Brown's Lost Promise: New York City Specialized High Schools as a Case Study in the Illusory Support for Class-Based Affirmative Action

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INTRODUCTION

Race-conscious affirmative action faces its stiffest constitutional threat to date. Justice Powell's "diversity" rationale, articulated in a solo concurrence in

DOI: https://doi.org/10.15779/Z38HD7NT39.

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Regents of California v. Bakke,[1] has provided the constitutional peg by which race-conscious affirmative action programs have withstood strict scrutiny for over 40 years.[2] But, to opponents of race-based affirmative action,[3] policies that ameliorate historic discrimination are nothing more than a "naked racial-spoils system."[4] These opponents maintain their support, however, for class-based affirmative action—those programs that provide "help for the poor and disadvantaged."[5] As Chief Justice Roberts once wrote, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[6]

Given the Court's increasingly conservative composition during the Trump administration, it appears that the Court may soon come to disfavor the diversity rationale. The Court may soon review a First Circuit decision relying on the diversity rationale to uphold the constitutionality of Harvard's affirmative action program, and it seems likely that the Court's newest members will side against the university—and race-conscious affirmative action—in that case.[7]

Using the case study of *Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio*, a lawsuit challenging New York City's class-based policies to diversify its elite Specialized High Schools, this Essay explains that purported support for class-based affirmative action serves as a rhetorical smokescreen for eliminating *Brown v. Board of Education*'s promise of a racially integrated society. This Essay contends that it is not the ameliorative programs' race- or class-based means that elicits conservative disapproval, but rather the communities that ultimately stand to benefit from the programs.

I.
BACKGROUND: NEW YORK CITY'S SPECIALIZED HIGH SCHOOLS AND *CHRISTA MCAULIFFE INTERMEDIATE SCHOOL PTO, INC. V. DE BLASIO*

A. A Primer on New York City's Specialized High Schools

In the early 20th century, New York City established "specialized high schools" to prepare a workforce with specific technical skills.[8] Over time, these

1. 438 U.S. 265, 291 (1978) (Powell, J., concurring).

2. For more on Justice Powell's impetus for ushering in the diversity rationale, *see* Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423 (2020).

3. These opponents are largely, but not exclusively, political conservatives. There are undoubtedly at least some conservatives who support race-conscious affirmative action, and at least some political liberals who oppose it.

4. Brett Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL. ST. J. (September 27, 1999).

5. Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 1979 WASH U. L. Q. 147, 156 (1979).

6. Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 748 (2007).

7. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 980 F.3d 157 (1st Cir. 2020).

8. *See* JERALD THOMAS & CORINNE WILLIAMS, *The History of Specialized STEM Schools and the Formation and Role of the NCSSSMST*, ROEPER REVIEW,2009, at 18.

institutions—initially Stuyvesant High School, Bronx High School of Science ("Bronx Science"), and Brooklyn Technical High School ("Brooklyn Tech")—became highly-esteemed, widely considered to be the means by which the children of recent immigrants and the working-class could propel themselves to a better life.[9] In a typical year, 25,000 eighth-graders from across New York City apply to the eight Specialized High Schools, and 5,000 are accepted.[10] In the words of a former New York City Comptroller, "[a]dmittance to these schools is a ticket to success. They bring an almost certain guarantee of high school graduation . . . and an almost certain guarantee of college acceptance."[11]

In 1971, the New York State Legislature passed the Hecht-Calandra Act, codifying the protocol for entry into these prestigious schools: a top score on the Specialized High Schools Admissions Test ("SHSAT").[12] Prospective students rank the Specialized High Schools they wish to attend in order of preference prior to taking the exam. After the results are finalized, the New York City Department of Education ("NYCDOE") sorts the scores from highest to lowest, assigning students, in order of performance on the exam, to their highest ranked school with available seats.[13] Traditionally, the most selective schools are Stuyvesant, Bronx Science, and Brooklyn Tech.[14] Students who are not admitted to any of the eight Specialized High Schools are placed into the general pool of applicants for New York City's other public high schools.[15]

This legislation came with controversy. In 1971, the Chancellor of the NYCDOE launched an investigation into the Specialized High Schools after a community organization accused the pre-1971 admissions exams of "screen[ing] out black and Puerto Rican students."[16] Before the investigatory committee

9. In 2015, all eight of the Specialized High Schools ranked in the top 100 public high schools in the country, and top 15 high schools in New York State. *See* BEST HIGH SCHOOLS RANKINGS, U.S. NEWS & WORLD REPORT (2015), http://www.usnews.com/education/best-high-schools/national-rankings; TOP NEW YORK HIGH SCHOOLS, U.S. NEWS & WORLD REPORT (2015), http://www.usnews.com/education/best- high-schools/new-york/rankings?int=983308.

