sup>291</sup> *Id.* at 240. This amount of racial isolation could have resulted from over-enrollment in certain majors (including the Business school) which obligated some sections of the school to limit enrollment from Top Ten Percent Law applicants. *Id.* at 229.

<sup>292</sup> Critical mass refers to the idea that minorities should be represented in the classroom in meaningful numbers to decrease a sense of social isolation and the perception that the minority must be a spokesperson for their race. *Grutter*, 539 U.S. at 319-320, 329-330.

<sup>293</sup> A study conducted by the university showed that a large percentage of undergraduate courses did not have adequate minority representation (no minorities or just one minority student) necessary to achieve critical mass. *Fisher*, 631 F.3d at 225.

<sup>294</sup> *Id.* at 230.

environment that was not conducive to training the leaders of tomorrow.”<sup>295</sup> The Fifth Circuit panel drew specifically upon Justice O’Connor’s civics rationale for diversity, in terms of the university’s pipeline function: “Cultivating paths to leadership for underrepresented groups serves both the individual and the public, sustaining an infrastructure of leaders in an increasingly pluralistic society.”<sup>296</sup>

The *Fisher* plaintiffs argued that the additional race-conscious program failed the narrow tailoring test, arguing that the program amounted to impermissible racial balancing<sup>297</sup> and that because the race-neutral program successfully created racial diversity within the university, the additional measures were overbroad and thus, not narrowly tailored to the interest of achieving diversity.<sup>298</sup> The Fifth Circuit panel found that because the race-conscious system was based on *Grutter*’s holistic and non-dispositive factor-based framework, it did not amount to racial balancing, even though it appeared to privilege some minorities (blacks and Hispanics) over other groups (Asian-Americans and Whites).<sup>299</sup> With respect to the argument that the race-neutral measures (particularly the Top Ten Percent Law) rendered additional race-conscious measures impermissible, the Fifth Circuit held that the narrow tailoring test, which does not require exhaustion of all race-neutral remedies, would not forestall the use of race-conscious measures just because the Top Ten Percent Law contributed somewhat to the racial diversity at the university.<sup>300</sup> The court also questioned whether or not the Top Ten Percent law was, in fact, a workable race-neutral solution because, in its implementation, it reduced the selectivity of the university (by admitting large numbers of individuals without respect to test scores).<sup>301</sup>

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<sup>295</sup> *Id.* at 237.

<sup>296</sup> *Id.* at 238.

<sup>297</sup> *Id.* at 235-236 (summarizing plaintiffs’ argument).

<sup>298</sup> *Id.* at 234, 239, 243 (summarizing plaintiffs’ argument).

<sup>299</sup> *Id.* at 233-238.

<sup>300</sup> *Id.* at 238,

<sup>301</sup> *Id.* at 242.

Citing *Grutter*, the Fifth Circuit Panel reiterated that educational institutions must not be forced to choose between diversity and abandoning the “academic selectivity that is the cornerstone of [their] educational mission.”<sup>302</sup>

### ***C. Predictions and Suggestions for the Supreme Court in Resolving Fisher***

In predicting how the current Supreme Court might rule in *Fisher*, *Grutter*’s diversity rationale as well as its deferential<sup>303</sup> approach to strict scrutiny is in jeopardy. Based on the reasoning in *Parents Involved*, which questioned whether there could ever be a compelling interest in achieving racial diversity,<sup>304</sup> we might expect Justices Alito, Thomas, Scalia and Chief Justice Roberts to reject Texas’s proffered interest in achieving racial diversity at the classroom level. As Justice Kagan recused herself from the *Fisher* case for having participated in it as Solicitor General,<sup>305</sup> this leaves Justices Sotomayor, Breyer, and Ginsburg as likely to vote in favor of Texas’s program.

As commentators have forecasted,<sup>306</sup> Justice Kennedy’s vote will determine whether *Fisher* will be upheld (in a non-binding, non-precedential 4-4 decision); whether the Court will affirm diversity as a compelling interest for using racial preferences in higher education but strike down Texas’s system for failing to meet strict scrutiny’s narrow tailoring test; or whether

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<sup>302</sup> *Id.* at 239 (quoting *Grutter*, 539 U.S. at 340).

<sup>303</sup> See *supra* note 284.

<sup>304</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 725-733 (2007). The majority dismissed *Grutter* as inapplicable outside of secondary education and then strenuously questioned whether racial diversity could ever be a compelling interest. See *id.* at 725 and 725-733. The Court ultimately based its decision on the Seattle School District’s failure to prove that its pupil assignment program was narrowly tailored to meeting its stated interest in achieving racial diversity.

<sup>305</sup> Adam Liptak, *Justices Take Up Race as a Factor in College Entry*, THE NEW YORK TIMES (February 21, 2012) A1, available at <http://www.nytimes.com/2012/02/22/us/justices-to-hear-case-on-affirmative-action-in-higher-education.html?pagewanted=all>.

<sup>306</sup> See Erwin Chemerinsky, *Momentous Term for the ‘Kennedy Court’?*, ABA JOURNAL (October 3, 2011 8:54 a.m.), [http://www.abajournal.com/news/article/momentous\\_term\\_for\\_the\\_kennedy\\_court/](http://www.abajournal.com/news/article/momentous_term_for_the_kennedy_court/); Andrew Cohen, *At the Supreme Court, Odds Lie Against Affirmative Action*, THE ATLANTIC (February 21, 2012 4:44 p.m.), <http://www.theatlantic.com/national/archive/2012/02/at-the-supreme-court-odds-lie-against-affirmative-action/253393/>.

the Supreme Court dispenses with racial preferences in higher education altogether. Justice Kennedy, as commentators have noted, has never affirmed an affirmative action program.<sup>307</sup> But he has endorsed *Grutter's* holding that racial diversity in the educational context, if properly framed, can be a compelling governmental interest.<sup>308</sup> Nonetheless, it remains unclear whether Justice Kennedy will be receptive to the University of Texas's argument that racial diversity at the classroom level is compelling.

