

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

2015

## Ratings Fetishism

Leslie Yalof Garfield

*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Education Law Commons](#)

---

### Recommended Citation

Leslie Yalof Garfield, Ratings Fetishism, 39 N.Y.U. Rev. L. & Soc. Change 409 (2015), <http://digitalcommons.pace.edu/lawfaculty/1000/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# RATINGS FETISHISM

LESLIE YALOF GARFIELD<sup>∞</sup>

2014 SYMPOSIUM ISSUE

DIVERSITY IN EDUCATION AND THE FUTURE OF AFFIRMATIVE ACTION

I. INTRODUCTION.....	409
II. SYSTEMATIC RACIAL BIAS IN TEST TAKING .....	411
III. RATINGS IN THE CONTEXT OF SUPREME COURT AFFIRMATIVE ACTION ....	413
IV. CONCLUSION .....	417

## I.

### INTRODUCTION

The obsession with increasing the reputational rankings of American colleges and universities more detrimentally impacts race-based admissions policies than does Supreme Court doctrine. It is no secret that many schools inflate, misleadingly report, or falsify records in order to pander to rankings systems like *U.S. News and World Report* (“*U.S. News*”).<sup>1</sup> These systems weigh

---

<sup>∞</sup> Professor of Law, Pace Law School. The Author would like to thank the members of the Board of Editors of the *N.Y.U. Review of Law and Social Change* for an invitation to their symposium and acknowledge the comments and questions from the other invited speakers, NYU law school students and professors, and other participants in the symposium. The author also thanks Christina Casarella for her outstanding research support.

1. See Elise Amendola, *Editorial: Colleges Fail Students When They Game Rankings*, USA TODAY (Sept. 5, 2012, 8:20 PM), <http://www.usatoday.com/news/opinion/story/2012-09-05/college-rankings-US-news/57614840/1> (“Emory [University] officials misrepresented enrollees’ SAT and ACT scores, and in some years their high school standing, in reports to the U.S. Education Department and to publications that rank colleges, including *U.S. News & World Report*.”); Kenneth Anderson, *LSAC Study on Law Schools Gaming Resources for US News Rankings*, VOLOKH CONSPIRACY (Dec. 3, 2009, 11:31 AM), <http://www.volokh.com/2009/12/03/lvac-study-on-law-school-gaming-resources-for-us-news-rankings> (summarizing an LSAC study regarding law schools redistributing resources to increase their respective rankings in *U.S. News & World Report* and noting the increase in merit scholarships intended to improve the statistical profile of incoming classes); Elie Mystal, *Villanova Law ‘Knowingly Reported’ Inaccurate Information to the ABA*, ABOVE THE LAW (Feb. 4, 2011, 3:34 PM), <http://abovethelaw.com/2011/02/villanova-law-school-knowingly-reported-inaccurate-information-to-the-aba> (discussing dean’s admission that Villanova Law submitted inaccurate admission information to the American Bar Association); Elie Mystal, *Another Law School Caught in a Lie*, ABOVE THE LAW (Sept. 12, 2011, 1:40 PM), <http://abovethelaw.com/2011/09/another-law-school-caught-in-a-lie> (citing an example in which a University of Illinois College of Law administrator reported inflated grade point averages and LSAT scores); Justin Pope, *Colleges May Obsess Over Rankings, But Students Don’t Care*, HUFFINGTON POST (Feb. 5, 2012, 8:05 AM), <http://www.huffingtonpost.com/2012/02/05/colleges-may-obsess-over-rankings-1256365.html> (explaining the significant role of rankings, such as *U.S. News & World Report*, on college administrators, with one college, Baylor University, offering financial rewards to already admitted students to retake the SAT exam as a ploy to boost the average score it could report).

a schools mean standardized test scores (SAT<sup>2</sup> and/or ACT<sup>3</sup>) heavily as one of the factors for assigning a rank. Thus, the incentive among schools playing the ratings game is to admit students with the highest SAT scores.<sup>4</sup> But, if one agrees with the data that underrepresented minorities as a group perform less well than their non-minority counterparts,<sup>5</sup> it is, sadly, an understandable reality that schools focusing on gaming the *U.S. News* system are disinclined to admit underrepresented minority students. Consequently, ratings fetishism, an unreasonable obsession with high national rankings, is ruining diversity on our college campuses.