10. *See* Sean Patrick Corcoran & E. Christine Baker-Smith, *Pathways to an Elite Education: Application, Admission, and Matriculation to New York City's Specialized High Schools*, EDUC. FINANCE & POL., at 256, 257.

11. John C. Liu, *Bringing Diversity to New York City's Specialized High Schools*, HUFFINGTON POST (Mar. 30, 2012), http://www.huffingtonpost.com/john-c-liu/nyc-specialized-high-schools_b_1391712.html.

12. *See, e.g.*, Hecht-Calandra Act of 1972, N.Y. EDUC. LAW § 2590-g(12); Jim Dwyer, *Decades Ago, New York Dug a Moat Around Its Specialized School*s, N.Y. TIMES (June 8, 2018), https://www.nytimes.com/2018/06/08/nyregion/about-shsat-specialized-high-schools-test.html; Nicole Tortoriello, *Dismantling Disparities: An Analysis of Potential Solutions to Racial Disparities in New York City's Specialized High School Admissions Process*, 49 COLUM. J. OF L. & SOC. PROBS. 417 (2016) (describing that the SHSAT is "a two-and-a-half hour multiple-choice exam that measures verbal and mathematical skills").

13. *See* Corcoran & Baker-Smith, *supra* note 10, at 260.

14. *See id.* at 259 table 1.

15. *See* Tortoriello, *supra* note 12, at 424.

16. M.S. Handler, *Bronx High School of Science Accused of Bias in Admissions*, N.Y. TIMES (Jan. 22, 1971).

returned its findings that admissions "should be based on multiple criteria that are objective and equitable,"[17] the New York State Legislature passed the Act to prevent what it feared would be a "lowering of standards."[18]

The Hecht-Calandra Act included only one remedial measure to gain acceptance into the Specialized High Schools: the "Discovery" program.[19] This program was designed to provide "disadvantaged students"—as determined by the NYCDOE—the opportunity to gain admission into the Specialized High Schools "without in any manner interfering with the academic level of those schools."[20] Specialized High Schools offer admission through the Discovery program based on SHSAT score, considering "high potential" "disadvantaged" candidates in score order.[21] To be eligible for admission through the Discovery program, a student must take the SHSAT and fall below the cutoff score for a particular school, be "certified . . . as disadvantaged," recommended by her middle school as bearing "high potential," and attend a summer preparatory program.[22]

B. The Barriers Created by the Specialized High School System

New York City is known for its multicultural identity, but its Specialized High Schools remain racially homogenous. In 2019, the overall acceptance rate for Specialized High Schools was 17.4 percent, of which: Asian-Americans students comprised 29 percent; White students made up 27.3 percent; Black students totaled 3.5 percent; and Latino students comprised 4.8 percent.[23] Black and Latino children make up 67 percent students in New York City, but do not even comprise ten percent of seats at these prestigious institutions.[24] In 2019, Stuyvesant admitted only seven Black students out of their 895 freshman slots, down from ten students admitted in 2018 and 13 in 2017.[25] These demographics

17. *See* Leonard Buder, *New Entry Policy at 4 Special Schools is Urged: Group Appointed by Scribner Against Competitive Tests as the Sole Criterion*, N.Y. Times (Nov. 24, 1971).

18. *See* Fred M. Hechinger, *Challenge to the Concept of the Elite*, N.Y. TIMES (May 23, 1971). *But see* Tortoriello, *supra* note 12, at 424 (positing that "the surrounding circumstances and other actions by the legislature raise questions as to the true motive behind the law's adoption").

19. Hecht-Calandra Act of 1972, N.Y. EDUC. LAW § 2590-g(12)(d).

20. *Id.*

21. *Id.*

22. *Id.*

23. The remaining roughly 35 percent are those of unknown race or multiracial. Christina Veiga, *By the Numbers: New York City's Specialized High School Offers*, CHALKBEAT (Mar. 19, 2019), https://www.chalkbeat.org/posts/ny/2019/03/19/by-the-numbers-new-york-citys-specialized-high-school-offers/.

24. *See* N.Y.C. COUNCIL, SCHOOL DIVERSITY IN NYC (May 1, 2019) (finding that 41 percent of New York City students are Latino and 26 percent are Black). https://council.nyc.gov/data/school-diversity-in-nyc/

25. *See* Eliza Shapiro, *Only 7 Black Students Got Into Stuyvesant, N.Y.'s Most Selective High School, Out of 895 Spots*, N.Y. TIMES (March 18, 2019), https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html?module=inline.

have become starker over the years: Brooklyn Technical High School's Black population dropped from 50 percent in 1976 to 14 percent in 2017.[26]