Assuming *arguendo* that the Supreme Court finds that Texas has a compelling interest in achieving the benefits of diversity at the University and classroom level, then the inquiry proceeds to whether or not Texas can show that it meets the narrow tailoring test. At this point, the Court might move in two different directions. First, it could view the success of the race-neutral Texas Ten Percent Law (achieving a student body that was 4.5% black, 16.9% Hispanic, and 17.9% Asian<sup>309</sup>) as evidence that race-neutral measures worked and that because the additional race-conscious measures had only a minimal impact, they cannot be considered effective or necessary and, thus, they are not narrowly tailored.<sup>310</sup> Or, it could accept the University of Texas's argument that the modest impact of its race-conscious program is a "constitutional virtue, not a vice"<sup>311</sup> because the use of race-conscious measures, on top of its

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<sup>307</sup> See *id.*

<sup>308</sup> See *Parents Involved*, 551 U.S. at 783, 787-788 (concurring opinion of Justice Kennedy).

<sup>309</sup> *Fisher*, 631 F.3d at 224.

<sup>310</sup> See *Fisher v. University of Texas at Austin*, 644 F.3d 301, 306-307 (5th Cir. 2011) (Petition for Rehearing En Banc) (Garza, J., dissenting) (summarizing this argument that the success of the Ten Percent Law sheds doubt on whether or not the additional race-conscious measures can meet the narrow tailoring test). Justice Garza cited *Parents Involved* for the contention that if the use of race-conscious factors achieve only a minimal impact on achieving the goal, then that is evidence that the system is not narrowly tailored. *Id.* at 307 (citing *Parents Involved*, 551 U.S. at 734-735). Petitioner has also made this argument in her Brief to the Supreme Court. Brief for Petitioner at 38-43, *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345).

<sup>311</sup> Brief for Respondent at 36-38, *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345). In making this argument, the University of Texas claims that its program is modest in terms of using race as one small factor in its holistic review process but that its use of race did have a "significant impact on advancing UT's diversity initiative." *Id.* at 36-37.

race-neutral Top Ten Percent program, is no broader than necessary to achieve its diversity goals.

In terms of how class issues intersect with this decision, a holding that affirms the use of additional race-conscious measures, on top of a race-neutral program, in part because it shows the institution is achieving much of its diversity in a race-neutral way, would incentivize schools to increase both SES and racial diversity to ensure that they meet strict scrutiny. Texas's Top Ten Percent Law arguably benefits low and middle-SES individuals because the top ten percent of all high school students in Texas gain admission to the University of Texas, regardless of school district, school tax base, and other merit indicators (such as test scores).<sup>312</sup> In this way, the Top Ten Percent plan is laudable for dismantling some of the selectivity and merit factors that obstruct disadvantaged persons' access to quality higher education.<sup>313</sup>

Thus, Texas's use of both race-conscious measures and race-neutral measures achieves its goals of increasing both SES and ethnic diversity on its campus. And, increasing both SES and racial diversity in turn will engender the civics benefits identified by O'Connor in *Grutter*—in terms of grounding the nation's future leaders in a variety of viewpoints and ensuring that the path to leadership through educational institutions remains open.<sup>314</sup> As discussed in further detail below, the policy goals that underlie Justice O'Connor's diversity rationale have become

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<sup>312</sup> The University of Texas's brief implies as much, indicating that the minority individuals who gain admittance through the Top Ten Percent program have lower SES indicators than their minority counterparts in the second decile who gain admittance through its holistic review processes. Brief for Respondent at 33-34, *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345).

<sup>313</sup> While Texas's additional race-conscious program also contains factors designed to capture low SES individuals, (Fisher, 631 F.3d at 228; Brief for Respondent at 7, 34, *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345)), the University of Texas argues that one of the reasons it requires its race-conscious program is because that program (as opposed to the Top Ten Percent Law program) allows it to better capture qualified minority applicants with strong merit indicators, thereby protecting the selectivity of the institution. Brief for Respondent at 32-34, *Fisher v. University of Texas at Austin*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345); see also *Fisher*, 631 F.3d at 239 (agreeing with the contention that "existing percentage plans – including UT's – are simply not 'capable of producing a critical mass without forcing [universities] to abandon the academic selectivity that is the cornerstone of [their] educational mission.'" (quoting *Grutter*, 539 U.S. at 340 (internal citation omitted))).

<sup>314</sup> See *Grutter*, 539 U.S. at 330-333; *Fisher*, 631 F.3d at 236-238.

increasingly important with current social trends; arguably states have a compelling interest in bridging the widening gap between those in positions of power and everyone else.

Thus, regardless of what will likely happen in the Fisher case, what *should* happen, from a policy perspective, is that the court should reaffirm Justice O'Connor's diversity rationale and hold that the University of Texas's race-conscious program, utilized on top of its race-neutral program, is narrowly tailored to meet a compelling interest of achieving diversity at the university level and at the classroom level. That there might be diversity within the University as a whole is not sufficient to achieve Justice O'Connor's ideal of civic participation, particularly if there is a lack of diversity in areas of the University (the business school, for instance) that serve as a pipeline for the State of Texas's next set of leaders.<sup>315</sup> The Supreme Court should stay on course with its precedent in *Bakke* and *Grutter* and find that the University of Texas's modest use of race-conscious factors, in a non-dispositive way, is narrowly tailored to meeting its compelling interest in achieving diversity within its university.

The next subsections discuss, in more detail, how the use of race-neutral and race-conscious measures in higher education can benefit the structure of society, possibly lessening the class divide that is afflicting the country. It will also refute the argument that SES measures (rather than race-conscious measures) are the best way to achieve diversity.

