

# ECONOMIC INEQUALITY AND COLLEGE ADMISSIONS POLICIES

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*As economic inequality in the United States has reached unprecedented heights, reformers have focused considerable attention on changes in the law that would provide for greater equality in wealth among Americans. No doubt, much benefit would result from more equitable tax policies, fairer workplace regulation, and more generous spending policies.*

*But there may be even more to gain by revising college admissions policies. Admissions policies at the Ivy League and other elite American colleges do much to exacerbate the problem of economic inequality. Accordingly, reforming those policies may represent the most effective strategy for restoring a reasonable degree of economic equality in the United States.*

*Fortunately, there is an important alternative to traditional admissions policies for elite universities to consider—“top class rank” policies. Indeed, some public universities have already adopted top class rank policies in lieu of affirmative action to promote student body diversity. While the impact on student diversity is a key feature of top rank policies, this Article focuses on another critical benefit of the policies—their ability to turn elite universities from institutions that exacerbate economic inequality into institutions that foster economic equality.*

|  |     |
|--|-----|
| INTRODUCTION .....   | 102 |
| I. ECONOMIC INEQUALITY COMPROMISES ECONOMIC<br>MOBILITY IN THE UNITED STATES .....               | 103 |
| II. TRADITIONAL COLLEGE ADMISSIONS POLICIES<br>EXACERBATE ECONOMIC INEQUALITY .....              | 104 |
| III. TOP CLASS RANK POLICIES PROMOTE ECONOMIC<br>EQUALITY .....                                  | 106 |
| A. <i>Top Class Rank Policies Provide Incentives for<br/>            Economic Equality</i> ..... | 108 |

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|   |     |
|---|-----|
| <i>B. Empirical Evidence from Texas Illustrates the Benefits of Top Class Rank Policies</i> ..... | 109 |
| <i>C. Nationwide Implementation Would Increase the Impact of Top Class Rank Policies</i> .....    | 111 |
| IV. TOP CLASS RANK POLICIES CAN BE DESIGNED TO MINIMIZE TRADE-OFFS .....                          | 114 |
| <i>A. Top Class Rank Policies Can Produce a Well-Rounded Student Body</i> .....                   | 114 |
| <i>B. Top Class Rank Policies Can Maintain Academic Excellence</i> .....                          | 115 |
| <i>C. Top Class Rank Policies Can Ensure Racial, Ethnic, and Economic Diversity</i> .....         | 118 |
| V. TOP CLASS RANK POLICIES AND THE U.S. SUPREME COURT .....                                       | 119 |
| VI. TOP CLASS RANK POLICIES AND OTHER ALTERNATIVES TO AFFIRMATIVE ACTION .....                    | 121 |
| VII. IMPLEMENTING TOP CLASS RANK POLICIES .....   | 122 |
| CONCLUSION .....  | 123 |

## INTRODUCTION

As economic inequality in the United States has reached unprecedented heights, reformers have focused considerable attention on changes in the law that would provide for greater equality in wealth among Americans. More equitable tax policies, fairer workplace regulation, and more generous spending policies would do much to promote equity.<sup>1</sup>

But there may be even more to gain by revising college admissions policies. Admissions policies at the Ivy League<sup>2</sup> and other elite American colleges greatly exacerbate the problem of economic inequality. Accordingly, reforming those policies may represent the most effective strategy for restoring a reasonable degree of economic equality in the United States.

More specifically, elite universities can do much to promote economic equality by adopting “top class rank” admissions policies.<sup>3</sup> In-

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<sup>1</sup> Expansion of the earned income tax credit would be quite useful, as would a higher minimum wage and greater funding of food stamps and housing subsidies for the poor.

<sup>2</sup> See *Ivy League*, DICTIONARY (July 16, 2016), <http://www.dictionary.com/browse/ivy-league?s=T>.

<sup>3</sup> Under top class rank policies, colleges base their admissions decisions primarily—or even exclusively—on a student’s high school class rank. As discussed later in this article, top class rank policies take different forms. See *infra* note 25. The focus of this article is on the Texas model under which students earn automatic admission to a public college if their grade point average (GPA) places them in the top part of their high school class rank. For more detail, see *infra* text accompanying note 25.

deed, some public universities already have adopted top class rank policies, though primarily in order to promote student body diversity. While the impact on student diversity is a key feature of top rank policies, this article focuses on their ability to turn elite universities from institutions that exacerbate economic inequality into institutions that foster economic equality.

## I. ECONOMIC INEQUALITY COMPROMISES ECONOMIC MOBILITY IN THE UNITED STATES

In recent decades, economic inequality in the United States has greatly increased. In 2007, the top ten percent of families took home a fifty percent share of national income, the first time that has happened (according to data going back to 1910).<sup>4</sup> The rich have been getting richer and the poor are increasingly being left behind.

The problem of economic inequality is worsened by stratified residential geography. The well-to-do are less likely than in the past to live next door to the indigent, leaving many of the poor in neighborhoods that are socially isolated from their more prosperous counterparts.<sup>5</sup> As a result, many children live in “high-disadvantage” communities that suffer from high rates of poverty, low-performing schools, high levels of unemployment and crime, and increased environmental risks to health.<sup>6</sup> These community detriments have lifelong implications, especially for black children. A black child growing up in a high-poverty community suffers from diminished cognitive skills,<sup>7</sup> reduced high school graduation rates,<sup>8</sup> and downward economic mobility.<sup>9</sup> The United States is no longer the land of opportunity that it promises to be. The odds of climbing the so-

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<sup>4</sup> See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 24 (2014).

<sup>5</sup> See SHERYLL CASHIN, *PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA* 25 (2014); Paul A. Jargowsky, *Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy*, 2015 CENTURY FOUND. 1, <http://apps.tcf.org/architecture-of-segregation>; Patrick Sharkey & Bryan Graham, *Mobility and the Metropolis: How Communities Factor into Economic Mobility*, 2013 PEW CHARITABLE TRUSTS 7, [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2013/MobilityandtheMetropolis.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2013/MobilityandtheMetropolis.pdf).

<sup>6</sup> See Geoffrey T. Wodtke, David J. Harding & Felix Elwert, *Neighborhood Effects in Temporal Perspective: The Impact of Long-Term Exposure to Concentrated Disadvantage on High School Graduation*, 76 AM. SOC. REV. 713, 715–16 (2011).

<sup>7</sup> See Robert J. Sampson, Patrick Sharkey & Stephen W. Raudenbush, *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children*, 105 PROC. NAT'L ACAD. SCI. 845, 845 (2008).

<sup>8</sup> See Wodtke et al., *supra* note 6, at 729.