I do not make these observations casually. There are countless examples of colleges and universities manipulating the data, or even worse, knowingly deceiving *U.S. News* in an effort to game the system. For example:

- *The New York Times* reported that elite schools sometimes ask students with lower SAT scores than many of their admitted

2. See Kendra Johnson, *Racial Bias SAT I/ACT Blocks College Access: Is it Constitutional for College Officials to Condition Admission on Racially Bias Assessment?*, 33 U. BALT. L.F. 2, 2 (2003) (“At its inception, SAT was an acronym for the Scholastic Aptitude Test and then the Scholastic Assessment Test. The test is now officially named the SAT I because of uneasiness at the Educational Testing Service (“ETS”) and the College Board about defining just what the test measures.”).

3. See *ACT History*, ACT, <http://www.act.org/about-us/our-story/faqs/> (last visited Nov. 21, 2014) (“In 1959, University of Iowa education professor E.F. Lindquist launched the forerunner to the ACT assessment, now known as the ACT college readiness assessment.”).

4. See, e.g., Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1080 (2009) (internal citation omitted) (“[C]olleges and universities need high *average* SAT scores to place well in the college-rankings systems like *U.S. News & World Report*’s ‘America’s Best Colleges’”).

5. See THE COLLEGE BOARD, *2011 College-Bound Seniors: Total Group Profile Report*, 3, tbl.8 (2011), available at [http://media.collegeboard.com/digitalServices/pdf/research/cbs2011\\_total\\_group\\_report.pdf](http://media.collegeboard.com/digitalServices/pdf/research/cbs2011_total_group_report.pdf) (showing a ninety-nine point difference between test-takers who identify as white and those who identify as Black or African American and a seventy-four point difference between those who identify as white and those who identify as Mexican, Mexican American, Puerto Rican, Other Hispanic, Latina or Latin American). See also *id.* at 4, tbl.11 (noting a 398 point differential between students from homes with incomes less than \$20,000 per year and students from homes with incomes of over \$200,000 per year); THE COLLEGE BOARD, *2010 College-Bound Seniors: Total Group Profile Report*, 4, tbl.11 (2010), available at <http://professionals.collegeboard.com/profdownload/2010-total-group-profile-report-cbs.pdf> (showing a 392 point differential). Courts and commentators have cited “stereotype threat” as one explanation, or at least one factor, in the disparity between white and non-white standardized test takers. The term suggests that test takers perform less well on standardized tests when they are aware that their results might be viewed “through the lens of racial stereotype.” The term was first cited in 1995 by Claude M. Steele and Joshua Aronson, after conducting four experiments involving African American and white undergraduate test takers. See Steele & Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 801 (1995); see also, e.g., *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 866–67 (E.D. Mich. 2001), *rev’d*, 288 F.3d 732 (6th Cir. 2002), *aff’d*, 539 U.S. 306 (2003) (acknowledging “stereotype threat” as a psychological concept but finding that plaintiffs had not submitted evidence directly tying stereotype threat to LSAT race disparities); Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307 (2015).

classmates to delay enrollment until January so that the school need not report their entering Fall statistics to *U.S. News*;<sup>6</sup>

- Baylor University offered financial rewards to already admitted students who agreed to retake the SAT in hopes of raising their test scores;<sup>7</sup>
- A senior official at Claremont McKenna, one of the top ten liberal arts schools in the U.S., was forced to resign after reporting he inflated the school's average SAT scores;<sup>8</sup>
- Iona College in New Rochelle, New York acknowledged that it lied about the test scores it had it given *US News*.<sup>9</sup>