- i. *A Reaffirmance of Justice O'Connor's Diversity Rationale and Incentivizing Universities to Employ both Race-Neutral and Race-Conscious Measures to Achieve Diversity Could Ameliorate the Social Distance Problem We Are Witnessing in Today's Society.*

With respect to the policy interests that would be furthered by incentivizing both SES and racial diversity, commentators from both the right<sup>316</sup> and the left<sup>317</sup> have argued that members of

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<sup>315</sup> See *Fisher*, 631 F.3d at 240.

<sup>316</sup> MURRAY, *supra* note 14, at 100.

elite policy circles (fed by selective schools with little SES diversity) have become disconnected from the general American populace. Accordingly, higher education desperately needs a broader range of SES diversity, including more representation from middle SES ranges. When there is too much distance between persons in policy-making positions and persons who are affected by those policy decisions, decisions are made that fail to consider how others will be impacted.<sup>318</sup> To generalize the communication psychology research on class, discussed in Parts III and IV, the powerful individuals who operate in elite circles of power are likely to be detached and think in abstract, rather than contextualized, terms.<sup>319</sup> Moreover, there appears to be a connection between the low e.q. (emotional quotient) of the powerful and the structure of merit: high merit indicators correlate with low levels of altruistic behavior and vice-versa.<sup>320</sup> In *Twilight of the Elites*, Christopher Hayes argues that the divergence trend explains several policy failures of the 2000s, including the financial crisis, the Katrina evacuation, and the Iraq War.<sup>321</sup> Hayes attributes these failures to the impoverished thinking of individuals operating in corrupt elite circles, closed off from the rest of America.<sup>322</sup> Some would argue that a greater commitment to diversity within elite educational institutions will not improve this faulty decision-making process, as elite schools tend to incubate the heuristics of the dominant culture.<sup>323</sup> But in response, we can point to the studies indicating that individuals matriculating at elite institutions

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<sup>317</sup> HAYES, *supra* note 5, at 191-215.

<sup>318</sup> *Id.* at 183, 191-215.

<sup>319</sup> See *supra* notes 227-234 and surrounding text; see also HAYES, *supra* note 5, at 189 (“Those in power pay less attention to the characteristics, views of, and details about the low power people they encounter, and are less empathetic overall.”).

<sup>320</sup> See GUINIER & TORRES, *supra* note 22, at 269-271 (citing Richard O. Lempert, David L. Chambers, and Terry K. Adams, “Michigan’s Minority Graduates in Practice: *The River Runs Through Law School*, 25 LAW & SOCIAL INQUIRY 395, 496-497 (2000) (In a study of Michigan Law School graduates, higher LSAT scores correlated with less pro-bono service) and referring to WILLIAM G. BOWEN AND DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (In a study of Harvard graduates, blue-collar background and lower SAT scores correlated with more altruistic values)).

<sup>321</sup> HAYES, *supra* note 5, at 17, 191-215.

<sup>322</sup> *Id.* at 183, 191-215.

<sup>323</sup> See Zweigenhaft and Domhoff, *supra* note 20, at 6-7, 231-233.

with lower SES indicators do engage in more altruistic behavior upon graduating.<sup>324</sup> We can hope that greater SES diversity will slow down the oligarchic trend.

In cruder terms, because economic wealth and power flow most easily to those with elite educational credentials, the need for greater SES diversity in elite institutions gains more resonance, particularly when we consider the twin trends of income inequality and social immobility. Statistically, Americans have a one-third chance of becoming more prosperous than their parents.<sup>325</sup> But the greater likelihood is that a person will remain at the same level as his/her parents or fall behind to a lower position.<sup>326</sup> The famous Barrington Moore, Jr. quote—“no bourgeoisie, no democracy”<sup>327</sup>—effectively conveys the civic danger of allowing income gaps to grow too large. Because elite institutions function as the pipeline to social, economic, and civic power, good public policy warrants more opportunities for lower SES and middle SES to attend these institutions.

These broad social distance and divergence trends strongly support the argument that America would benefit if we modified our meritocracy to make our power circles less insular and less distant. In light of the divergence trend, Justice O'Connor's civics rationale for diversity encompasses more expansive policy implications, a point that the *Fisher* decision could seize upon. Diversity in higher education, particularly at elite levels, should broadly encompass both the racially disadvantaged as well as the economically disadvantaged. And, because of enduring racial disparities within the middle class (as explained in this paper from a cultural

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<sup>324</sup> See *supra* note 320.

<sup>325</sup> NOAH, *supra* note 1, at 31, but see Pew Research Paper, PURSUING THE AMERICAN DREAM, *supra* note 12, at 2 (In comparing the present with the past, 84% of Americans have higher incomes than their parents; 50% have greater wealth than their parents).

<sup>326</sup> Noah, *supra* note 1, at 31.

<sup>327</sup> BARRINGTON MOORE, JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD & PEASANT IN THE MAKING OF THE MODERN WORLD 418 (Beacon Press 1993) quoted in Noah, *supra* note 1, at 77.



standpoint), measures that benefit underrepresented racial minorities in the middle class remain justified.<sup>328</sup>

As this Article has sought to show, cultural inequality (a product of *de jure* and *de facto* discrimination, structural inequality, and other processes of subordination) continues to obstruct minority performance in the educational merit game. Accordingly, race-conscious affirmative action remains necessary as a counter-balance. The practical analytical problem is that the intent to redress past discrimination is not considered a compelling interest for using race-based affirmative action;<sup>329</sup> therefore, it is impossible to argue that affirmative action is necessary to turn around the cultural and societal disparities that systemic *de facto* discrimination has produced. However, as a policy basis for continuing race-conscious affirmative action, we can rely on Justice O'Connor's reasoning that diversity in education not only improves learning outcomes, but also enhances the perspective of our future leaders.<sup>330</sup> That diversity in higher education might also increase democratic representation in civic power circles and reduce the social distance problem among elite decision-makers functions as a *collateral* benefit of achieving diversity at the university and classroom level. Analytically, *de facto* discrimination remains relevant to the analysis, not because schools are using affirmative action to remedy past discrimination, but because past and present *de facto* discrimination continues<sup>331</sup> to necessitate

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<sup>328</sup> Malamud, *Assessing Class-Based Affirmative Action*, *supra* note 36, at 467; Malamud, *Affirmative Action and the Black Middle Class*, *supra* note 36, at 988.