<sup>9</sup> See Patrick Sharkey, *Neighborhoods and the Black-White Mobility Gap*, 2009 PEW CHARITABLE TRUSTS 2–3, [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2009/pewneighborhoods1.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2009/pewneighborhoods1.pdf); CASHIN, *supra* note 5, at 24; see also Richard Rothstein, *Racial Segregation and Black Student Achievement*, EDUC., JUST., & DEMOCRACY 173, 173 (Danielle Allen & Rob Reich eds. 2013).

cioeconomic ladder are low for those on the bottom rungs, and well below the odds they would face in other Western developed countries.<sup>10</sup>

In short, while being poor presents serious obstacles to a child's future, growing up in a poor community presents even more serious obstacles to success. Research has shown that "the more economically segregated a metro area is, the less economically mobile its residents are"<sup>11</sup> and that what matters more for economic mobility is not the degree of economic inequality but the degree to which neighborhoods are economically segregated.<sup>12</sup> Thus, for example, studies have shown that the economic mobility of poor children improves when their families move from a high-poverty neighborhood to a more advantaged community.<sup>13</sup>

## II. TRADITIONAL COLLEGE ADMISSIONS POLICIES EXACERBATE ECONOMIC INEQUALITY

Upper-income families have many reasons to carve out exclusive residential enclaves, independent of college admissions policies. The well-to-do can create communities with low crime rates, low poverty rates, and excellent schools. Nevertheless, college admissions policies play an important role as well. These policies have done much to reward, and therefore accelerate, residential segregation by income in America.<sup>14</sup>

Currently, when thinking about their children's prospects for admission to college, upper-income parents recognize that they are better off with a two-tiered educational system in which their children attend a small number of high-performing schools that the Ivy League and other elite universities rely upon as "feeder" schools.<sup>15</sup> The parents' children

<sup>10</sup> Economic mobility is 2.5 times higher in Canada and more than three times higher in Denmark than in the United States. See John E. Morton & Isabel V. Sawhill, *Economic Mobility: Is the American Dream Alive and Well?*, 2007 PEW CHARITABLE TRUSTS 5, <http://www.pewtrusts.org/en/research-and-analysis/reports/2007/05/25/is-the-american-dream-alive-and-well>.

<sup>11</sup> See Sharkey & Graham, *supra* note 5, at 9.

<sup>12</sup> See *id.* at 10.

<sup>13</sup> See Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates* 4 (Harv. U. Dep't of Econ., 2015), [http://scholar.harvard.edu/files/hendren/files/nbhds\\_paper.pdf](http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf); see also Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, 2010 CENTURY FOUND. 5, <http://www.tcf.org/assets/downloads/tcf-Schwartz.pdf>.

<sup>14</sup> See Chetty & Hendren, *supra* note 13, at 4.

<sup>15</sup> At the University of Texas at Austin, for example, half of the 1996 entering class came from only about four percent of high schools in Texas (59 out of more than 1,500 statewide). Mark C. Long et al., *Policy Transparency and College Enrollment: Did the Texas Top Ten Percent Law Broaden Access to the Public Flagships?*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 82, 84–85 (2010). At Harvard, one-third of the 2013 entering class came from eleven percent of the high schools that sent students to the class. Meg P. Bernhard, *The Making of a Harvard Feeder School*, HARV. CRIMSON, Dec. 13, 2013, <http://www.thecrimson.com/article/2013/12/13/making-harvard-feeder-schools>.

will be better prepared for the SAT or ACT exams, and selective colleges<sup>16</sup> will dip deeper into the schools' senior classes in making offers of acceptance.<sup>17</sup> Parents with means therefore prefer a residential geography with a relatively small number of higher-income communities that have higher-performing school districts.

In these higher-income communities, the parents wield their political influence and wealth on behalf of their children. They lobby for increases in public funding for their school districts, and they also generate greater private funding by creating foundations that supplement their school districts' government dollars.<sup>18</sup> In addition, they provide their children with the other advantages of prosperous communities.

Reserving their influence and wealth for their own children has paid ample dividends for the well-to-do. At the 193 most selective colleges and universities in the United States, students from the richest quartile of the population outnumber students from the poorest quartile by a ratio of fourteen to one.<sup>19</sup> And there are many benefits to students who attend an elite university. Their institutions spend much more on them than would lower-ranked schools,<sup>20</sup> they are more likely to earn a bachelor's degree and gain acceptance to graduate or professional school,<sup>21</sup> and they enjoy higher lifetime earnings.<sup>22</sup> Students at elite universities also are more

<sup>16</sup> "Selective" colleges are those that are selective in their admissions decisions, admitting a limited percentage of applicants based on the quality of the applicants' credentials.

<sup>17</sup> See Long et al., *supra* note 15, at 84–85.

<sup>18</sup> See, e.g., CARMEL HIGH SCHOOL FOUNDATION, <http://www.carmelhighschoolfoundation.org/>.

<sup>19</sup> See Peter Dreier & Richard D. Kahlenberg, *Making Top Colleges Less Aristocratic and More Meritocratic*, N.Y. TIMES, Sept. 12, 2014, <http://www.nytimes.com/2014/09/13/upshot/making-top-colleges-less-aristocratic-and-more-meritocratic.html>.

<sup>20</sup> See The Hechinger Report, *Education Spending Gap Widens Between College Haves and Have-Nots*, U.S. NEWS (Jan. 25, 2016, 2:18 PM), <http://www.usnews.com/news/articles/2016-01-25/education-spending-gap-widens-between-college-haves-and-have-nots-since-recession>.

<sup>21</sup> See Anthony P. Carnevale & Jeff Strohl, *Separate & Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege*, 2013 CTR. ON EDUC. & THE WORKFORCE 24–25, [https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR\\_.pdf](https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR_.pdf). In 2007, highly selective colleges spent \$92,000 per student while low-selectivity colleges spent only \$12,000 per student. Caroline M. Hoxby, *The Changing Selectivity of American Colleges*, 23(4) J. ECON. PERSP. 95, 109 (2009).

<sup>22</sup> See Caroline M. Hoxby, *The Return to Attending a More Selective College: 1960 to the Present*, FORUM FUTURES: EXPLORING THE FUTURE OF HIGHER EDUC., 2000 PAPERS 24 (Maureen Devlin & Joel Meyerson eds., 2001). According to one estimate, attending a state flagship university can yield an increase of around twenty percent in annual earnings by ages 28–32. See Mark Hoekstra, *The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach*, 91 REV. ECON. & STAT. 717, 724 (2009). Some researchers have not found an earnings premium for the typical student from attendance at an elite university. Stacy B. Dale & Alan B. Krueger, *Estimating the Effects of Characteristics over the Career Using Administrative Earning Data*, 49 J. HUM. RESOURCES 323, 325–26 (2014). But even under their analysis, students from disadvantaged backgrounds realize a substantial earnings premium from attending a selective college. See *id.* at 326. In other words, when students

likely to form friendships and develop other ties with classmates who will become leaders in government, business, and the professions.<sup>23</sup>

In short, by leveraging their wealth to create exclusive and advantaged communities, well-to-do parents are better able to secure seats in the elite universities for their children and ensure an intergenerational reproduction of privilege.<sup>24</sup>

As indicated, college admissions policies are not the only factor influencing economic inequality. But the policies play an important role. Moreover, reform of college admissions policies can provide a counterbalance to economic inequality from all causes. That is the topic of the next section of this article.

### III. TOP CLASS RANK POLICIES PROMOTE ECONOMIC EQUALITY

Instead of employing the traditional admissions policies that foster economic inequality, America's elite universities could follow the Texas approach to college admissions at the state's public universities. Rather than basing admissions on an applicant's grades, test scores, essays, and other factors, the universities would base admission primarily on an applicant's high school class rank. Under the simple version of the Texas top class rank policy, students are guaranteed admission to the University of Texas at Austin (UT-Austin), Texas A&M University, and other state colleges if their grade point average ("GPA") places them in the top ten percent of their high school class.<sup>25</sup>

Texas adopted its top class rank policy in the wake of *Hopwood v. University of Texas*, a 1996 decision by the U.S. Court of Appeals for the Fifth Circuit.<sup>26</sup> The *Hopwood* court concluded that the Fourteenth

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from lower-income families are excluded from elite universities, they lose an important opportunity to ascend the socioeconomic ladder.

<sup>23</sup> The U.S. president, every justice on the U.S. Supreme Court, and around half of U.S. senators have earned an undergraduate, graduate, or professional degree at a top university. See *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

<sup>24</sup> See Carnevale & Strohl, *supra* note 21, at 7.