New York City public schools in general are already among the most segregated in the country, a key factor influencing which students make it to the City's Specialized High Schools. Almost 75 percent of Black and Latino students attend a school with less than 10 percent White students.[27] Students in New York City have to apply to middle school, which adds yet another exclusionary layer to New York City's stratified education system.[28] Roughly half of all public-school students admitted to the Specialized High Schools in 2013 attended one of only twenty-four middle schools (4.5 percent of all middle schools in the city), and 85 percent attended one of eighty-eight schools (16 percent of all middle schools).[29] As the *New York Times* noted, "good schools remain a scare resource, especially in poor neighborhoods, and low-income and low-performing children are still more likely to end up in underfunded schools."[30]

Specialized High Schools had recently strayed away from using the Discovery program to ameliorate these racial disparities.[31] By 2015, both Bronx Science and Stuyvesant stopped accepting students through this program.[32] In 2018, only 5 percent of the over 4,000 seats in Specialized High Schools were filled through the Discovery program.[33] However, the NYCDOE recently changed its course by allotting 20 percent of the seats in every Specialized High

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26. *See* Eliza Shapiro & K.K. Rebecca Lai, *How New York's Elite Public Schools Lost Their Black and Hispanic Students*, N.Y. TIMES (June 3, 2019), https://www.nytimes.com/interactive/2019/06/03/nyregion/nyc-public-schools-black-hispanic-students.html.

27. *See* N.Y.C. Council, *supra* note 24.

28. *See* N.Y.C. DEP'T OF EDUC., NYC MIDDLE SCHOOL, https://www.schools.nyc.gov/enrollment/enroll-grade-by-grade/middle-school**.** Many middle schools base their admissions decisions on a student's fourth grade academic records, invite the student to undergo another round of testing, utilize the student's New York State Math and English Language Arts test scores, scrutinize their attendance and punctuality, and/or examine the child's "academic and personal behavior" reports. *See id.* (discussing the admissions criteria for "screened," "screened language," and "composite" programs). A student has priority to middle schools located in the geographic area in which they reside. To put it one way, "[t]he most important factor in determining where your child goes to middle school is how you complete their middle school application." Mayor Bill de Blasio has recently indicated that the middle school screening process will change, but it remains to see how it will be implemented. *See* Eliza Shapiro, *New York City Will Change Many Selective Schools to Address Segregation*, N.Y. TIMES (Dec. 18, 2020), https://www.nytimes.com/2020/12/18/nyregion/nyc-schools-admissions-segregation.html.

29. *See* Corcoran & Baker-Smith, *supra* note 10, at 258.

30. *See* Tracy Tullis, *How Game Theory Helped Improve New York City's High School Application Process*, N.Y. TIMES (Dec. 5, 2014), http://www.nytimes.com/2014/12/07/ nyregion/how-game-theory-helped-improve-new-york-city-high-school-application- process.html.

31. *See* Winne Hu, *Elite New York High Schools to Offer 1 in 5 Slots to Those Below Cutoff*, N.Y. TIMES (Aug. 13, 2018), https://www.nytimes.com/2018/08/13/nyregion/discovery-program-specialized-schools-nyc.html.

32. *Id.*

33. *Id.*

School for Discovery students by 2020.[34] Furthermore, only students who attend "high-poverty" middle schools are eligible for admission through this program.[35]

These changes have been met with fierce backlash, prompting litigation in the Southern District of New York. In *Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio*, a number of Asian-American organizations, a middle school parent teacher organization, and three individual parents, represented by the self-described libertarian Pacific Legal Foundation ("PLF"), accuse Mayor Bill de Blasio and NYCDOE Chancellor Richard A. Carranza of "gerrymander[ing]" the Discovery program to discriminate against Asian-Americans applicants to the Specialized High Schools by using the new Economic Net Income calculation to determine "high poverty" middle schools as a "racial proxy."[36] The plaintiffs allege that this policy change violates the Fourteenth Amendment's Equal Protection Clause by decreasing the number of Asian-American students who can compete for seats in the Discovery program and those who can gain admission without the program (notwithstanding the fact that Asian-American students have disproportionately benefited from this change).[37] The plaintiffs seek both injunctive relief that would prevent the City from implementing these changes to the Discovery program and declaratory relief that the changes are unconstitutional.[38] While Southern District of New York Judge Edgardo Ramos denied the plaintiffs' request for a preliminary injunction, the court has not yet decided the constitutionality of the changes to the Discovery program.[39]

II.
THE EFFECT OF THE U.S. SUPREME COURT'S LATEST ADDITIONS ON RACE-CONSCIOUS AFFIRMATIVE ACTION

The composition of the Supreme Court matters tremendously to affirmative action jurisprudence. Conservative justices largely view affirmative action policies as unconstitutional, while liberal justices do not.[40] The Court has added

34. *Id.*

35. *Id.*

36. Complaint at 2, Christa McAuliffe Intermediate Sch. PTO, Inc. v. Bill De Blasio, No. 18 Civ. 11657 (S.D.N.Y. Mar. 4, 2019); *see also* Alex Bavalsky, *NYC DOE Specialized High School Discovery Program Expansion*, THE SURVEY (June 28. 2019), http://surveybths.com/2019/06/nyc-doe-specialized-high-school-discovery-program-expansion/.