The incentive to elevate standardized test scores works against those who perform poorly on the SAT or ACT. Schools are disinclined to admit students who present with low SAT and ACT scores because admitting applicants with lower test scores will drag down a school's mean test score—and thus, its national ranking.<sup>10</sup>

## II.

### SYSTEMATIC RACIAL BIAS IN TEST TAKING

The institutional drive to achieve a high mean SAT or ACT score disproportionately disfavors underrepresented minority applicants. The specific numbers bear this out. In 2006, the average African American score on the combined math and verbal portions of the SAT test was 863.<sup>11</sup> The mean score for white students on the combined math and verbal SAT was 1063, approximately 17% higher.<sup>12</sup> Sadly, there is significant research pointing toward racial bias and institutional prejudice on the SAT, which forms an achievement gap between underrepresented minority groups such as Blacks and Hispanics,

6. Richard Perez-Peña & Daniel E. Slotnick, *Gaming the College Rankings*, N.Y. TIMES, Feb. 1, 2012, at A14.

7. *Id.*

8. *Id.*

9. *Id.* Iona's misrepresentation was a contributing factor to the school's rank of thirty among regional schools, when a more proper calculation would have yielded a rank of fifty in the same category. *Id.*

10. See Robert Morse, *Best Colleges Ranking Criteria and Weights*, U.S. NEWS (September 9, 2013, 9:40 PM), available at <http://www.usnews.com/education/best-colleges/articles/2013/09/09/best-colleges-ranking-criteria-and-weights>. In an effort to climb up in the rankings, therefore, schools are increasingly limiting the number of admitted students with SAT scores below their desired mean. See Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC'Y REV. 105, 110 (2006).

11. See *A Large Black-White Scoring Gap Persists on the SAT*, 53 J. BLACKS HIGHER EDUC. 72 (Autumn 2006), available at [http://www.jbhe.com/features/53\\_SAT.html](http://www.jbhe.com/features/53_SAT.html).

12. *Id.* See also THE COLLEGE BOARD, *2012 College-Bound Seniors: Total Group Profile Report*, 3, tbl.8 (2012), available at <http://media.collegeboard.com/digitalServices/pdf/research/TotalGroup-2012.pdf>.

and Caucasian and Asian students.<sup>13</sup> In 2010, the *Harvard Educational Review* published empirical findings by Maria Santelices and Mark Wilson, which replicated a 2003 study. The study, based on a statistically sound set of test scores found that the SAT “favors one ethnic group over another.”<sup>14</sup> John Ogbu, in his work *Black American Students in an Affluent Suburb*, reported similar findings in his study of Black students in Shaker Heights, Ohio.<sup>15</sup>

The disparity between white students and African American and Hispanic students has translated into a lack of diversity at the college level. A recent *New York Times* study considered the admissions rate of schools in the seven states that have adopted bans on race-preference policies.<sup>16</sup> Its findings revealed that the number of African American and Hispanic students admitted to elite state colleges and universities dropped precipitously the year each state enacted its ban.<sup>17</sup> For a specific example, consider the change in diversity after California adopted Proposition 209,<sup>18</sup> which, like the Michigan referendum, banned the consideration of race in the admissions process. The marked decrease in minority enrollment at the state’s elite schools points to just how devastating the lack of consideration of race can be in ensuring a critical mass of classroom diversity.<sup>19</sup>

In 1998, UC Berkeley’s admissions rate for Black students fell from 47.8% to 19.7%; Latina students saw their chances of freshman admission go from

---

13. See generally Johnson, *supra* note 2; Steele & Aronson *supra* note 5. See also Roy Freedle, *How and Why Standardized Tests Systematically Underestimate African-Americans’ True Verbal Ability and What To Do about It: Towards the Promotion of Two New Theories with Practical Applications*, 80 ST. JOHN’S L. REV. 183 (2006) (reviewing Dr. Freedle’s SAT correlation studies identifying inherent bias in standardized tests); William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In-Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 158 (2002) (analyzing the disparate impact of the SAT).