<sup>25</sup> As top ten students accounted for an increasing percentage of the UT-Austin entering class, the campus sought and obtained a revision of the top ten law. See *infra*, note 45. Since 2011, UT-Austin reserves only seventy-five percent of its entering slots for the automatically admitted students and therefore adjusts its top class rank cut-off annually, usually ending up at the top seven or eight percent of high school classes. Other states also have top class rank policies, but typically guarantee admission to one of the state's public universities rather than to all of them (e.g., Florida), or treat a top class rank as a strong preference rather than a guarantee of admission (e.g., California). See *Talented Twenty Program*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/schools/family-community/activities-programs/talented-twenty-program>; *Statewide Path*, U. OF CAL., <http://admission.universityofcalifornia.edu/freshman/california-residents/admissions-index/index.html>. There also is precedent from France. In July 2013, the French Parliament enacted a top class rank policy for the country in order to ensure equal access to higher education for immigrant, low-income, and rural students.

<sup>26</sup> See *Hopwood v. Univ. of Tex.*, 78 F.3d 592 (5th Cir. 1996).

Amendment's Equal Protection Clause forbids public universities from taking race or ethnicity into account in their admissions decisions. As a result, state universities in Texas could not employ traditional affirmative action policies as a way to promote the racial and ethnic diversity of their student bodies (until the U.S. Supreme Court validated affirmative action in 2003).<sup>27</sup> The Texas legislature responded to *Hopwood* by enacting the state's top class rank policy.<sup>28</sup> Because many high schools have an overwhelmingly minority student body,<sup>29</sup> admitting the top ten percent of every high school provides a useful way to bring diversity to a college's entering class.

Indeed, at UT-Austin, the top class rank policy has done much more than has the university's affirmative action policy to promote admission of underrepresented racial and ethnic minorities and the economically disadvantaged. As mentioned earlier,<sup>30</sup> top class rank students account for 75% of the UT entering class, with the other 25% being assessed on a range of factors, including grades, standardized test scores, essays, recommendations, extracurricular activities, community service, socioeconomic background, race, and ethnicity.<sup>31</sup> In 2015, the top class rank part of the class was 36% white, 6% black, and 28% Hispanic.<sup>32</sup> The other part of the class, with its affirmative action component, included 49% white, 4% black, and 14% Hispanic students.<sup>33</sup> With regard to economic

<sup>27</sup> In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court overruled *Hopwood*.

<sup>28</sup> David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181, 187 (1998). For more discussion of the Texas policy, see LANI GUINIER & GERALD TORRES, *MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 67–74 (2002).

<sup>29</sup> In the Houston Independent School District, 87% of students are African-American or Hispanic. *2015–2016 Facts and Figures*, HOUSTON INDEP. SCH. DISTRICT, <http://www.houstonisd.org/site/default.aspx?PageType=14&DomainID=7908&PageID=41879&ModuleInstanceID=48525&ViewID=1e008a8a-8e8a-4ca0-9472-a8f4a723a4a7&IsMoreExpandedView=true> (last visited June 20, 2016). In the Dallas Independent School District, 93% of students are African-American or Hispanic. *2015.2016 Facts*, DALLAS INDEP. SCH. DISTRICT, [http://www.dallasisd.org/cms/lib/TX01001475/Centricity/Domain/48/district\\_facts.pdf](http://www.dallasisd.org/cms/lib/TX01001475/Centricity/Domain/48/district_facts.pdf) (last visited June 20, 2016). In the San Antonio Independent School District, 97.5% of students are African-American or Hispanic. *SAISD at a Glance*, SAN ANTONIO INDEP. SCH. DISTRICT, [http://www.saisd.net/main/index.php?option=com\\_docman&task=doc\\_view&gid=1676&tmpl=component&format=raw&Itemid=160](http://www.saisd.net/main/index.php?option=com_docman&task=doc_view&gid=1676&tmpl=component&format=raw&Itemid=160) (last visited June 20, 2016).

<sup>30</sup> See *supra* note 25; see also *infra* note 45.

<sup>31</sup> *Fisher*, 136 S. Ct. at 2205–06.

<sup>32</sup> The University of Texas at Austin, *Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175, 81st Legislature: For the Period Ending Fall 2015*, at 33 (Dec. 31, 2015), [http://admissions.utexas.edu/docs/sb175\\_report\\_2015.pdf](http://admissions.utexas.edu/docs/sb175_report_2015.pdf).

<sup>33</sup> *Id.* Among high school seniors in Texas, 32% are white, 12.5% are black, and 49% are Hispanic. TEX. EDUC. AGENCY, generated by David Orentlicher, using PEIMS Standard Reports Overview (2016).

background, 19% of the top class rank students came from families with an income less than \$40,000. Only 7% of the other students did.<sup>34</sup>

While the diversity benefits of top class rank policies are important, they are not the point of this article. Rather, I am interested here in what top class rank policies offer beyond promoting student body diversity. As economic theory predicts, and empirical evidence from Texas shows, top rank policies can play a critical role in promoting the economic integration of America's neighborhoods and thereby in fostering a greater degree of economic equality in the United States.

#### A. *Top Class Rank Policies Provide Incentives for Economic Equality*

Consider what would happen if top class rank policies were implemented widely by the elite universities in the United States, private as well as public. That is, leading universities would only admit students who placed in the top five or ten percent of their high school class rank.<sup>35</sup> With universal use of top class rank policies, students attending high-performing high schools would lose their advantage in the admissions process. Finishing in the top rank of a lower-performing school would be preferable to finishing just below the top rank at a strong school. In a world of top class rank policies, the odds of gaining admission to Yale, the University of Chicago, or Stanford would be much greater from an urban high school than from a suburban or private high school.<sup>36</sup> The incentive for parents to congregate in a small number of high-performing school districts would drop substantially. And that incentive would be replaced by a strong incentive to disperse over a large number of school districts.<sup>37</sup>

As higher-income families moved to lower-performing school districts,<sup>38</sup> they would do much to improve the districts' schools. Importantly, lower-performing schools would gain backing from a stronger constituency. The higher-income families would continue to lobby for increases in public school funding and to support greater private funding

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<sup>34</sup> *Report to the Governor*, *supra* note 32, at 34.

<sup>35</sup> Because they draw from a national applicant pool and are more selective than UT-Austin and other top public universities, elite private universities might need a higher threshold than the Texas top ten percent for a top class rank policy. For further discussion, see *infra* text accompanying notes 51–52, 55.

<sup>36</sup> While urban communities often suffer from higher rates of poverty than do suburban communities, there are many distressed suburban and rural communities, too. CASHIN, *supra* note 5, at 25–26. Top class rank policies would help distressed suburban and rural communities as well.

<sup>37</sup> Orentlicher, *supra* note 28, at 190.

<sup>38</sup> As discussed, *infra*, text accompanying notes 50–51, this argument does not assume that higher-income families would choose *low*-performing school districts. Rather, the assumption is that they would settle on schools with not as high a level of achievement.



through school district foundations,<sup>39</sup> but they would do so for the lower-performing school districts. Moreover, the benefits would extend to K-8 education, partly because funding is allocated on a district-wide basis, and also because many families will not wait until high school to choose their school districts or because families will enroll their younger children in K-8 grades when they enroll their older children in high schools.