<sup>329</sup> See *Bakke*, 438 U.S. 265, 307 (1978);

<sup>330</sup> *Grutter*, 551 U.S. at 332-334.

<sup>331</sup> Justice O'Connor's *Grutter* prediction that race conscious affirmative action will no longer be necessary by 2028 may not be an accurate forecast. See *Grutter*, 539 U.S. at 343. Justices Ginsburg and Breyer recognized as much in their concurring opinion in *Grutter*, expressing skepticism that the current inequalities embedded in our society, particularly in our educational institutions, can be ameliorated to achieve a bona fide system of equal opportunity by 2028. See *id.* at 344-346. As this article has sought to convey, the magnitude by which culture operates in tandem with deep structural inequalities raises additional doubts that these fissures can be repaired by 2028. Cultural inequality, which cannot be separated from racial inequality, can be likened to an impenetrable fog that permeates all aspects of society. The enduring vitality of cultural inequality, coupled with education's continued dependence on selectivity and merit metrics, mean that race-conscious controls will likely be necessary to achieve educational diversity well beyond 2028.

the use of race conscious factors to achieve diversity in educational institutions. As Justice O'Connor recognized, underrepresented students, "by virtue of our Nation's struggle with racial inequality . . . are less likely to be admitted in meaningful numbers on criteria that ignore these experiences."<sup>332</sup>

ii. *A "Class, Not Race" Approach to Affirmative Action Fails to Achieve the Policy Interests Encompassed in Justice O'Connor's Civics Themed Diversity Rationale*

The "class, not race"<sup>333</sup> argument will likely play some role in resolving the *Fisher* case. In an *Amicus Curiae* brief submitted in support of Petitioner for certiorari in the *Fisher* case, Professor Richard Sander argues that race-conscious measures cannot meet the narrow-tailoring test because class-based measures (factors relying on an individual's income, education, and occupations) are better suited for achieving diversity.<sup>334</sup> Sander characterizes race-based affirmative action as unfairly handing out point boosts to blacks and Hispanics to equalize their lower test scores with those scores of other groups.<sup>335</sup> In Sander's estimation, if class is used to achieve diversity, these "massive" credential disparities would be minimized.<sup>336</sup>

Sander's fairness argument seems to be founded on the unstated premise that LSAT scores accurately capture an individual's natural and innate cognitive talent. As with any

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<sup>332</sup> *Grutter*, 551 U.S. at 338.

<sup>333</sup> Deborah C. Malamud, *Class-Based Affirmative Action*, *supra* note 36, at 1847.

<sup>334</sup> *Amicus Curiae* Brief for Petitioners filed by Stuart Taylor, Jr. and Richard Sander at 21-23, *Fisher v. University of Texas at Austin*, 132 S.Ct. 1536 (Feb. 21, 2012) (No. 11-345) (authored by Richard Sander) [Hereinafter Sander *Amicus* Brief in Support of Certiorari]. After certiorari was granted, Professor Sander submitted another *Amicus Curiae* Brief "in support of neither party." *Amicus Curiae* Brief filed by Stuart Taylor, Jr., and Richard Sander, *Fisher v. University of Texas at Austin* at 30-32, 132 S.Ct. 1536 (Feb. 21, 2012) (No. 11-345) (May 2012) (authored by Richard Sander) [Hereinafter Sander *Amicus* Brief]. The two briefs are substantially similar in the arguments presented.

<sup>335</sup> *Id.* at 22; Richard Sander, *Class in American Legal Education*, 88 DENVER UNIV. L. REV. 631, 654 (2011) [Hereinafter Sander, *Class in American Legal Education*] (explaining that in the context of LSAT scores, affirmative action policies afford blacks a fifteen point boost and Hispanics a seven or eight point boost); *see also* Murray and Herrnstein, *supra* note 163, at 451-452 (reporting the differences between black, white, Asian, and Hispanic SAT scores).

<sup>336</sup> Sander, *Class in American Legal Education*, *supra* note 335, at 658, 666-667.

standardized cognitive test, the reality, accepted by nearly all scientists invested in the psychometric field, is that these tests can only measure a “*developed* capacity for intelligent behavior.”<sup>337</sup> By emphasizing the individual performative aspects of the LSAT and de-emphasizing the external obstacles that get in the way of developing a capacity for this style of testing, the rhetoric leaves no space to consider how social structures operate to control individual outcomes in our credentializing system.

Many scholars have critiqued Sander’s approach.<sup>338</sup> This Article offers an additional critique of Sander’s individualist perspective in that his colorblind formulation of economic disadvantage does not (and cannot) fully capture all qualified applicants, particularly when we account for cultural disadvantages, many of which intersect with race. Because tests like the LSAT measure a developed capacity for a certain type of pressurized abstract processing, stellar performance is predictable in instances where individuals are exposed to culturally rich environments where they can practice the type of skills rewarded on high-stakes tests.<sup>339</sup> It is true that a race-blind SES affirmative action system would capture more qualified applicants than a pure “merit-based” system because access to the cultural capital necessary to succeed in

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<sup>337</sup> Jencks, *supra* note 67, at 61-62 (emphasis added).