37. *See* Alex Zimmerman, *Asian Students Continue to Benefit Most From Program Meant to Integrate NYC's Specialized High Schools*, CHALKBEAT (Apr. 10, 2019) https://www.chalkbeat.org/posts/ny/2019/04/10/discovery-program-specialized-schools-integration/. (finding that in 2019 the percentage of Discovery offers to Asian American students increased by 11%, while the percentage of Discovery offers to Black students increased by only 1.6%).

38. Complaint, *supra* note 36, at 2.

39. *Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio*, 364 F.Supp.3d 253 (S.D.N.Y. 2019).

40. The notable exceptions were Justices Anthony Kennedy and Sandra Day O'Connor, both conservative jurists, who supported at least some level of affirmative action.

three new Justices to its ranks since it last considered an affirmative action case.[41] This Part will examine the affirmative action views of Justices Kavanaugh and Barrett, as they replaced two votes in favor of race-conscious affirmative action plans (from Justices Kennedy and Ginsburg).

A. Justice Kavanaugh

Although he did not rule on the issue during his tenure on the D.C. Circuit, Justice Kavanaugh has repeatedly questioned the constitutionality of race-conscious affirmative action during his time in government service and private practice. Given this record, many civil rights activists are concerned that his addition to the Court may prove fatal to affirmative action.[42] Justice Kavanaugh once referred to race-conscious affirmative action programs as "naked racial set-aside[s]."[43] He has, however, evidenced support for race-neutral programs.[44] This Part will examine how Justice Kavanaugh's amicus brief in *Rice v. Cayetano* elucidates his hostility to ameliorative race-based policies.

1. Amicus Brief in Rice v. Cayetano

While a partner at Kirkland & Ellis, Justice Kavanaugh penned an amicus brief in *Rice v. Cayetano*. In that case, the Supreme Court held that Hawaii's constitutional provision that limited the right to vote for trustees for the Office of Hawaiian Affairs to Native Hawaiians violated the Fifteenth Amendment by creating a race-based qualification for voting.[45] The Office of Hawaiian Affairs was created to provide land and other benefits for Native Hawaiians—those

41. The most recent case was Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016) (ruling that the University of Texas's use of race in admissions was constitutional).

42. *See* Kadia Tubman, *Kavanaugh's views on affirmative action draw scrutiny*, YAHOO! NEWS (September 7, 2018), https://www.yahoo.com/news/kavanaughs-views-affirmative-action-draw-scrutiny-113120833.html (quoting Vanita Gupta, President and Chief Executive Officer of The Leadership Conference on Civil and Human Rights, who explains that "[t]here's a very great concern that [Justice Kavanaugh] will strike down efforts to increase diversity and inclusion not only in education but in employment and all across the board").

43. Email from Bretty Kavanaugh to Timothy E. Flanigan, Francisco J. Noel & Alberto R. Gonzales (Aug. 8, 2001, 14:12 EST), https://www.scribd.com/document/387988906/Booker-Confidential-Kavanaugh-Hearing#download.

44. During the 2003 term when the Court was deciding Gratz and Grutter, Kavanaugh wrote an email stating that the Administration's stance on these cases should be that: "There is a real difference [between race-neutral and race-conscious program] because race-neutral programs treat us all as individuals and do not define us solely as members of racial groups. That is why the Supreme Court has emphasized that race-neutral programs must be the first choice and race-based programs employed only as a last resort." Email from Brett M. Kavanaugh to Jay P. Lefkowitz (Jan. 15, 2003, 08:18 EST), http://civilrightsdocs.info/pdf/judicial-nominations/2018/SCOTUSdocs/Pages%20from%2008-09-18%20GWB%20Document%20Production%20%28Set%201%2C%20Pages%2010%2C001-20%2C000%29.pdf. Given Justice Kavanaugh's hostile views towards race-based affirmative action, therefore, it may be necessary to consider facially-neutral policies that can achieve similar ends.