In addition to improving lower-performing schools, the inflow of higher-income families would create other important benefits for disadvantaged communities. Rates of poverty, unemployment, and crime would fall, and revenues would rise from property taxes and other local levies. Consequently, local government agencies would enjoy a fortunate combination of greater resources for public services and a reduced demand for those services. Stop-gap safety net spending could be replaced by long-term investments in public transportation, other critical infrastructure, and important cultural institutions. Indeed, top class rank policies could do much to correct the imbalances in public finances from community to community that exacerbate socioeconomic disparities in the United States.

Most importantly, by creating a greater degree of residential integration by income, top class rank policies would give children in all communities a meaningful opportunity to move up the socioeconomic ladder. Top class rank policies directly address the obstacles to economic equality in the United States from stratified residential geography.

#### *B. Empirical Evidence from Texas Illustrates the Benefits of Top Class Rank Policies*

Of course, an important question is whether parents really would choose less competitive, lower-performing high schools to guarantee a top high school class rank for their children. College prospects are a leading consideration for families when choosing a high school,<sup>40</sup> but they are not the only reason why parents prefer higher-performing schools for their children and wealthier school districts for their residences. Moreover, a lower-performing school may not provide as strong a preparation for the rigors of college study.

On this question, we have important empirical evidence from the implementation of the Texas top class rank policy. The studies indicate that top class rank policies do in fact cause families to select lower-performing schools and school districts. A leading study found that among

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<sup>39</sup> See *supra* text accompanying note 18.

<sup>40</sup> MARK SCHNEIDER, PAUL TESKE & MELISSA MARSCHALL, CHOOSING SCHOOLS: CONSUMER CHOICE AND THE QUALITY OF AMERICAN SCHOOLS 91 (2000) (describing survey data with 69% of parents listing college matriculation rate as a reason for their children's schools' high quality).

students with both an interest in attending a flagship public university in Texas and an opportunity to strategically enroll in a different high school, families for at least five percent of students made the strategic choice.<sup>41</sup>

Not only do families choose lower-performing schools, they also choose to live in lower-performing school districts. A study on this question found that after adoption of the Texas top class rank policy, increases in property values were significantly higher in lower-performing than in higher-performing school districts, especially in the lowest-performing districts.<sup>42</sup> And the increases in property taxes were quite meaningful, measuring in the millions of dollars per district (though still in the range of about eight percent of total property tax revenues).<sup>43</sup>

To be sure, the impact has been modest, but one would not expect a huge impact from the Texas top class rank policy. While students' chances for admission to the state's public universities are higher if they apply from a lower-performing high school, their chances for admission to selective private universities or out-of-state public universities remain greater from higher-performing high schools. For students who want to attend Princeton, Rice, or the University of Michigan, the Texas top class rank policy does not change the students' incentives for choice of high school.<sup>44</sup>

In addition, while Texas guarantees admission to top class rank students, a top class rank is not the exclusive path to a public university in the State. For financial, family, or other reasons, many top class rank students do not exercise their option to enroll, leaving many seats for non-top class rank applicants at even the most selective public universities.<sup>45</sup> Hence, Texas students can pursue their interest in an excellent

<sup>41</sup> Julie Berry Cullen, Mark C. Long & Randall Reback, *Jockeying for Position: Strategic High School Choice Under Texas' Top Ten Percent Plan*, 97 J. PUB. ECON. 32, 44 (2013). The study also found that more students would have transferred if there had been nearby high schools that offered a sufficient increase in chances of finishing in the top ten percent of the class. *Id.* at 44.

<sup>42</sup> Kalena E. Cortes & Andrew I. Friedson, *Ranking Up by Moving Out: The Effect of the Texas Top 10% Plan on Property Values*, 67 NAT'L TAX J. 51, 66–68 (2014).

<sup>43</sup> *Id.* at 74.

<sup>44</sup> Even without a top class rank policy, some high achievers might prefer a less competitive school. They might want to increase their chances of standing out. But switching to a top class rank policy for in-state public universities does not give those high achievers a greater reason to choose the less competitive school if they hope to study at a private or out-of-state public university.

<sup>45</sup> In the early years of the Texas top class rank policy, about half of the UT-Austin first-year class comprised top class rank admittees. Sunny X. Niu & Marta Tienda, *Minority Student Academic Performance Under the Uniform Admission Law: Evidence from the University of Texas at Austin*, 32 EDUC. EVAL. & POL'Y ANALYSIS 44, 49 (2010). Top class rank admittees constituted an increasing percentage of entering classes, peaking at 87% with the 2010 first-year class. To preserve admission prospects for non-top ten students, the state legislature

state university without moving to a lower-performing school. At St. John's School, an elite private high school in Houston, more than forty percent of the senior class was admitted to UT-Austin in 2014.<sup>46</sup> Given the limits of the incentive, it is impressive that the Texas policy has had as big an effect as it has.

### C. *Nationwide Implementation Would Increase the Impact of Top Class Rank Policies*

Although top class rank policies can have only a modest impact when limited to public universities in a state, the policies could easily have a substantial impact if used widely by public and private universities. If all selective universities, whether in Texas or in other states, adopted a top class rank model, the incentives for choosing a lower-performing school would become very strong.

As discussed above, the benefits from attending an elite university are considerable.<sup>47</sup> Accordingly, competition for admission to selective universities is fierce. At Harvard, 39,041 students applied for the class of 2020, and only 2,106—less than six percent—were accepted.<sup>48</sup> Stanford attracted even more applications, 43,997, and accepted only 2,063—less than five percent of candidates.<sup>49</sup> Parents spend thousands of dollars on tutors and SAT prep courses, tens of thousands of dollars on tuition at top-notch private schools, and students look for every opportunity to bur-nish their resumes. The whole process has come to be known as the college admissions “arms race.”<sup>50</sup> With the enormous interest in attending elite universities and the low odds for acceptance, families will be very attracted to options that meaningfully increase their chances of accept-

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capped top class rank enrollment at 75% of the first-year class for UT-Austin, beginning with the fall 2011 entering class. *Report to the Governor, supra* note 32, at 2.

<sup>46</sup> Telephone conversation with Courtney Burger, Director of Admission, St. John's School, Houston, Texas. None of St. John's School's students qualify for the automatic admission based on class rank. Because St. John's does not rank its students, they are not eligible for the top class rank policy.

<sup>47</sup> See *supra* text accompanying notes 19–24. And even if parents and students overestimate the benefits of attending an elite college, they act on the basis of their perceptions. Hence, many parents make every effort to improve their children's chances of admission to selective universities.

<sup>48</sup> *Harvard Admitted Students Profile*, HARV. C., <https://college.harvard.edu/admissions/admissions-statistics> (last visited Aug. 14, 2016).

<sup>49</sup> Press Release, Stanford Univ., *Stanford Offers Admission to 2,063 Students from Around the World* (Mar. 25, 2016), available at <http://news.stanford.edu/2016/03/25/admission-announce-032516> (last visited Aug. 14, 2016). Even these daunting statistics overstate most applicants' odds of acceptance since some students are accepted at multiple elite universities.

<sup>50</sup> DON HOSSLER, JACOB P.K. GROSS & BRANDI M. BECK, PUTTING THE COLLEGE ADMISSION “ARMS RACE” IN CONTEXT: AN ANALYSIS OF RECENT TRENDS IN COLLEGE ADMISSION AND THEIR EFFECTS ON INSTITUTIONAL POLICIES AND PRACTICES 3 (2010), <http://www.nacacnet.org/research/publicationsresources/marketplace/documents/collegeadmissionarmsrace.pdf>.

ance. And under a top class rank policy, moving to a lower-performing school district would greatly increase the chances of acceptance for most upper-income families.