<sup>338</sup> The University of Denver Law Review, as it published Sander’s article on Class and Legal Education, also published a number of comments that critiqued his approach. *See generally*, Deborah C. Malamud, *Class Privilege in Legal Education: A Response to Sander*, *supra* note 156; Deirdre M. Bowen, *Meeting Across the River: Why Affirmative Action Needs Race & Class Diversity*, 88 DENVER L. REV. 751 (2011); Eli Wald, *The Visibility of Socioeconomic Status and Class-Based Affirmative Action: A Reply to Professor Sander*, 88 DENVER L. REV. 861 (2011); Angela Onwuachi-Willig and Amber Fricke, *Class, Classes, and Classic Race-Baiting: What’s in a Definition?*, 88 DENVER L. REV. 807 (2011); Daniel Kiel, *An Ounce of Prevention is Worth a Pound of Cure: Reframing the Debate About Law School Affirmative Action*, 88 DENVER L. REV. 791 (2011); Arin N. Reeves, *Race as a Red Herring? The Logical Irrelevance of the Race v. Class Debate*, 88 DENVER L. REV. 835 (2011). For a well-reasoned critique of Sander’s mismatch theory (which posits that affirmative action harms blacks because it places them in law schools where they are at a competitive disadvantage) see David Wilkins, *A Systemic Response to Systemic Disadvantage: A Response to Sander*, 57 STANFORD L. REV. 1915 (2005) (critiquing Sander’s mismatch theory). For a critique of the empirical approach that Professor Sander took in formulating his mismatch theory, see Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students? A Correction, A Lesson, and An Update*, 105 NORTHWESTERN L. REV. 791 (2011).

<sup>339</sup> *See id.* (culture likely impacts an individual’s ability to perform in novel situations that require the application of knowledge) and LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 24, at 2-9, 29 (upper-middle class inculcation, with its intensive verbal focus, is aligned with dominant institutional norms for success and also explains why children of educated parents receive higher test scores than children whose parents dropped out of high school).

the merit game does correlate with one's SES status.<sup>340</sup> However, as Part III of this paper suggests, there are other barriers at work in the acquisition of cultural capital, and these obstacles make it more difficult for disadvantaged groups to achieve optimal educational outcomes. In order to capture the greatest number of qualified applicants through a class-based affirmative action system, class must be calculated in a robust and intersectional way.

The social science research discussed above sets forth a compelling cultural explanation for achievement differences between poor/working-class individuals and middle/upper-class individuals.<sup>341</sup> Seen through this lens, class-cultural differences are easy to understand and appreciate. Things become muddier when we start talking about cultural disparities within the middle class or between the middle class and the upper class. Over thirty years ago, prominent poverty sociologist William Julius Wilson declared that race-conscious affirmative action primarily benefits the black middle class, doing little to alleviate poverty.<sup>342</sup> The requirements for entry into higher education make it difficult for many impoverished persons to gain a foothold. The selectivity controls that elite institutions maintain make entry doubly difficult for those situated below the middle class, particularly at the graduate level, where, in addition to test scores, one must also obtain a competitive undergraduate GPA. In the higher education merit game, the individuals who are most likely to succeed, from any race, come from relatively privileged backgrounds. Thus, affirmative action in higher education is a small-scale system for repositioning actors within the middle class. This begs the question of whether affirmative

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<sup>340</sup> See *supra* notes 22, 138-140 and surrounding text. The other reason why a race-blind SES approach to affirmative action would not succeed at capturing racial diversity has to do with the fact that minorities are minorities. Low SES minorities would be swamped by majority individuals with low SES indicators. See Malamud, *Class Privilege in Legal Education: A Response to Sander*, *supra* note 156, at 732.

<sup>341</sup> See generally, LAREAU, *UNEQUAL CHILDHOODS*, *supra* note 24 (upper-middle class juxtaposed with lower-class and poor children); William Julius Wilson, *Jobless Poverty, A New Form of Social Dislocation*, *supra* note 245, at 342, 344, 347 (in comparison with middle-class job applicants, impoverished inner-city residents, who lack soft-skills cultural capital, are at a significant disadvantage).

<sup>342</sup> Remnick, *supra* note 73, at 100 (citing WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (Univ. of Chicago Press 1978)).

action, as it is practiced in higher education in the United States, is just a “first-world problem.”<sup>343</sup>

That affirmative action primarily benefits the black middle class creates powerful rhetoric to discontinue racial preferences. For instance, Richard Sander argues that “[i]t is hard to justify giving large preferences to blacks and Hispanics from privileged backgrounds while ignoring the needs of low-SES [socio-economic status] applicants of all races.”<sup>344</sup> Professor Sander’s proposed solution to his mismatch problem (which posits that blacks are “harmed” by attending law schools in a cohort of non-minority peers with higher indicators)<sup>345</sup> is to reduce race-conscious affirmative action and replace it with class-based affirmative action, which would redistribute individuals within the law school hierarchy.<sup>346</sup> The more elite law schools would become less racially diverse, but the amount of racial diversity across legal education in general would remain about the same.<sup>347</sup> What then, would be the harm, in pursuing this path? We are, after all, only dealing with relative positions *within the middle class*.

The response, as set out in Part III, is that the systemic cultural obstacles make it more difficult for middle class blacks and other minorities to acquire and deploy the cultural capital necessary for mobility. Moreover, as others have argued, the black middle class cannot be situated on the same plane as the white middle class, particularly when the analysis moves

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<sup>343</sup> First World Problems are “frustrations and complaints that are only experienced by privileged individuals in wealthy countries. It is typically used as a tongue-in-cheek comedic device to make light of trivial inconveniences.” First World Problems, KNOW YOUR MEME, <http://knowyourmeme.com/memes/first-world-problems>.

<sup>344</sup> Sander, *Class in American Legal Education*, *supra* note 335, at 664. See also, BELL AND HERRNSTEIN, *THE BELL CURVE*, *supra* note 163, at 467 (arguing that affirmative action places low SES white youth at an unfair disadvantage).

<sup>345</sup> Sander’s mismatch theory posits that affirmative action harms minority students when they enter legal educational institutions with lower indicators than their white counterparts. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 370-371, 478-479 (2004) (Hereinafter, Sander, *A Systemic Analysis of Affirmative Action*); The academic harm that befalls these students, in Sander’s view, produces a higher bar failure rate. *Id.* at 372-372, 479; Sander, *Class in American Legal Education*, *supra* note 335, at 666.

<sup>346</sup> Sander, *A Systemic Analysis of Affirmative Action*, *supra* note 345, at 474, 483.