14. Maria Veronica Santelices & Mark Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 HARV. EDUC. REV. 106, 126 (2010).

15. JOHN U. OGBU, *BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB*, 34–36 (2003) (discussing findings of the author’s thirty-year study of the academic performance of Black American students in the Shaker Heights, Ohio school district); see also Richard Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 449–53 (2004) (identifying the disproportionate performance of minority groups on standardized tests and using his findings to suggest that students who perform less well on the SAT are academically mismatched with their higher performing classmates).

16. See Ford Fessenden & Josh Keller, *How Minorities Have Fared in States with Affirmative Action Bans*, N.Y. TIMES, <http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html> (last updated Apr. 22, 2014).

17. *Id.* The University of Florida, the University of California, Berkeley, and the University of Washington showed particularly sharp drops the year the ban was instituted, although some schools, including the University of Florida, admitted a slightly higher number of underrepresented minority students a few years after the ban was instituted. *Id.*

18. CAL. PROP. 209 (1996). PROP. 209 was codified in the California Constitution at CAL. CONST. art. 1, § 31 (West 2014).

19. See *supra* notes 16–17.

44.4% to 20.6%.<sup>20</sup> At UCLA, the admission rate for African American freshmen applicants fell from 37.6% to 23% in 1998; for Latina applicants, it dropped from 40.4% to 24.3%.<sup>21</sup> Stated differently, more than one-half of California's public high school graduates are Black, Native American, and Latina ethnicities; yet they make up only 15% of the freshman class at UC Berkeley.<sup>22</sup>

### III.

#### RATINGS IN THE CONTEXT OF SUPREME COURT AFFIRMATIVE ACTION

Given the observed differences among ethnicities on standardized test scores, it is difficult for schools to create a comfortable coexistence between a race-sensitive admissions plan and a plan driven by the goal of elite status among ranked schools. Justice Thomas, in his *Grutter v. Bollinger* dissent, acknowledged as much when he admonished Michigan for seeking constitutional affirmation for a program that he said “s[ought] to improve marginally the education it offer[ed] without sacrificing too much of its exclusivity and elite status.”<sup>23</sup> Indeed, the Court is becoming increasingly hostile to helping schools create a constitutionally permissible race-preference admissions policy, fueling the argument that underrepresented minorities are losing access to elite institutions. The Court originally sanctioned the consideration of race in admissions decisions in its 1978 decision *Regents of the University of California v. Bakke*.<sup>24</sup> Since then, the Court has retreated from its pronouncement in *Bakke* that race could be considered a “plus” in admissions decisions.

Opponents of race-preference policies first challenged their use in *Bakke*.<sup>25</sup> In that case, Allen Bakke, an applicant to the UC Davis School of Medicine, challenged the school's admission policy, which set aside sixteen percent of its seats for underrepresented minority students who applied with objective test scores that were not as competitive as their majority peers.<sup>26</sup> A plurality of the Court agreed that race-preference admissions policies could pass constitutional muster if there was a compelling governmental interest and the program was

---

20. Katy Murphy, *UC after Proposition 209: How minority student admissions changed*, OAKLAND TRIBUNE (June 22, 2013, 12:00 PM), [http://www.mercurynews.com/education/ci\\_23516742/uc-after-proposition-209-how-minority-student-admissions?source=pkg](http://www.mercurynews.com/education/ci_23516742/uc-after-proposition-209-how-minority-student-admissions?source=pkg).

21. *Id.*

22. *Id.* See also Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary, 134 S. Ct. 1623, 1680 (Sotomayor, J., dissenting) (“The elimination of race-sensitive admissions policies in California has been especially harmful to black students. In 2006, for example, there were fewer than 100 black students in UCLA's incoming class of roughly 5,000, the lowest number since at least 1973.”).