This is not to say that families would select the weakest school district instead of the strongest district. That might happen to some extent in the case of a low-performing district or school with excellent programs for gifted students. For the most part, though, one would expect more of a cascading effect. Some families would choose a B district over an A district, others a C district over a B district, and so on. Early responders will make the lower-performing schools more attractive, and more families will be interested in those schools in subsequent years. Over time, the incentives for choosing a lower-performing school district would become self-reinforcing and lead to a distribution of wealth across schools and school districts that is much more uniform than exists today.

Note that it would be important to make a top class rank *necessary* rather than just *sufficient* for admission to college. As the Texas experience indicates, the incentives created by top class rank policies are diluted if students can gain admission to selective universities without a top class rank.

How high would an applicant's class rank need to be if all selective universities adopted a top class rank policy? Entering class data suggest that a top ten percent threshold would work well overall for the leading universities. About 1.6 million students enroll as full-time freshmen in four-year colleges every year, and more than eight percent of those students attend one of *Barron's* 82 most selective universities or University of California-Berkeley, University of Illinois, University of Michigan, UT-Austin, or University of Wisconsin, which are examples of elite universities not included in *Barron's* top 82.<sup>51</sup> At the most selective schools, a higher threshold might be needed, closer to the one or two percent range. Indeed, Harvard could fill its entering class with about one-tenth of a percent of the 1.6 million.<sup>52</sup>

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<sup>51</sup> *Ranking Colleges by Selectivity*, N.Y. TIMES, Apr. 4, 2013, <http://www.nytimes.com/interactive/2013/04/04/business/economy/economix-selectivity-table.html>; KEVIN EAGAN ET AL., THE AMERICAN FRESHMAN: NATIONAL NORMS 5 (2014). Total entering class numbers of about 134,000 were calculated by drawing individual class numbers from each university's "common data set," which usually is available on the university's website. For an example of a common data set, see *2015–2016 Common Data Set*, WILLIAMS C. (Dec. 4, 2015), [http://provost.williams.edu/files/williams\\_cds\\_1516\\_w\\_tuition.pdf](http://provost.williams.edu/files/williams_cds_1516_w_tuition.pdf) (last visited Aug. 14, 2016). While 134,000 is less than 10% of 1.6 million, the examples of Berkeley, Michigan, Texas, etc., indicate that *Barron's* most competitive list excludes a number of elite universities.

<sup>52</sup> 1,667 students enrolled in the Harvard Class of 2020. *Harvard Admitted*, *supra* note 48. For the class of 2018, more than 3,000 high school valedictorians applied to Harvard. *College Admits Class of '18*, HARV. GAZETTE, Mar. 27, 2014, <http://news.harvard.edu/gazette/story/2014/03/college-admits-class-of-18/>. Even under a top student only policy, the college could have accepted only about two-thirds of applicants who would have been eligible for admission.

But even at the most selective institutions, a more generous top class rank could work. As discussed in the next section of this article, highly selective schools could use a top five or ten percent rank as a threshold requirement for admission to narrow the pool of eligible applicants. Then the schools could use other criteria to choose among applicants—as long as the odds for admission from the narrowed pool were equal across different high schools. In other words, an elite college would automatically reject any student below the top five or ten percent and then decide among the remaining applicants based on whatever criteria it wanted, as long as the odds of admission from any one high school were similar to the odds of admission from other high schools. For example, Harvard would not be able to accept five or ten percent of the Phillips Exeter Academy class and one percent or less of the class from other high schools. Rather, the odds of admission to Harvard would have to be the same from all high schools. Such an approach would preserve the incentive to move to lower-performing school districts.

While the choice of a less competitive high school may seem like an unfair way for families to “game” a top class rank policy, there is a more accurate way to view the strategy. Top class rank policies allow universities to undo the existing gaming of the admissions process that has contributed to the high level of economic inequality in the United States. Current admissions policies reward the development of a two-tiered education system, with “haves” and “have-nots,” rather than a system in which all students can realize their potential. As a corollary, current admission policies reward parents who congregate in up-scale neighborhoods and abandon the inner city or other locales for their residences, taking their wealth to advantaged communities and exacerbating economic inequality. In contrast, top class rank policies reward parents for setting up their households in less advantaged communities and moving society in a direction of greater social and economic equality.

In addition to creating an incentive for higher-income families to move to lower-performing school districts, top class rank policies create important incentives for students already living in lower-performing school districts. While students at lower-performing schools face long odds for admission to selective colleges under traditional college admissions policies, top class rank policies give them much more favorable odds. Hence, when elite universities switch to a top class rank policy, they greatly increase the payoff for working hard at one’s studies.<sup>53</sup> Accordingly, top class rank policies should result in higher academic achievement generally among students at lower-performing schools. This

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<sup>53</sup> Kalena E. Cortes & Lei Zhang, *The Incentive Effects of the Top 10% Plan 4* (June 14, 2012) (unpublished manuscript) (available online at <http://users.nber.org/~cortes/kcortes%20LZhang%20Incentives-Top10.pdf>).

is exactly what has happened in Texas. Performance on the State's standardized testing for tenth graders has increased in lower-performing schools, especially at the lowest-performing schools.<sup>54</sup>

#### IV. TOP CLASS RANK POLICIES CAN BE DESIGNED TO MINIMIZE TRADE-OFFS

##### A. *Top Class Rank Policies Can Produce a Well-Rounded Student Body*

Universities might worry that by focusing only on class rank as a metric of student achievement, much would be lost in terms of student body diversity and the richness of campus life. In fact, top class rank policies can accommodate those concerns. If admissions offices want to consider athletic ability, musical talent, or other interests and experiences, they can do that too. As mentioned above, having a high class rank could represent a threshold requirement for admission, with other factors deciding which among the top class rank students are admitted. An elite college could initially narrow its applicant pool by excluding anyone with a high school class rank below the top five or ten percent. Then it could winnow the pool further by taking into account other aspects of an applicant's talents, experiences, and background. As noted, it would just be important to ensure that there be an equal chance of admission across different high schools for the top athletes, artists, or other applicants who bring special talents, experiences, or backgrounds to the table.<sup>55</sup>

It also would be important to keep a top class rank as a threshold requirement when other metrics are used to evaluate applicants. If students could overcome a lower class rank with strong athletic ability or exceptional musical talent, then students could game a top class rank system by transferring schools for senior year of high school.<sup>56</sup> But waiting to transfer until senior year will not be attractive as long as class rank is critical. The students would bring their grades with them and therefore

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<sup>54</sup> *Id.* at 3.

<sup>55</sup> Equal treatment across high schools would include the principle that admissions be proportionate. Students at a high school with 1000 students should have twice the odds of admission as a student at a high school with 500 students. This would prevent families from gaming a top class rank policy by creating a lot of small high schools. In Texas, students are not eligible for the top class rank policy unless their high school has at least 10 students in the graduating class. Marta Tienda, *Striving for Neutrality Lessons from Texas in the Aftermath of Hopwood and Fisher*, in *THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS* 91, 92 (Richard D. Kahlenberg ed., 2014).

<sup>56</sup> The most outstanding athletes and musicians would not need to transfer to take advantage of a policy that rewards the top athletes or artists. But very good athletes or artists who fall just below the top level of athletes and artists at their current school could rise to the top at other high schools.

could easily fall short of the necessary GPA for a top class rank in their new school.<sup>57</sup> Parents will choose the less competitive school at the outset of their children's high school education if they want to improve their children's chances of admission to a selective university.<sup>58</sup>

Top class rank as a threshold requirement with consideration of additional factors may seem complicated, and other factors would add more complexity. For example, it is simple to apply a top class rank policy to a high school with a senior class of a thousand, but what about very small high schools, where the senior class might have only ten students?

