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AFFIRMATIVE ACTION TESTED: THE CONSTITUTIONALITY OF "LANDSCAPE"

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INTRODUCTION

In August 2019, the College Board[1] announced it was launching a program providing higher education institutions with "context about students' high schools and neighborhoods when making admissions decisions."[2] In August 2019, the College Board announced it was launching "Landscape," a program providing higher education institutions with "context about students' high schools and neighborhoods when making admissions decision."[3] Landscape collects and organizes data into three categories—basic high school data, such as school locale, test score comparison, and high school and neighborhood indicators—that offers insight into high schools and neighborhoods.[4] Among these indicators are quintessential measures of socioeconomic status, including college attendance, household structure, median family income, housing stability, education levels, and crime rate.[5] To provide admissions officials

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[1] The College Board is an American not-for-profit organization that partners with over 6,000 higher education institutions and administers standardized tests assessing college readiness, including the SAT. *About the College Board*, COLL. BD., https://about.collegeboard.org/overview [https://perma.cc/B744-ZL6P] (last visited Mar. 23, 2021).

[2] Newsroom, *College Board Announces Improved Admissions Resource*, COLL. BD. (Aug. 27, 2019) [hereinafter Newsroom], https://newsroom.collegeboard.org/college-board-announces-improved-admissions-resource [https://perma.cc/2BJE-BNNK].

[3] *Id.*

[4] *Id.*

[5] Landscape, *College Board Announces Improved Admissions Resource*, COLL. BD., https://pages.collegeboard.org/landscape [https://perma.cc/4ABJ-77SS] [hereinafter *Improved Admissions Resource*] (last visited Apr. 24, 2021).

with "more consistent background information so they can fairly consider every student, no matter where they live and learn," these six indicators are averaged and presented on a 1–100 scale for both a student's high school and neighborhood.[6] A higher score represents a "higher level of challenge related to educational opportunities and outcomes"; a lower score indicates less of a challenge in attaining academic success.[7]

This Note addresses potential Fourteenth Amendment[8] challenges to the new Landscape profile. Although the College Board's efforts are laudable, Landscape raises several constitutional questions because of its socioeconomic classification system and similarity to past affirmative action programs that were challenged on Equal Protection grounds.[9] Before turning to these issues, Part I provides a descriptive overview of Landscape and discusses the program's origin, evolution, and methodology. Part I concludes by summarizing the prevailing criticisms of Landscape's rating system, which some have called an "adversity score."[10]

Part II then offers a snapshot of modern Equal Protection jurisprudence, which follows the oft-cited three-tiered framework of strict scrutiny, intermediate scrutiny, and rational basis review.[11] Thereafter, Part II surveys the development of affirmative action in higher education, beginning with the landmark *Regents of the University of California v. Bakke*[12] decision. Notably, almost all affirmative action cases since *Bakke* have involved race and therefore have triggered strict scrutiny, including the recently-decided *Fisher v. University of Texas at Austin* case.[13] However, several legal scholars suggest class-

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[6] Newsroom, *supra* note 2; *Improved Admissions Resource*, *supra* note 5.

[7] *Improved Admissions Resource*, *supra* note 5.

[8] U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[9] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 307 (2003); Gratz v. Bollinger, 539 U.S. 244, 245 (2003). Both cases involved race-based rather than class-based affirmative action programs.

[10] Anemona Hartocollis, *SAT's New 'Adversity Score' Will Take Students' Hardships into Account*, N.Y. TIMES (May 16, 2019), https://www.nytimes.com/2019/05/16/us/sat-score.html [https://perma.cc/U7Z3-VJPE].

[11] Clark v. Jeter, 486 U.S. 456, 461 (1988) ("In considering whether [a program] violates the Equal Protection Clause . . . we apply different levels of scrutiny to different types of classifications.").

[12] 438 U.S. 265, 287–88, 356–57 (1978).

[13] 136 S.Ct. 2198, 2209–10 (2016).

based affirmative action programs, which account for socioeconomic disadvantage, could instead receive rational basis review.[14]

After building on the necessary factual and legal background in Parts I and II, Part III turns to the threshold requirement in any Fourteenth Amendment Equal Protection analysis,[15] and assesses whether the College Board, a private not-for-profit organization, functions as a state actor because of its virtual monopoly over the college admissions process. This Note argues that, under the "entwinement test" established in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,[16] the College Board functions as a state actor because publicly-funded institutions have historically developed an "entangled" relationship with the College Board.

Part IV evaluates the constitutionality of Landscape under the Equal Protection Clause, and argues rational basis review is appropriate because Landscape uses indicators that depend heavily on socioeconomic classifications.[17] Alternatively, if Landscape is framed in terms of geographic locale, courts would still apply rational basis review.[18] Next, this Note contends that the College Board has a legitimate interest in providing schools with consistent data reflective of students' socioeconomic upbringing because the Supreme Court of the United States previously held diversity in higher education is a compelling interest.[19] Finally, despite criticism that Landscape is both underinclusive and overinclusive, this Note concludes that the program is rationally related to its proffered end.[20]

I. THE COLLEGE BOARD'S EFFORT TO DIVERSIFY HIGHER EDUCATION

The acronym "SAT" is notorious. Since 1926, countless college-bound students have taken the College Board's

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[14] *See, e.g.*, Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1037–38, 1060, 1064 (1996) [hereinafter Kahlenberg, *Class-Based Affirmative Action*].