45. Rice v. Cayetano, 528 U.S. 495 (2000); *see also* Brief of Amici Curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom in Support of Petitioner, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 345639.

whose ancestors inhabited the islands in 1778, the year England's Captain Cook first "discovered" the islands.[46] In the amicus brief, Kavanaugh argued that Hawaii's voter qualification is not only a violation of the Fifteenth Amendment—as the Court, in an opinion authored by Justice Kennedy, ultimately held—but also a violation of the Equal Protection Clause of the Fourteenth Amendment.[47] Kavanaugh asserted that if the Court upheld Hawaii's constitutional amendment, it would permit "an extraordinary racial patronage and spoils system" in which Massachusetts, for example, could establish an "Office of Irish Affairs" to distribute select state funds solely to its Irish-American residents.[48]

Kavanaugh also argued that the Hawaii constitutional provision would discriminate against other groups who have suffered discrimination, such as African-Americans, Asian Americans, and Native Americans.[49] Kavanaugh contended that, in fact, Hawaii's actions were more repugnant than those of the Jim Crow South, which, to him, at least tried to hide their laws' discriminatory impact with statutory pretext.[50] In so arguing, Kavanaugh evoked a reactionary colorblindness that would place him squarely with the conservative wing of the Court, joining Justices Alito, Gorsuch, Roberts, and Thomas in their commitment to constitutional colorblindness.[51] And Kavanaugh was quoted in the same year by the *Christian Science Monitor* as positing that *Cayetano* "is one more step along the way in what I see as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of

46. *Cayetano*, 528 U.S. at 499-500; HAW. REV. STAT. §10—2(1993).

47. *See* Brief of Amici Curiae, *supra* note 45, at 2.

48. *See id.* at 5. Irish-Americans in Massachusetts, however, have no such ancestral claims to the land. The analogy falls short, further, when one considers that the U.S. admitted Hawaii into the Union in 1959, effectively annexing Native Hawaiian land. The plight of Native Hawaiians is most similar to that of Native Americans. Kavanaugh contended that the "Constitution does not contain a Hawaiian Commerce Clause, but only an Indian Commerce Clause." To him, Native Americans were distinct, because they were "separate sovereigns within the United States—and have been so considered since before the Constitution was ratified". *See id.* at 25. Yet the Indian Commerce Clause was specifically intended to benefit indigenous people who were in the United States before the formation of the Union in 1776. *See id.* at 29. Native Americans in states formed after 1776 are treated equally to those in earlier states. But if Native Americans enjoy a special relationship with the United States due to their indigenous status, then so too should Native Hawaiians—who are indigenous to their locale. And "Native Hawaiians" should fall under the banner of "Native American" as well, if Native American is to mean those groups native to America.

49. *Id.* at 19.

50. *Id.* at 8-9 ("[I]n the nearly 130 years since the Fifteenth Amendment was ratified—troubled though those years have been with respect to racial relations and racially motivated voting devices—no State so far as we are aware has thought it permissible to enact into law a facial racial qualification on the right to vote in any state election. Indeed, several States, no doubt recognizing that the language of the Fifteenth Amendment was clear and unequivocal, resorted instead to pretext and subterfuge to try and evade what all understood to be the meaning of the Fifteenth Amendment").

51. Ian Haney Lopez, *Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (discussing the Court's use of colorblindness).

government."[52] In a Wall Street Journal op-ed, Kavanaugh held that Hawaii's program was nothing more than a "naked racial-spoils system."[53]

Ultimately, this amicus brief reflects Kavanaugh's views that benign measures of racial classification are as undesirable as invidious classifications on the basis of race. While this brief was authored before the *Grutter* and *Fisher* opinions and does not elucidate his views on current Equal Protection Clause jurisprudence, it likely reflects his views on affirmative action.[54]

B. Justice Barrett

Justice Barrett did not write an opinion on affirmative action during her tenure as a judge on the Seventh Circuit.[55] Nor has she written op-eds or publicly available emails commenting on race-conscious programs.[56] However, her views on *stare decisis* may predict the weight she will assign to the Court's affirmative action jurisprudence.

In a 2013 law review article, she wrote that *stare decisis* is a "soft rule"—one based in policy—rather than an "inexorable command."[57] The doctrine's power, she opines, is limited when the precedential case like *Roe* is unpopular.[58] Justice Barrett favors a weak *stare decisis* that enforces the Constitution, not precedents that she believes are at odds with the Constitution.[59]

Justice Barrett's endorsement of this relaxed view of *stare decisis* may mean the end of race-conscious affirmative action programs. Her mentor, Justice Scalia, was a staunch opponent of these programs on textualist and originalist grounds.[60] She may point to the defeat in "liberal" California of Proposition 16, which would have overturned Proposition 209's constraint on using race-conscious affirmative action programs, as evidencing a growing discontent with race-conscious programs more generally.[61] Given her reliably conservative

52. Warren Richey, *New Case may clarify court's stand on race*, CHRIST. SCI. MON. (October 6, 1999).

53. Brett Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL. ST. J. (September 27, 1999).

54. *See* Brief of Amici Curiae, *supra* note 45, at 20. Kavanaugh argues that race-conscious laws are constitutional if they are "remedying prior discrimination in the jurisdiction and field in which the classification is imposed". However, the *Grutter* opinion makes clear that remedying past discrimination is no longer a valid governmental interest. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

55. *See* Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), https://www.nytimes.com/article/amy-barrett-views-issues.html (noting that then-Judge Barrett had not written an opinion on affirmative action).