Top class rank policies are no more complicated than current admissions policies at selective colleges. Once a university abandons a simple reliance on a composite of high school grades and test scores and employs a holistic evaluation of candidates that includes a host of factors, the process becomes quite complex. In addition, the complexities of top class rank policies should not be exaggerated. With regard to the high school class size question, for example, more than 85% of public high school students graduate with a senior class of at least one hundred.<sup>59</sup> Students at very small schools can be considered by pooling them together.

### *B. Top Class Rank Policies Can Maintain Academic Excellence*

Universities also might worry that high school class rank provides an imperfect measure of academic ability. Finishing at the top of a low-performing school may say less about the high-ranker than about the competition from classmates. Standardized test scores, on the other hand, provide a measure that is uniform across high schools and that gives colleges a way to compare top students from different schools.

As it turns out, top class rank policies can be implemented without compromising the academic strength of a university's student body. An analysis of the Texas top class rank policy compared the college grades and likelihood of graduation among beneficiaries of the policy at the UT-Austin with the grades and graduation rates of the students who were displaced—the rejected applicants who would have been admitted in the absence of the top class rank policy. The study found that the top-rank admittees “consistently performed as well as or better than” the displaced

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<sup>57</sup> Texas high schools addresses the transfer issue by requiring a minimum duration of attendance before a student can qualify for the top class rank automatic admission. Cullen et al., *supra* note 41, at 34.

<sup>58</sup> Students whose families move to a different city or state during high school would not be disadvantaged. While they would bring their grades with them to their new high schools, they would have had to decide in their previous locale whether to enroll in a higher-performing or lower-performing high school.

<sup>59</sup> NAT'L CTR. FOR EDUC. STAT., generated by David Orentlicher, using El SI Table Generator (2016).

students, even though the top-rank admittees arrived at UT with lower SAT or ACT scores.<sup>60</sup>

This may seem surprising, but it is not. Test scores are based on a single test administered on a single day while class rank reflects four years of effort in courses that present similar challenges to those that high school students will face in college.<sup>61</sup> Studies have found that high school grades are a better predictor than test scores of college achievement and that the combination of grades and test scores offers only a small increase in predictive accuracy over grades alone.<sup>62</sup> According to one study based on nationwide data, using test scores in addition to high school class rank increases the ability of admissions officers to correctly predict college completion in only one to two out of every thousand cases.<sup>63</sup> In a study of graduation rates at public universities, test scores added little or nothing to the highly significant predictive power of high school GPA.<sup>64</sup> Studies at individual colleges come to similar conclusions. When the office of admissions at Johns Hopkins University looked at data for its students, it found that high school GPA was the best predictor of first-year college GPA “by a wide margin” when compared to SAT and SAT Subject Test scores. Indeed, consideration of SAT scores

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<sup>60</sup> Niu & Tienda, *supra* note 45, at 64–65. Of course, the displaced students did not attend UT-Austin. To estimate their level of college achievement, the researchers compared the top class rank admittees with a cohort of admitted non-top rank students who were similar in high school performance to the students who were displaced by the top class rank policy. Thus, the study’s results are conservative—the students who actually were displaced were viewed as weaker applicants than the students who made up the “displaced” student cohort in the study. *Id.* at 50–51, 54. To be sure, UT-Austin expanded its academic support services to help top class rank students make the transition from a low-performing high school to a high-performing college.

If top class rank policies are adopted widely, top class rank admittees should be even stronger than in Texas. Recall that universal adoption of class rank policies would provide a greater incentive than does the Texas policy for families to choose lower-performing schools. As lower-performing schools became more desirable, they would be better funded and their students more competitive. Accordingly, the performance of their top students should improve significantly.

<sup>61</sup> Richard C. Atkinson & Saul Geiser, *Reflections on a Century of College Admissions Tests*, in *SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS* 23, 25 (Joseph A. Soares ed. 2012).

<sup>62</sup> *Id.*; James Crouse, *Does the SAT Help Colleges Make Better Selection Decisions?*, 55 *HARV. EDUC. REV.* 195, 212 (1985); John Brittain & Benjamin Landy, *Reducing Reliance on Testing to Promote Diversity*, in *THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS* 160, 160–61 (Richard D. Kahlenberg ed. 2014); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 *CAL. L. REV.* 953, 974–75 (1996). Analyses from the not-for-profit that sponsors the SAT, the College Board, find somewhat better predictive value from the SAT than is found in analyses by outsiders. Brittain & Landy, *supra*, at 161.

<sup>63</sup> Crouse, *supra* note 62, at 209.

<sup>64</sup> WILLIAM G. BOWEN, MATTHEW M. CHINGOS, & MICHAEL S. MCPHERSON, *CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA’S PUBLIC UNIVERSITIES* 113–16 (2009).



in addition to high school GPA improved the office's ability to predict first-year achievement by only two percent.<sup>65</sup>

The small benefit from standardized test scores has been illustrated in other ways. In a study of colleges that made submission of test scores optional, there were only marginal and statistically insignificant differences in college achievement between students who submitted test scores and students who opted not to submit their scores.<sup>66</sup> Moreover, because there is a much greater correlation between family wealth and test scores than between family wealth and high school grades,<sup>67</sup> consideration of test scores does more to distinguish between higher- and lower-income applicants than between stronger and weaker applicants.<sup>68</sup> As a result, it is becoming increasingly common for selective colleges, including Bowdoin, Bryn Mawr, Smith, and Wesleyan, to make submission of SAT or ACT scores optional for applicants.<sup>69</sup>

If colleges wanted to take test scores into account, they still could do so under a top class rank policy. Admissions officers could make the scores one of the additional factors used to winnow their applicant pools after narrowing the pools based on class rank. By considering test scores

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<sup>65</sup> Teresa Wonnell, Chloe Melissa Rothstein, & John Latting, *Predictors of Academic Success at a Highly Selective Private Research University*, in *SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS* 137, 141 (Joseph A. Soares ed., 2012). SAT Subject Test scores added only one percent to the admissions offices ability to predict first-year achievement. *Id.* at 143. This study was conducted after the 2005 revision of the SAT. *Id.* at 137. A study at Siena College of its students found that high school GPA was a "somewhat stronger predictor" than SAT score of final college GPA and that there was a "sharp decline" in college graduation rates for students with high SATs and low high school GPAs. SIENA COLLEGE OFFICE OF INSTITUTIONAL RESEARCH, WHITE PAPER: SAT SCORES AS PREDICTORS OF ACADEMIC SUCCESS (Aug. 29, 2013).

<sup>66</sup> William C. Hiss & Valerie W. Franks, *Defining Promise: Optional Standardized Testing Policies in American College and University Admissions* 8 (Feb. 2014), <http://www.nacacnet.org/research/research-data/nacac-research/Documents/DefiningPromise.pdf>. The average final GPAs for the two groups were 2.88 for submitters and 2.83 for non-submitters, and the graduation rates were 64.5% and 63.9%, respectively. *Id.* at 8.

<sup>67</sup> Brittain & Landy, *supra* note 58, at 166.

<sup>68</sup> *Id.* at 160.