<sup>347</sup> *Id.* at 483.

beyond income and occupational data and focuses on longer-term indicators of financial stability such as wealth and assets.<sup>348</sup> For instance, because of the continuing effects of discriminatory redlining and mortgage practices as well as de jure and de facto housing discrimination, the residential assets held by middle class blacks are worth less than middle class whites.<sup>349</sup> An intersectional approach to affirmative action, one that appreciates connections between class and race, would more effectively capture all the individuals necessary to achieve the type of diversity sanctioned by *Grutter*.<sup>350</sup>

Indeed, the *Fisher* case illustrates the danger of racial hierarchy within middle-class fields. While the University of Texas was able to use a race-blind system to achieve some general diversity within its institution, an internal hierarchy had emerged within the university, with blacks and Hispanics overrepresented in the education and social work departments (traditionally low prestige occupations) but underrepresented in more elite departments such as the business school.<sup>351</sup> Thus, to improve the diversity across its different departments, the University of Texas created a small race-conscious system modeled after *Grutter*.<sup>352</sup> The issue now is whether or not, given that the race-blind system had achieved a modicum of diversity, the additional race-based system meets strict scrutiny's narrowly tailored standard.<sup>353</sup> In any event, it appears that the University of Texas seriously considered Justice O'Connor's third rationale for diversity—that diversity in higher education, particularly elite schools—is necessary to

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<sup>348</sup> See Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, *supra* note 36, at 940, 949, 969-988, 992; OLIVER AND SHAPIRO, *supra* note 192, at 94-95.

<sup>349</sup> Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, *supra* note 36, at 969-974; OLIVER AND SHAPIRO, *supra* note 192, at 15-20, 94-95.

<sup>350</sup> 539 U.S. at 330-332.

<sup>351</sup> *Fisher*, 631 F.3d at 240.

<sup>352</sup> *Id.* at 240-242.

<sup>353</sup> It is unknown, but it would be useful to know to what extent this striation within the Univ. of Texas also cut across class lines.

achieve “effective participation by members of all racial and ethnic groups in the civic life of our nation.”<sup>354</sup>

What is implicit in this justification for using race in affirmative action is that civic leaders do not generally come from low-prestige areas of the middle class—elementary school teachers or social workers. Civic leaders who wield true cultural and political power are most likely to come from those occupations that carry higher prestige, income, and more room for growth into the upper-middle and upper-class. In law, this pipeline problem plays out in the reality that graduates from non-elite law schools are largely shut out from the legal profession’s power circles—corporate law firms, government policy makers, and the judiciary.<sup>355</sup>

Moreover, in response to the argument that SES measures alone are sufficient to create diversity in educational institutions,<sup>356</sup> there are two general reasons why an exclusively colorblind affirmative action program will not work. First, because minorities are minorities, majority applicants with similar SES backgrounds swamp disadvantaged minorities.<sup>357</sup> Second, continuing economic, cultural, psychological, and environmental inequality places disadvantaged minorities behind the starting line, behind their more privileged counterparts in the merit race.<sup>358</sup> As an alternative to a colorblind approach to class-conscious diversity measures, race should be considered as a factor that contributes to one’s class status.<sup>359</sup> Because whiteness functions as a kind of cultural capital and because race and culture intersect to interpose unique barriers for

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<sup>354</sup> 539 U.S. at 332.

<sup>355</sup> Justice O’Connor noted this reality in *Grutter*, pointing out the large number of elite law graduates in the judiciary and in Congress. 539 U.S. at 334.

<sup>356</sup> See Sander, Amicus Curiae Brief in Support of Petition for Certiorari, *supra* note 334, at 21; Sander Amicus Curiae Brief, *supra* note 334, at 30.

<sup>357</sup> See *supra* note 340.

<sup>358</sup> Professor Malamud refers to this as the “top of the bottom” problem. Malamud, *Assessing Class Based Affirmative Action*, *supra* note 36, at 458.

<sup>359</sup> Professor Malamud has also raised this analytical framework as a possibility but remains skeptical as to whether courts would accept it. Malamud, *Class Based Affirmative Action*, *supra* note 36, at 1860.

disadvantaged minorities, race-conscious measures might fairly be conceptualized as a type of class-based affirmative action.<sup>360</sup>

The way the debate has been framed should not force us into a false choice between race-based affirmative action and race-neutral class based affirmative action. We need class-conscious measures as well. In effectuating class-conscious diversity programs, schools should be cognizant of the difficulty in capturing the full complexity of social disadvantage through simple economic categories.<sup>361</sup> This is especially true in capturing cultural disadvantage. Not as a replacement to, but in addition to race-based strategies, schools should employ a robust set of SES indicators<sup>362</sup> designed to capture disadvantaged applicants with high potential, but with lower traditional indicators. The fairly robust SES factors that Richard Sander formulated for his 1997 class-based affirmative action project at UCLA represents a good start for a workable class conscious diversity program.<sup>363</sup>

## V. The Way Ahead

If social science literature is correct that higher class individuals are predisposed to lower emotional intelligence, less awareness of the needs of others, and more greed-oriented

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<sup>360</sup> See *supra* notes 248-256 and surrounding text.

<sup>361</sup> *Malamud*, Class Based Affirmative Action, *supra* note 36, at 1889.

<sup>362</sup> The factors could be similar to those suggested by Richard Sander and employed by UCLA Law School in 1997, in response to Proposition 209's ban of racial preferences in California public schools. Richard H. Sander, *Experimenting with Class-Based Affirmative Action*

47 J. LEGAL. EDUC. 473, 483-484 (1997). UCLA Law, attempting to cast a wide net for socio-economic disadvantage, used the following factors: mother's education; father's education; parental income; parental wealth; and high school address with three connected variables – proportion of single-parent households in the applicant's high school neighborhood, the proportion of families in the neighborhood receiving welfare, and the proportion of adults in the neighborhood who had not graduated from high school. *Id.* at 483-484. Sander's formulation of SES is laudable for going beyond the traditional income, education, and occupation factors. However, as this paper has sought to show and as Professor Malamud points out with Sander's UCLA Law program, a quantitative "snapshot" approach is unlikely to capture class standing with complete accuracy. See Deborah C. Malamud, *A Response to Professor Sander*, 47 J. LEGAL EDUC. 505, 507 (1997).