56. *See id*.

57. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1713 (2013) (quoting Payne v. Tennessee, 501 U.S. 808, 827-28 (1991).

58. *Id.* at 1727 ("[T[he public response to controversial cases like *Roe* reflects public rejection of the proposition that stare decisis can declare a permanent victor in a divisive constitutional struggle rather than desire that precedent remain forever unchanging").

59. *Id.* at 1728.

60. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 346 (2003) (Scalia, J., dissenting).

61. *See* Jessica Wolf & Melissa Abraham, *Prop. 16 failed in California. Why? And what's next?*, UCLA NEWSROOM (Nov. 18, 2020), https://newsroom.ucla.edu/stories/prop-16-failed-in-california.

views on virtually all legal issues, it appears that Justice Barrett also views the cases upholding race conscious programs—*Fisher* and *Grutter* specifically—as anathema to her view of the Constitution as a "colorblind" document. Time will tell, but, should race-conscious affirmative action programs return to the Court in the near future, the writing appears on the wall for their demise.

III.
MCAULIFFE: A TEST CASE FOR CLASS-BASED AFFIRMATIVE ACTION

McAuliffe will serve as a test case for class-based affirmative action policies, and it is one that could make its way up to the Supreme Court. The Court's jurisprudence on facially-neutral policies indicates that the Court will uphold the NYCDOE's expanded use of the Discovery program for several reasons. This Part explains why the Court is likely to do so in regards to both the Hecht-Calandra Act and the Expanded Discovery Program, and what the implications of the Court's actions might be.

A. The Hecht-Calandra Act

The Hecht-Calandra Act, from which NYCDOE derives its authority in the first place, is race-neutral. The statute does not make any express racial classifications, so it would not trigger strict scrutiny. Nor does the law use any pretextual proxy for a racial classification that would suggest "discriminatory" intent. Indeed, for decades the Act's practical effect has been a disproportionately deleterious impact on Black and Latino enrollment in Specialized High Schools. Thus, the Court would likely apply rational basis review. As mentioned above, the legislature argued that the law was necessary to avoid a "lowering of standards."[62] Maintaining high-quality schools is almost certainly a legitimate government interest. So too would be the government's interest in expanding admissions to "disadvantaged" students, as the statute does not define disadvantaged on racial grounds. Thus, the Hecht-Calandra Act would likely survive judicial scrutiny for facial neutrality.

B. The Expanded Discovery Program

Because the NYCDOE does not utilize a racial classification in its redefinition of the Discovery program, the Court should uphold the expanded Discovery program. The Department is permitted under the statute to increase the percentage of students admitted through the Discovery program, so the simple fact that it is increasing the percentage from 4 percent to 20 percent is neither constitutionally nor statutorily dubious. In fact, Plaintiffs themselves

62. *See* Fred M. Hechinger, *Challenge to the Concept of the Elite*, N.Y. TIMES (May 23, 1971). *But see* Tortoriello, *supra* note 12, at 424 (positing that "the surrounding circumstances and other actions by the legislature raise questions as to the true motive behind the law's adoption").

concede that the changes to the Discovery program are facially neutral.[63] The manner in which it determines eligibility—the key element in question in this case—is also done in a facially-neutral manner. Limiting Discovery offers to only those students who attend high-poverty middle schools—those which are at or above 60 percent on New York City's Economic Needs Index—is not limiting Discovery offers to (or from) students from any particular race.[64] Just as the Court found in *Fisher* that any student in Texas may gain admission into its universities by placing in the top 10 percent of their high school class, so too should the Court support the revamped Discovery program criteria from which any qualifying student from a high-poverty middle school may benefit.[65] Indeed, contrary to the plaintiffs' contention, the newly-defined Discovery program has mostly benefitted Asian-American students, whose share of Discovery seats increased by almost 12 percent.[66]

If the Court strikes down the program, it would have to reconsider its rulings on facial neutrality. The Court permitted Texas to utilize its Ten Percent Plan, even though there was ample evidence that the Legislature enacted the Plan, at least in part, to ameliorate racial disparities in admission.[67] The new Discovery program does have a disparate impact—not on Asian-American students as alleged in the lawsuit, but against White students, whose percentage of seats in the program dropped from 26.3 percent in 2018 to 14.6 percent.[68] PLF can hardly claim that Asian-American students suffer from these new rules when their percentage share in it improved drastically as a result of the alterations. As such, the Court is likely to uphold the amended Discovery program as a facially-neutral affirmative policy.