<sup>69</sup> *Id.* at 165; Nick Anderson, *George Washington University Applicants No Longer Need to Take Admissions Tests*, WASH. POST, July 27, 2015, <http://www.washingtonpost.com/news/grade-point/wp/2015/07/27/george-washington-university-applicants-no-longer-need-to-take-admissions-tests/>; FAIRTEST: NATIONAL CENTER FOR FAIR & OPEN TESTING, 180+ "TOP TIER" SCHOOLS WHICH DEEMPHASIZE THE ACT/SAT IN ADMISSIONS DECISIONS PER U.S. NEWS & WORLD REPORT BEST COLLEGES GUIDE (2015), <http://www.fairtest.org/sites/default/files/Optional-Schools-in-U.S.News-Top-Tiers.pdf>. At Bowdoin, one reason for making SAT scores optional was the fact that among its honors graduates, only 31% had scored above the class average for the exam while 24% had scored below the average. DAVID OWEN & MARILYN DOERR, NONE OF THE ABOVE: THE TRUTH BEHIND THE SATS, REVISED AND UPDATED 238 (1999).

in this fashion, very little would be lost. Test scores are least valuable when used to compensate for an applicant's low GPA.<sup>70</sup>

Other concerns about top class rank policies can be addressed in the design of the policies. For example, because students might take easier classes to ensure a higher GPA, high schools can give extra grade points for more challenging classes, as is common already, and colleges can make sufficiently demanding coursework a prerequisite to admission.<sup>71</sup>

Would great emphasis on class rank put undue pressure on high school students who want to attend an elite university? These students already face intense pressure, and they already recognize that they need exceptional credentials to be successful candidates at colleges that accept as few as five percent of applicants. According to 2007 data, the average student at the most selective colleges enrolled with an SAT/ACT score at the ninety-eighth percentile.<sup>72</sup>

### C. *Top Class Rank Policies Can Ensure Racial, Ethnic, and Economic Diversity*

If higher-income parents choose lower-performing schools for their children, would that undermine the ability of top class rank policies to admit applicants from underrepresented minorities or from economically disadvantaged backgrounds? As mentioned, top class rank policies produce much of their racial, ethnic, and economic diversity by drawing students from high schools that have high enrollments of minority and low-income students.<sup>73</sup>

If top class rank policies drive upper-income, white families to the minority high schools, those schools might send more upper-income, white graduates and fewer lower-income, minority graduates to selective institutions. As wealthier white students displaced poorer minority students, the diversity benefits of top class rank policies would erode.

Top class rank policies need not be viewed simply as alternatives to affirmative action. Universities can compensate for any displacement effects of top class rank policies by taking into account an applicant's race or ethnicity.

And even in the absence of an affirmative action policy, colleges can maintain racial and ethnic diversity with top class rank policies by reserving seats in their entering classes for applicants who have exper-

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<sup>70</sup> OWEN & DOERR, *supra* note 69, at 236 (quoting current and former admissions officers at Harvard, Stanford, and other universities for the point that applicants with low high school grades and high SAT scores are very weak candidates).

<sup>71</sup> Texas amended its top class rank policy to include a rigorous high school curriculum requirement. Tienda, *supra* note 55, at 92 n.4.

<sup>72</sup> Hoxby, *Changing Selectivity*, *supra* note 21, at 99.

<sup>73</sup> See *supra*, text accompanying notes 28–34.

iened economic disadvantage, family hardship, or other obstacles. While consideration of socioeconomic disadvantage usually is not as effective as direct consideration of race and ethnicity at promoting racial and ethnic diversity,<sup>74</sup> it is possible to fashion policies based on economic class that are more effective than direct consideration of race or ethnicity.<sup>75</sup>

Moreover, the displacement of minority and low-income students would diminish over time. As school districts become less stratified in terms of wealth, race, and ethnicity, poor and minority students will enjoy greater opportunities to realize their potential. Recall in this regard the earlier point that what matters more for economic mobility of children is not the degree of economic inequality but the degree to which neighborhoods are economically segregated.<sup>76</sup>

In sum, while there are potential disadvantages of top class rank policies, the risks can be minimized by sound design. Adopting top class rank policies poses little threat to higher education. On the other hand, the potential payoff from the policies is very high. If top class rank policies make for greater economic equality among communities in the United States, then the policies' benefits would extend beyond the small percentage of children who would achieve a top class rank—or the small percentage who benefit currently from affirmative action policies<sup>77</sup>—to all of the children in currently disadvantaged communities.

## V. TOP CLASS RANK POLICIES AND THE U.S. SUPREME COURT

While the socioeconomic implications of top class rank policies provide sufficient reason for elite universities to adopt them, the universities may be forced in upcoming years to consider top class rank policies as alternatives to their current admissions policies.

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<sup>74</sup> Anthony P. Carnevale, Stephen J. Rose & Jeff Strohl, *Achieving Racial and Economic Diversity with Race-Blind Admissions Policy*, in *THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS* 187, 191–93 (Richard D. Kahlenberg ed., 2014).

<sup>75</sup> Matthew N. Gaertner, *Advancing College Access with Class-Based Affirmative Action: The Colorado Case*, in *THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS* 175, 180–81 (Richard D. Kahlenberg ed., 2014) (discussing a class-based policy developed at the University of Colorado).

<sup>76</sup> *Supra*, text accompanying notes 11–13. Note that top class rank policies have an inherently limited displacement effect. The more rapid the movement of upper-income families to lower-performing school districts, the quicker the dissipation of the displacement effect. On the other hand, the more gradual the movement of upper-income families, the less pronounced will be the displacement effect.

<sup>77</sup> Not only does affirmative action in higher education reach a small percentage of minority students, it also reaches only the more affluent in the minority student pool. Richard H. Sander, *Class in American Legal Education*, 88 *DENV. U. L. REV.* 631, 651 (2011).

The U.S. Supreme Court has increasingly expressed concerns about the constitutionality of race-conscious admissions policies. When the Court upheld the affirmative action policy at the University of Michigan Law School in 2003, the justices announced their expectation that “25 years from now, the use of racial preferences will no longer be necessary.”<sup>78</sup> Many court watchers expected the Court to shorten that time horizon earlier this year and reject race-conscious policies in *Fisher v. University of Texas*.<sup>79</sup>

In *Fisher*, Abigail Fisher challenged UT-Austin’s use of affirmative action as a complement to its top class rank approach after the University denied Fisher a seat in its 2008 undergraduate entering class.<sup>80</sup> While the Court upheld the UT-Austin admissions policy, it emphasized the narrow scope of its decision. The Court referred to the “*sui generis*” nature of the policy and the fact that the biggest impact on the plaintiff’s chances for admission came from the top class rank component of the admissions policy rather than the affirmative action component.<sup>81</sup> The Court also warned that because “this case has been litigated on a somewhat artificial basis,” its peculiar circumstances “may limit its value for prospective guidance.”<sup>82</sup>

Because the Court has become less sympathetic to race-conscious admissions policies, universities need to prepare for the possibility that they will have to turn to alternative admissions policies.<sup>83</sup> This is true for private, as well as public, universities. While past challenges to affirmative action have primarily raised Fourteenth Amendment equal protection challenges, some of them also have raised a claim under Title VI of the Civil Rights Act of 1964, which applies to public and private universities

<sup>78</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>79</sup> 136 S. Ct. 2198 (2016); see, e.g., FANTASY SCOTUS, <https://fantasyscotus.lexpredict.com/case-prediction/fisher-v-univ-of-tx/> (last visited Aug. 14, 2016) (reporting that a majority of participants in the Fantasy Scotus prediction survey expected the Court to reject the UT policy rather than uphold it).

<sup>80</sup> *Fisher*, 136 S. Ct. at 2207.

<sup>81</sup> *Id.* at 2208–09.