<sup>363</sup> See *supra* note 362.



behavior,<sup>364</sup> then there is ample reason to want to change the culture of our elite circles. However, because of the *U.S. News & World Report* rankings game, which so heavily weighs school selectivity,<sup>365</sup> I am uncertain that true diversity (diversity that accurately reflects the social constitution of society at large) can ever be achieved in elite institutions and the power circles fed by them. What we have had and are likely to continue to have is a smattering of minorities and rags-to-riches stories.<sup>366</sup> In all likelihood, elite circles will continue to be primarily comprised of white males from privileged backgrounds.<sup>367</sup> As progressive critics have argued, token diversity in elite power circles has not and is not likely to change how institutions operate at their core.<sup>368</sup>

In terms of achieving a 180-degree change, a recommitment to affirmative action cannot be the exclusive solution, although it is still necessary, given the constraints of the merit and selectivity system. A better approach is for progressive elites to commit to giving up our dependence on selectivity as a dispositive factor in our credentializing system, which might realistically upend our current merit system, even if it dilutes the value of our own cultural capital and privileged professional identities. We must also commit ourselves to serious self-study and deeply consider how our actions might be contributing to a trend toward oligarchy.

Some of these questions might include considering what role homophily plays in the context of hiring the individuals who will be our colleagues as law professors. Whereas the soft-skills concept enables the exercise of homophilic preferences that can mask both class and racial bias, in academia, we might ask whether the collegiality concept serves the same function.

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<sup>364</sup> See *supra* notes 227-234 and surrounding text.

<sup>365</sup> See, e.g., Tamanaha, *supra* note 22 (discussing various ways that law schools game the U.S. News system to increase their selectivity ranking, as measured by their median g.p.a. and LSAT scores.).

<sup>366</sup> ZWEIFENHAFT AND DOMHOFF, *supra* note 20, at 6-7.

<sup>367</sup> *Id.* (While the power elite is more diverse, its “core group continues to consist of wealthy, white Christian males, most of whom are still from the upper third of the social ladder.”).

<sup>368</sup> *Id.* at 7, 248.

Academic selectivity has produced a disturbing lack of SES diversity among law professors.<sup>369</sup> In response to this lack of SES diversity in our own circles, Professor Michael Higdon argues that law schools should commit themselves to hiring teachers from less elite backgrounds.<sup>370</sup> In evaluating arguments against proposals to rely less on selectivity and prestige, we must question whether contrary positions can be fairly characterized as a status closure device<sup>371</sup> designed to limit competition for our positions, or a resistance to change based on fear of diluting our professional identities and self worth.

We might think of stamping out the “cult of smartness”<sup>372</sup> that sometimes afflicts legal actors who profess progressive ideals. Elite individuals who fall victim to the cult of smartness employ a vague and arbitrary standard to reject qualified individuals because they are not smart enough. As Christopher Hayes points out, a particularly ugly example of the cult of smartness manifested itself in the comments of Professor Lawrence Tribe about Supreme Court Justice Sonia Sotomayor. At the time, Sotomayor was on President Obama’s Supreme Court nomination short list, as was Harvard Law School Dean Elena Kagan. Professor Tribe wrote a memorandum to President Obama, arguing that the President should nominate Kagan instead of Sotomayor, disclosing his opinion that Justice Sotomayor, Princeton graduate and former editor in chief of the Yale Law Review, was “not as smart as she thinks she is.”<sup>373</sup> Conservatives, of course, seized upon the leaked Tribe memo to emphasize its hyper-elitism.<sup>374</sup>

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<sup>369</sup> Higdon, *supra* note 22, at 9 (“[T]o the extent a law school values having a socio-economically diverse faculty, hiring exclusively from elite law schools makes achieving that goal more unlikely”).

<sup>370</sup> *Id.* at 21-22.

<sup>371</sup> Jewel, *supra* note 53, at 115.

<sup>372</sup> HAYES, *supra* note 5, at 165.

<sup>373</sup> HAYES, *supra* note 5, at 165.

<sup>374</sup> Ed Whelan, *Tribe to Obama: Sotomayor Is “Not Nearly As Smart As She Seems To Think She Is,”* THE NATIONAL REVIEW ONLINE, <http://www.nationalreview.com/bench-memos/251301/tribe-obama-sotomayor-not-nearly-smart-she-seems-think-she-ed-whelan> (October 28, 2010 9:42 a.m.)

Ironically, in theorizing about collapsing the merit system and traditional elite pipelines into power circles, progressives might take a cue from conservatives. In 2007, during George W. Bush's presidency, controversy erupted over the Justice Department's role in the firing of several federal prosecutors, ostensibly on political grounds. Monica Gooding, a Justice Department employee working under then Attorney General Alberto Gonzalez, was tasked with answering questions about the situation.<sup>375</sup> What is striking about Ms. Gooding was not her difficult predicament, but her lack of elite credentials in light of her prestigious position. Ms. Gooding received her law degree from Pat Robertson's Regents University School of Law, a decidedly non-elite institution with clear ties to the evangelical right.<sup>376</sup> It turns out that Ms. Gooding was one of 150 Regents graduates in the service of the federal government.<sup>377</sup> For the Bush administration, Regents' correlation with conservative values trumped traditional preferences for academic prestige and selectivity.