IV.
CONSERVATIVE AFFINITY FOR CLASS-BASED AFFIRMATIVE ACTION

The conservative opposition against a revamped Discovery program is quite telling, given that numerous conservative legal activists, judges, and scholars have championed class-based affirmative action for decades. To these critics of race-conscious affirmative action, the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[69] Ward Connerly, the architect of California's Proposition 209 banning race-conscious affirmative

63. Complaint, *supra* note 36, at 14.

64. *See id.*

65. *See generally* Fisher v. Texas, 136 S. Ct. 2198 (2016).

66. *See* Zimmerman, *supra* note 37.

67. *See* Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. CIV. R.-CIV. LIBERTIES L. REV. 245 (1999) (finding that "the legislators hoped that the Plan would attract students from high schools that did not traditionally send large numbers of students to the Texas university system, including schools large minority populations) .

68. *See* Zimmerman, *supra* note 37.

69. *See* Parents Involved In Community Schools v. Seattle School District No. 1, 551 U.S. 701, 748 (2007).

action, wrote that he does not "want to 'end all affirmative action,'" but rather to support need-based programs that benefit low-income Californians irrespective of race.[70] Justice Scalia once wrote that he "strongly favor[s]—what might be called . . . 'affirmative action programs' of many types of help for the poor and disadvantaged."[71] During his confirmation hearings, Justice Thomas affirmed his support for programs benefitting those with socioeconomic disadvantages.[72] Justice Kennedy embraced these race-conscious, facially-neutral laws, finding that the government has a legitimate interest "in ensuring all people have equal opportunity regardless of race."[73]

Critical race theorists have long highlighted the contradictions among many in the conservative intelligentsia on class- and race-based affirmative action.[74] While supporters of class-based affirmative action defend these programs as anti-poverty tools, Professor Tomiko Brown-Nagin notes that race-conscious affirmative action was originally conceived to be an anti-poverty measure as well.[75] Professor Randall Kennedy's prediction in his book, *Discrimination: Race, Affirmative Action, and the Law*, is prescient:

> Figures who typically evince little or no constructive sympathy whatsoever for the black poor all of a sudden become their putative champions for the limited purpose of discrediting affirmative action. My suspicion is that

70. Ward Connerly, *Ward Connerly Writes Back*, MOTHER JONES (May 22, 2000), http://www.motherjones.com/toc/2000/05/defending-ward-connerly.

71. Scalia, *supra* note 5, at 156. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring) ("Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on black. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of the Constitution").

72. *See Nomination of J. Clarence Thomas to Be Associate Justice of the Supreme Court of the United States Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 358 (1991) (statement of J. Clarence Thomas). *See also* Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L. J. 1049, 1058 (2017) ("Connerly, Scalia, and Thomas's articulations of support for class-based affirmative action came on the heels of their disavowals of support for race-based affirmative action").

73. Parents Involved, 551 U.S. at 787. A facially-neutral statute could, nevertheless, be race-conscious if the legislature intended, at least in part, to pass the law on account of race. *See* Holley & Spencer, *supra* note 67, at 245 (finding that "the legislators hoped that the Plan would attract students from high schools that did not traditionally send large numbers of students to the Texas university system, including schools large minority populations) .

74. It would be improper, however, to impugn the motives of all the conservative supporters of class-based affirmative action: after all, Texas's Ten Percent Plan only passed due to the courageous support of five Republican Representatives and thirteen Republican Senators. *See* H. JOURNAL, 75th LEG., REG. SESS. 1115 (Tex. 1997). *See also* Bridges, *supra* note 72, at 1063 (writing that "[t]he support that class-based affirmative action received from the Republic legislators . . . may have been a product of concern about the difficulty that many individuals face when attempting to ascend the economic ladder").

75. *See* Tomiko Brown-Nagin, *Rethinking Proxies for Disadvantage in Higher Education: A First Generation Students' Project*, 2014 U. CHI. LEGAL F. 433, 437–38 (2014) (finding that the Equal Opportunity Act, which utilized race-based affirmative action, was a "central . . . component of President [Lyndon B.] Johnson's 'War on Poverty'").

> when that mission is accomplished, they will renege on their promise to support nonracial, class-based reform and instead adopt their more usual posture: defending the current maldistribution of wealth, opportunity, and power in America.[76]

Professor Khiara Bridges' application of the construct of the "deserving" and "undeserving" poor to class-based affirmative action is a useful means of understanding PLF's objection in *McAuliffe*. Those who are poor due to no "fault" of their own—those impoverished due to old age, unforeseeable illness, or other circumstances beyond their control—are the "deserving" poor: deserving of our patience, deserving of our sympathy, and deserving of our resources.[77] On the other hand, there are those who are poor due not to circumstances of nature but conditions of their own choosing: the "undeserving" poor.[78] The line between those socioeconomically disadvantaged persons who are "deserving" and "undeserving" is often racial. In short, class-based affirmative action will only enjoy conservative support as long as it is seen as benefitting the "deserving" poor.[79]