23. *Grutter v. Bollinger*, 539 U.S. 306, 355–56 (2003).

24. 438 U.S. 265, 316 (1978) (Powell, J. concurring) (“race or ethnic background may be deemed a ‘plus’ in a particular applicant's file”).

25. *Id.*

26. *Id.* at 275–76.

narrowly tailored to meet that interest.<sup>27</sup> The *Bakke* court found that there was a compelling governmental interest in considering race a plus in admission because it was necessary to remedy present effects of past discrimination. Justice Powell, who wrote the plurality opinion, also observed that admitting a diverse group of students enriched the educational experience and constituted an additional compelling interest.<sup>28</sup>

Twenty-five years after it decided *Bakke*, the Court once again took up the question of constitutional permissibility of race-preference admissions policies.<sup>29</sup> In *Gratz v. Bollinger*<sup>30</sup> and *Grutter v. Bollinger*,<sup>31</sup> two cases decided on the same day, the Court considered the constitutionality of two separate University of Michigan admissions policies: in *Gratz*, the undergraduate admissions program which assigned points to students based on a variety of factors including high school grade point average, standardized test scores, high school curriculum, and underrepresented racial or ethnic background,<sup>32</sup> and in *Grutter*, the University of Michigan Law School's (the "Law School") admissions program which called for the enrollment of a "critical mass of underrepresented minority students" as a means of creating a diverse student body.<sup>33</sup> As in *Bakke*, the Court subjected the programs to the strict scrutiny test, agreeing to uphold the programs if it found a compelling governmental interest in the use of race-preference policies and if it found the challenged program was narrowly tailored to meet that interest.<sup>34</sup> In both cases, the Court agreed with Justice Powell's finding in *Bakke*; admitting a diverse group of students enriches the educational experience and remains a compelling interest, known as viewpoint diversity.<sup>35</sup> The Court struck down the

---

27. *Id.* at 299.

28. *Id.* at 314.

29. In the interim, lower circuits considered the issue. *See, e.g.*, *Smith v. Univ. of Wash. Law. Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (holding that Justice Powell's opinion in *Bakke* authorizes a "properly designed and operated race-conscious admission program"); *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (concluding that Justice Powell's opinion in *Bakke* was not binding on the Fifth Circuit); *Johnson v. Bd. of Regents of Univ. of Ga.*, 106 F. Supp. 2d 1362, 1368 (S.D. Ga. 2000) (holding that Justice Powell's opinion in *Bakke* regarding a compelling governmental interest in student diversity "is not binding . . . although . . . it is persuasive").

30. 539 U.S. 244 (2003).

31. 539 U.S. 306 (2003).

32. *Gratz*, 539 U.S. at 255. Students from an underrepresented racial or ethnic background were automatically assigned twenty points. *Id.*

33. *Grutter*, 539 U.S. at 318. Under the written policy, those reviewing applications for admission were encouraged to consider factors including recommendations, quality of the undergraduate institution, essays, course selection, and whether the applicant had a perspective or experience that would contribute to a diverse student body. *Id.* at 315. *See generally* Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the 21st Century*, 22 J.C. & U.L. 895 (1996).

34. *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 326.

35. *Grutter*, 539 U.S. at 328; *Gratz*, 539 U.S. at 271. Justice Ginsburg wrote that there remained an interest in remedying the present effects of past discrimination. *Id.* at 302–05 (Ginsburg, J., dissenting). This interest was paramount around the time of *Bakke*, since many of the applicants applying to medical school had matriculated in kindergarten around the time the Court decided *Bakke II*. *Id.*

undergraduate program holding it was not narrowly tailored because of its policy to assign points for particular students attributes including race.<sup>36</sup> However, it upheld the Law School's plan, which offered a more holistic approach to admissions decisions.<sup>37</sup> Because it passed strict scrutiny, the Law School policy at the center of *Grutter* became the new benchmark for constitutionally permissible race-preference programs. Following *Grutter*, programs that were holistic in scope and consider race as one of several factors, were permissible in schools that admitted students with the educational mission of admitting a critical mass of diverse voices.