<sup>82</sup> *Id.* at 2209. The artificial basis reflected the facts that the case came to the Court with important factual gaps in the record and that the passage of time made it infeasible to remand the case for further fact-finding. *Id.*

<sup>83</sup> Eight states have adopted bans on affirmative action in public universities, either through legislative action, executive order, or public referenda. Halley Potter, *What Can We Learn from States that Ban Affirmative Action?*, THE CENTURY FOUND. (June 26, 2014), <https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action> (last visited Aug. 15, 2016). In these states, public universities already have had to turn to alternatives to affirmative action. For some examples of states using top class rank approaches, see *supra* note 25. In *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), the Supreme Court upheld the constitutionality of bans on affirmative action in higher education.

alike, and which applies the same standards that the Equal Protection Clause applies.<sup>84</sup>

Under either the Fourteenth Amendment or Title VI, top class rank policies should withstand scrutiny. The Supreme Court has repeatedly stated that universities should employ race-neutral alternatives to promote student body diversity before turning to race-conscious policies.<sup>85</sup> Top class rank policies meet the Court's standard for a race-neutral policy.<sup>86</sup> Moreover, as indicated above, the Texas top class rank policy has done a better job than the affirmative action policy at UT-Austin of enrolling underrepresented minorities and economically disadvantaged students.<sup>87</sup>

## VI. TOP CLASS RANK POLICIES AND OTHER ALTERNATIVES TO AFFIRMATIVE ACTION

Could selective universities promote economic equality through other alternatives to affirmative action? Are some of the alternatives superior to top class rank policies in terms of promoting not only economic equality but also student body diversity? That does not seem likely. Other policies would be less effective than top class rank policies.

For example, admissions policies often try to foster student body diversity by taking into account an applicant's socioeconomic disadvantage. This approach can do much to generate a diverse entering class. However, it preserves the current incentives that college admissions policies create for economic inequality—higher-income families would still be better off in terms of their children's college prospects by remaining in their exclusive communities.

Universities also might consider an admissions policy based on geographic diversity. Under such an approach, elite colleges would give

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<sup>84</sup> *Grutter*, 539 U.S. at 343. Title VI claims have been brought successfully against universities in the past. *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (holding that Title VI proscribes racial discrimination that would be proscribed by the Fourteenth Amendment); *Flanagan v. President & Dirs. of Georgetown Coll.*, 417 F. Supp. 377 (D.D.C. 1976) (finding race-based financial aid to violate Title VI under some circumstances).

<sup>85</sup> *See, e.g.*, *Fisher*, 133 S. Ct. at 2420 (writing that race-conscious admission policies are permitted only when “no workable race-neutral alternatives would produce the educational benefits of diversity”).

<sup>86</sup> To be sure, there is some inconsistency between the Court's characterization of race-neutral admissions policies in higher education and its characterization of race-neutral policies in other settings. Ordinarily, if a policy is written in race neutral terms and has a disparate impact on the basis of race, the Court will treat the policy as race-conscious if there was intent to have the disparate racial impact. Top class rank policies are adopted with intent to have a disparate impact on the basis of race. *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting). Nevertheless, the Court has not subjected them to heightened scrutiny. *Cf. id.* at 297 (Souter, J., dissenting) (observing that “there is nothing unconstitutional” about top class rank policies).

<sup>87</sup> *See supra* text accompanying notes 30–34.

preference to applicants from underrepresented neighborhoods or simply seek an entering class that includes the best applicants from a broad range of communities. Southern Methodist University adopted the underrepresented neighborhood approach to geographic diversity after *Hopwood*,<sup>88</sup> Danielle Allen has advocated for geographic diversity based on a wide range of zip codes,<sup>89</sup> and other scholars favor a combination of geographic approaches.<sup>90</sup>

Like top class rank policies, geographic policies encourage higher-income families to live in lower-income neighborhoods. But it is easier for higher-income families to undermine the ability of geographic policies to counteract economic inequality or promote a diverse student body. For example, parents can send their children to elite private high schools rather than the public schools in their geographic area. They also could move into the lower-income geographic area, or rent an apartment there, just for their child's senior year of high school.

## VII. IMPLEMENTING TOP CLASS RANK POLICIES

To fully appreciate top class rank policies, it is important to recognize what they do not entail. They do not require any tax increases or expansion of public benefit programs—indeed, they reduce the demand on programs for the poor. No one has to be forcibly bused to school. Neither legislatures nor courts need act. In the past, implementation of top class rank policies in Texas and other states has been driven by court decisions, legislation, or public referenda, and the federal government could require colleges to adopt top class rank policies by making their adoption a condition for universities to receive federal funding. But leading universities need not wait for a government mandate. They can simply act on their own to implement top class rank admissions policies.

To be sure, elite universities would have to act collectively—individual colleges would be reluctant to act alone for fear that they would suffer in the *US News* or other rankings if their average SAT and ACT scores declined relative to those at other colleges. But elite universities already know how to act collectively. They use a common application form,<sup>91</sup> and they have used the same formula for calculating financial

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<sup>88</sup> Orentlicher, *supra* note 28, at 201–02.

<sup>89</sup> Danielle Allen, *Talent Is Everywhere Using ZIP Codes and Merit to Enhance Diversity*, in *THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS* 145, 147–48 (Richard D. Kahlenberg ed. 2014).

<sup>90</sup> CASHIN, *supra* note 5, at 82–83.

<sup>91</sup> Jessica Gross, *Who Made That? (College Application)*, N.Y. TIMES, November 10, 2013, <http://www.nytimes.com/2013/11/10/magazine/who-made-that-college-application.html>. To be sure, many colleges request supplemental application materials.

aid.<sup>92</sup> By acting together on class rank policies, selective universities can make it possible for the United States to live up to its vision as a land of opportunity for all.<sup>93</sup>

#### CONCLUSION

Elite universities are not mere bystanders to the problem of economic inequality. They do much to reward and reinforce the residential segregation by income of America that contributes to economic inequality. As a result, selective universities have a moral responsibility to promote economic equality, especially when they can do so at little cost. And especially when they can do so without having to coerce anyone. Top class rank policies promote socioeconomic equality by harnessing the self-interested behavior of higher-income families. Or, to put it another way, top class rank policies truly allow the wealthy to do good for society by doing well for themselves.

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<sup>92</sup> *United States v. Brown Univ.*, 5 F.3d 658, 662–63 (3d Cir. 1993). The federal government also has established financial aid guidelines for federal loans or loan guarantees. *Id.* at 662.

<sup>93</sup> There might be some antitrust concern with common action, but it likely would survive a legal challenge on antitrust grounds. The most important precedent here is the litigation over agreements by Ivy League and other leading schools to share financial aid information and offer the same level of aid to each student (i.e., although different students might receive different levels of aid, no student could obtain more aid from one of the schools than from the other schools). Many of the schools signed a consent decree with the Justice Department, but MIT went to court, and the Third Circuit's decision in the case suggests that courts would be sympathetic to a common admissions policy modeled upon the Texas top class rank approach. *See Brown Univ.*, 5 F.3d at 678 (observing that universities may be given more freedom under the Sherman Act if their concerted action broadens accessibility to higher education because "[i]t is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education"). In addition, the consent decree only prohibited common action on decisions about financial aid, tuition and fees, and faculty salary levels. *See United States v. Brown Univ.*, 805 F. Supp. 288 (E.D. Pa. 1991). Since antitrust law is more concerned about price-fixing than with other kinds of concerted action, agreements about financial aid, tuition, and faculty salaries are going to be more difficult to sustain than agreements about admissions criteria. And if antitrust concerns are serious, the colleges could seek an exemption from Congress.