This has been precisely the case in New York City. NYCDOE's redefined parameters for entry into the Discovery program should not have merited conservative scrutiny. After all, limiting the pool of students who may benefit from the program to those who attend the poorest schools is precisely the solution that Connerly, Scalia, and Thomas purportedly support. This policy is similar to Texas's facially neutral "Ten Percent Plan" that provides every Texan with an equal opportunity to gain admission into one of its top schools by delineating seats based not on race, but on geographic distribution in the state.[80]

If class-based affirmative action is truly the end to which opponents of race-conscious programs aspire, then the redefined Discovery program admission criteria should be its model. That it has received pushback from these same organizations belies the shallow support any integrative policies—race- or class-based—enjoy. Indeed, the Pacific Legal Foundation tells on itself when it describes the City's changes to the Discovery program as "only admit[ting] students from schools with a 60 percent or higher poverty rate—that is, schools with mostly Black and Hispanic students."[81] This assessment is, as previously noted, empirically incorrect: Asian-American students have actually benefitted

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76. RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 88-89 (2013).

77. Bridges, *supra* note 72, at 1076.

78. *Id.* at 1078.

79. *See id.* at 1080 ("As long as class-based affirmative action is conceptualized as benefitting the deserving poor—the true 'victims' of structural forces—then it will continue to enjoy popular support").

80. *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2205 (2016).

81. *Stopping New York's attempt to discriminate against Asian-American students*, PACIFIC LEGAL FOUNDATION, available at: https://pacificlegal.org/case/christa-mcauliffe-pto-v-de-blasio/.

the most from this change. And it evidences that the PLF's support of class-based affirmative action runs only as deep as the racial composition of the recipients whom the programs benefit.

CONCLUSION

When our institutions leave marginalized groups behind, they erode the public's confidence in their ability to represent the public.[82] The original purpose of affirmative action was to correct past injustices, focusing less on formal equality and more on substantive equity.[83] The veneer of "colorblindness," therefore, thinly shrouds centuries of racial injustice beneath the cloak of "merit."[84] It is intellectually dishonest to equate racial classifications that remedy these injustices as no less invidious than the racist classifications that created them.[85] Indeed, as one scholar notes, the same Congress that ratified the Fourteenth Amendment passed the Freedman's Bureau Act, a bill that would have granted the President authority to disseminate to every formerly enslaved person forty acres.[86] Justice John Paul Stevens famously critiqued this fallacious

82. *See* Earl Lewis & Nancy Cantor, *Introduction: the Value of Diversity for Democracy and a Prosperous Society*, *in* OUR COMPELLING INTERESTS: THE VALUE OF DIVERSITY FOR DEMOCRACY AND A PROSPEROUS SOCIETY 6 (Earl Lewis & Nancy Cantor, eds., 2016) (questioning whether " the perceived legitimacy of American institutions—from those that educate to those that adjudicate, from those that promulgate free expression to those that safeguard our security—at risk when so many are left behind in the 'land of opportunity'?").

83. *See* Lyndon B. Johnson, *Commencement Address at Howard University: "To Fulfill These Rights"* (June 4, 1965), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES BK.II § 301, at 636 (1965) (stating that the United States must not seek "just freedom but opportunity . . . not just equality as a right and a theory, but equality as a fact and as a result"). Scholars have argued that affirmative action policies are necessary to ensure substantive equity for marginalized groups. *See, e.g.*, CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES (1998)(commenting on the policy benefits of affirmative action); Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 304 (2015) (imploring the Court to "concern itself in a more robust way than it previously has with the societal deficits of those who have been marked by minority racial status and how these deficits are reproduced institutionally and structurally, rather than by individual decisions").

84. Colorblindness as a jurisprudential model originates in Justice Harlan's dissent in *Plessy*, where he held that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting). However, Justice Harlan's subsequently remarks that "[t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty." *Id*. Justice Harlan continued by demonizing another race—Chinese-Americans. "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." *Id* at 561.

85. *See* Angelo Guisado, *Reversal of Fortune: The Inappposite Standards Applied to Remedial Race-, Gender-, and Orientation-Based Classifications*, 92 NEB. L. REV. 1 (2013).

86. *Id.*

equivalence as "disregard[ing] the difference between a 'No Trespassing' sign and a welcome mat."[87]

But even if the diversity rationale falls out of favor with the U.S. Supreme Court, New York City's revamped Discovery program should not. The law that created the program and the manner in which it is applied are class-conscious, not race-conscious. And if the conservative members of the Court ultimately do rule against the City in *McAuliffe*, they will have demonstrated in plain sight that their support for class-based affirmative action was a rhetorical smokescreen, after all.

87. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).