Following *Grutter*, the Court turned its attention toward race-preference policies with more rapidity than it had post-*Bakke*. In 2007, the Court heard *Parents Involved in Community Schools v. Seattle School District No. 1*, in which it endorsed Justice Powell's finding that there is a compelling governmental interest in viewpoint diversity.<sup>38</sup> In *Parents Involved*, the Court considered the constitutionality of two different K-12 school districts' plans that were adopted as a means of maintaining racial equality in the schools.<sup>39</sup> A narrow majority of the Court reaffirmed the conclusion it had reached in *Grutter*, that there is a compelling governmental interest in viewpoint diversity and in assuring that institutions not revert to educational segregation.<sup>40</sup> In 2013, the Court returned to the constitutionality of race-preference admissions policies at the post-secondary school level when it considered *Fisher v. Texas*.<sup>41</sup> The case centered on the University of Texas's undergraduate two-tiered admissions program. The first tier was predicated on a state mandate granting automatic admission to students in the top ten percent of their high school class. The second tier, which the school used to fill up the remainder of the class, was closely fashioned after *Grutter*. Court observers watched the decision closely, anticipating that the Court would use *Fisher* to dismantle the use of race in state-

---

36. *Gratz*, 539 U.S. at 269. The Court held that University of Michigan's undergraduate point-allocation policy, which awarded twenty points to underrepresented minorities, "ensures that the diversity contributions of applicants cannot be individually assessed" and was therefore unconstitutional. *Id.* at 273, n.20 (quoting O'Connor, J., concurring).

37. *Grutter*, 539 U.S. at 333-43. The policy was constitutionally permissible because it did not "define diversity 'solely in terms of racial and ethnic status'" and did not "restrict the types of diversity contributions eligible for 'substantial weight' in the admissions process." *Id.* at 316. See generally Leslie Yalof Garfield, *The Inevitable Irrelevance of Affirmative Action Jurisprudence*, 39 J.C. & U.L. 1 (2013).

38. 551 U.S. 701 (2007).

39. *Id.* at 716-18.

40. *Id.* at 726. In Seattle, Washington, parents challenged a plan that used race as one of four tiebreakers to decide which students could attend an oversubscribed district school. In both cases, the school plans were designed to ensure racial diversity and equal access to the country's best colleges and universities. While the Court recognized viewpoint diversity as a compelling interest, it found that the plans at issue were not narrowly tailored to this interest. *Id.*

41. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).



sponsored post-secondary school admissions policies.<sup>42</sup> Instead the Court “punted,” finding that the lower court inappropriately deferred to the University in deciding whether the program was narrowly tailored.<sup>43</sup> The Court remanded the case and preserved the precedent that there is a compelling governmental interest in viewpoint diversity.<sup>44</sup> Thus, *Fisher* left schools free to consider race in their admissions decisions, alongside other personal attributes such as leadership or legacy status, which, when added to objective test scores, round out the applicant. But proponents of affirmative action knew that their celebration might be short lived.