Supreme Court Justice Clarence Thomas is another example of a conservative figure who has chosen to sidestep the hyper-academic selectivity inherent in the legal profession. Justice Thomas's hostility to institutional prestige and selectivity as a means to justify race-conscious affirmative action can be seen in his dissent in *Grutter*, where he states that "[r]acial discrimination [through an affirmative action policy] is not a permissible solution to the self-inflicted wounds of [the University of Michigan Law School's] elitist admissions policy."<sup>378</sup> In recent remarks at the University of Florida law school, Justice Thomas builds on this anti-elitist sentiment, stating:

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<sup>375</sup> Dahlia Lithwick, *Justice's Holy Hires*, THE WASHINGTON POST, April 8, 2007, at B2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/06/AR2007040601799.html>

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Grutter*, 539 U.S. at 350.

Isn't [bias against low-prestige schools] the antithesis of what this country is supposed to be about? Isn't that the bias we fought about on racial terms, or on terms of sex, or on terms of religion, et cetera? My new bias, which I now embrace, is that I don't eliminate the Ivies in hiring, but I intentionally prefer kids from regular backgrounds and regular students.<sup>379</sup>

Justice Thomas talks the talk but also walks the walk. His recent clerks hailed from Rutgers, George Mason, George Washington, and Creighton law schools.<sup>380</sup> The anti-elitism of Justice Thomas, though laudable, nonetheless furthers a type of right-wing morality that de-emphasizes how other aspects of conservative doctrine, particularly neo-liberal economic policies, promote race, gender, and other status-based subordination.<sup>381</sup> The progressive response, of course, must be to challenge the neo-liberal dichotomies (private trumps the public, the individual trumps the collective, etc.) that underlie conservative thought and connect that challenge up with ground-level advocacy, but I would also suggest that progressives should not allow conservatives to monopolize anti-elitist sentiment. If collapsing selectivity is a goal worth pursuing, then the way forward is for those in positions of power to stop fetishizing credentials and look instead to the whole person.

There are other lessons for progressives here. In all realms of the so-called elite circles—educational institutions and government—we should reconsider the view, originating in the progressive era, that government service policy-making is the special province for elite,

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<sup>379</sup> Brendan Farrington, *Justice Thomas Criticizes Law School Rankings*, THE SEATTLE POST INTELLIGENCER (September 21, 2012), <http://www.seattlepi.com/news/article/Justice-Thomas-criticizes-law-school-rankings-3883661.php>; Staci Zaretzy, *When It Comes To Hiring SCOTUS Clerks, Clarence Thomas Doesn't Care About the U.S. News Rankings*, ABOVE THE LAW (September 24, 2012 12:52 p.m.).

<sup>380</sup> *Id.*

<sup>381</sup> Martha T. McCluskey, *Thinking With Wolves, Left Legal Theory After the Right's Rise*, 54 BUFF. L. REV. 1191, 1293-1294 (2007). Professor McCluskey discusses this dynamic in the context of Scalia's opinions on abortion and gay marriage, allowing Justice Scalia to adopt socially conservative positions and portray them as a "true marker of non-wealthy economic status." See *id.* The dynamic is equally at work in this example.

credentialed experts.<sup>382</sup> A slavish devotion to traditionally defined intelligence risks turning out purblind policy-makers who cannot visualize the full impact of their decisions on others. Being “smart” is undoubtedly important for professional practice at the highest levels, but the stewardship ideals that undergird our profession also warrant due attention to empathy and altruism, concepts that do not show up on traditional merit metrics. If we are going to do more than just give platitudinal lip service to egalitarian concepts of mobility, inclusiveness, and pro-social conduct, then progressives should engage with anti-elitism and commit to dismantling large portions<sup>383</sup> of the merit system.

## VI. Conclusion

Culture plays an integral role in the ordering of social relations in America. However, an individualistic focus on merit and achievement tends to obscure the role culture plays in the transmission of social status. Wealthy and upper middle class parents have adopted hyper-interventionist strategies to help their children win in America’s high-stakes merit game. In deploying cultural capital to negotiate advantages with institutional actors, individuals who can display the appropriate middle class style and norms are able to acquire more cultural capital than individuals who lack this kind of cultural finesse. Many of these cultural differences occur

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<sup>382</sup> See JEROME AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 82-85 (1976) (Explaining that the view, originating in the progressive era, that elite credentials uniquely qualified individuals for reform and policy-making “enhanced the prerogatives of those who fully accepted the basic contours of the social system and trained young men for success within it.”).

<sup>383</sup> It is difficult to quantify a specific remedy here. In the context of higher education, my suggestion is that schools use a holistic admissions approach to filling 45% to 50% of a school’s slots, with the conscious goal of opening up more doors for diverse, low-SES, and median-range applicants. Need-based scholarships should trump merit-based scholarships. I recognize that these suggestions, particularly the emphasis on capturing qualified median students, will likely dilute a school’s selectivity ranking. From a practical standpoint, the selectivity incentives built into the U.S. News and World Report system make it unlikely that institutions will voluntarily take on these ideas. But new populist voices, amplified by the Occupy movement, continue to agitate for change in higher education, which could lead to a tipping point. See, e.g., ANYA KAMENETZ, *DIY EDU: EDUPUNKS, EDUPRENEURS, AND THE COMING TRANSFORMATION OF HIGHER EDUCATION* (Chelsea Green 2010) (Advocating a DIY approach to higher education that is not at all concerned about selectivity or prestige).

within the middle class, giving upper-class and upper-middle class children a distinct advantage. To address concerns about the undemocratic effects of continuing income and social class divergence in America, there is a compelling argument that elite educational institutions, because they supply the nation's next set of leaders, should commit to more SES diversity, specifically seeking more qualified students from the middle-middle and lower-middle strata.

However, at this point, class factors cannot be used to replace race-conscious affirmative action measures. Culture, class, and race intersect to create differential structures of inequality. In addressing the popular argument that SES preferences should replace race-conscious measures, a colorblind approach to achieving class diversity will not work to create true SES diversity. Ultimately, affirmative action, whether class based or race-conscious, is unlikely to make a large impact on the problem of social and economic divergence. What is really needed is a upending of the current merit system. Radical approaches—perhaps inspired by the Occupy movement—may be our best hope, to restructure opportunity and reboot social mobility.