Even before the Court rendered a decision in *Fisher*, it granted certiorari to *Schuette v. Coalition to Defend Affirmative Action*, a case challenging Michigan’s referendum banning the use of race in admissions.<sup>45</sup> The *Schuette* Court held 6-2<sup>46</sup> that Michigan Proposition 2, a ballot initiative prohibiting the consideration of race in the admissions process, was constitutional.<sup>47</sup> In deciding the case, the majority reaffirmed that *Grutter* was still good law, but Chief Justice Roberts, who authored the opinion, wrote that “There is no authority in the Constitution of the United States or in this court’s precedents for the judiciary to set aside Michigan laws that commit this policy determination to the voters.”<sup>48</sup> Justice Sotomayor, however, saw it differently. Writing a dissent that was longer than the majority and three other concurrences combined, Justice Sotomayor railed against the majority, writing “the Constitution does not give the majority free rein [sic] to erect selective barriers against racial minorities.”<sup>49</sup> Those selective barriers, according to Justice Sotomayor, arise when a school is no longer free to consider race in the admissions process.<sup>50</sup> Justice Sotomayor included a graph in her opinion displaying the unfortunate racial disparity that results when schools cannot consider race and cited, as support, the testimony of administrators who “expressed doubts over the ability to maintain minority enrollment through the use of a proxy, like socioeconomic status.”<sup>51</sup> Justice

---

42. See Lincoln Caplan, *Colleges Value Diversity, but Will the Court?*, N.Y. TIMES, Oct. 7 2012, [http://www.nytimes.com/2012/10/07/opinion/sunday/colleges-value-diversity-but-will-the-court.html?\\_r=0](http://www.nytimes.com/2012/10/07/opinion/sunday/colleges-value-diversity-but-will-the-court.html?_r=0).

43. *Fisher*, 133 S. Ct. at 2420–21.

44. *Id.* at 2414.

45. *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary v. Regents of Univ. of Michigan*, 701 F.3d 466 (6th Cir. 2012), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633, 185 L. Ed. 2d 615 (2013), *and rev'd sub nom. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014).

46. Justice Kagan recused herself in the *Schuette* case. See *Schuette*, 134 S. Ct. 1623, 1678 (2014).

47. *Id.*

48. *Id.* at 1637.

49. *Id.* at 1683 (Sotomayor, J., dissenting).

50. *Id.* at 1678.

51. *Id.* (citing the testimony of the University of Michigan’s Director of Undergraduate Admissions).

Sotomayor's dissent characterizes the majority decision as a roadblock to educational access for minorities, particularly at elite academic institutions. Her conclusions are based on an understanding that underrepresented minority students perform less well on objective tests and are therefore at a disadvantage for admission to schools that rely heavily on numbers. Statistics reflect her findings to be true.<sup>52</sup>

#### IV. CONCLUSION

As discussed throughout this article, an increasing number of schools are pandering to the rankings system, a practice deemed necessary to attract today's entering classes.<sup>53</sup> In an effort to maintain or improve their position in the reputational rankings, schools adopt administrative decisions that effectively increase their statistics in measured categories. An applicant's standardized tests score is one category; it carries significant weight among the rankings calculations. The attractiveness of a high *U.S. News* rankings, has the potential to be much more influential in the admissions decision-making process than is Supreme Court doctrine on racial preferences.

But the doctrine still matters. For forty-three states, *Grutter*, and its holding that there is a compelling governmental interest in viewpoint diversity, remains good law. *Schuette* did not state that schools could not consider race in the admissions process, rather it stands for the proposition that states' electorates are free to make the decision on whether state university admissions policies may consider immutable attributes.<sup>54</sup> Until states act legislatively, Court doctrine leaves schools free to consider race in their admissions decisions.

While *Grutter* remains the law in theory, the benefits of its holding have not been realized in fact. The overpowering quest among schools to reach the top of the rankings ladder drives admissions decisions at many schools in a way that the law does not. Consequently, it is rating fetishism, and not Supreme Court doctrine, that remains a roadblock to any avenue of opportunity left open by the Court's decisions.

---

52. See *supra* notes 15–19.

53. See generally Molly Alter & Randall Reback, *True To Your School? How Changing Reputations Alter the Demand for Selective US Colleges*, 36 EDUC. EVAL. & POL. ANALYSIS 1 (2014) (finding that *U.S. News* and *Princeton Review* annual rankings influence an applicant's decision making process).

54. See *Schuette*, 134 S. Ct. at 1636.