[15] United States v. Morrison, 529 U.S. 598, 621 (2000) ("[T]he Fourteenth Amendment . . . prohibits only state action.").

[16] 531 U.S. 288, 314 (2001) (Thomas, J., dissenting).

[17] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40–41 (1973).

[18] *See* Bush v. Gore, 531 U.S. 98, 109–10 (2000).

[19] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 307 (2003).

[20] *See* Vance v. Bradley, 440 U.S. 93, 108 (1979).

standardized test, the Scholastic Aptitude Test ("SAT").[21] In the class of 2019, over 2.2 million students sat for the exam—a four-percent increase from the class of 2018.[22] This upward trend will persist, as the College Board now offers free weekday testing through the "SAT School Day" program.[23] Simultaneously, the test-taking population will become more diverse because SAT School Day "makes the SAT possible for students who . . . could not have tested on a weekend" by "eliminating barriers and simplifying the test-day experience."[24] "[M]ore students, regardless of background, are considering college as part of their future."[25] Thus, the College Board has committed itself to other initiatives that help colleges consider educational and socioeconomic contexts in the application review process. Landscape is one such initiative.

A. Landscape's Predecessor: The "Environmental Context Dashboard"

In May 2019, the College Board announced a new initiative to measure socioeconomic adversity through the Environmental Context Dashboard ("the Dashboard").[26] Originally, the Dashboard included information about a student's high school, comparative SAT scores, and contextual data on a student's

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[21] *See* Frontline, *A Brief History of the SAT*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/sats/where/history.html [https://perma.cc/8BU2-BWVU] (last visited Mar. 23, 2021); *Inside the SAT Test*, COLL. BD., https://collegereadiness.collegeboard.org/sat/inside-the-test [https://perma.cc/4AVV-27FY] (last visited Mar. 23, 2021).

[22] *SAT Results: Class of 2019*, COLL. BD., https://reports.collegeboard.org/sat-suite-program-results/class-2019-results [https://perma.cc/G44H-Q9WR] (last visited Mar. 23, 2021).

[23] *See id.* In 2018, thirty-six percent of students took the SAT on a school day. *Id.* In 2019, forty-three percent of students took the SAT on a school day. *Id.*

[24] *Id.* Compared to weekend test-takers, weekday test-takers are more likely to have parents without high school diplomas or college degrees, identify as members of a minority group, and attend "high-poverty public schools," where over fifty percent of the student body is eligible for free or reduced-price lunch. *Id.*

[25] *Id.*

[26] *See* Hartocollis, *supra* note 10; Dana Goldstein, *Your Questions about the New Adversity Score on the SAT, Answered*, N.Y. TIMES (May 17, 2019), https://www.nytimes.com/2019/05/17/us/sat-adversity-score-explained.html [https://perma.cc/D3MS-NGT7]. The Dashboard "allow[ed] colleges to incorporate context into their admissions process in a data-driven, consistent way." *Frequently Asked Questions: Environmental Context Dashboard*, COLL. BD., [hereinafter Environmental Context Dashboard FAQs] https://secure-media.collegeboard.org/pdf/environmental-context-dashboard-faqs.pdf [https://perma.cc/TU69-2CRN] (last visited Mar. 23, 2021).

neighborhood and school.[27] The latter measure, dubbed an "[A]dversity [S]core," was derived from thirty-one pieces of data pertaining to a student's neighborhood and high school, meant to gauge disadvantage.[28] Admissions officials were to consider contextual data drawn from publicly available sources, such as the National Center for Education Statistics ("NCES") and the United States Census Bureau.[29] Some of the pertinent factors were median family income, percentage of households in poverty, percentage of single parent households, percentage of adults without a high school or college degree, percentage of unemployed adults, and crime rate.[30]

Neighborhood Measure *Comprised of income, family structure, housing, educational attainment, and likelihood of being a victim of a crime*	High School Measure *Comprised of income, family structure, housing, and educational attainment*
Median family income	Median family income
Percentage of all households in poverty (poverty rate)	Percentage of all households in poverty (poverty rate)
Percentage of families with children in poverty	Percentage of families with children in poverty

[27] *Environmental Context Dashboard FAQs*, *supra* note 26. High school information included senior-class-size, percentage of students who meet federal eligibility criteria for free and reduced price-lunch, rurality/urbanicity, average SAT score of colleges students from that high school attend, and percentage of seniors taking Advanced Placement Exams. Landscape, *Comprehensive Data and Methodology Overview*, COLL. BD., [herein after *Comprehensive Data and Methodology Overview*], https://securemedia.collegeboard.org/landscape/comprehensive-data-methodology-overview.pdf [https://perma.cc/5BVA-FAVG] (last visited Mar. 23, 2021). Comparative SAT scores were viewed within the twenty-fifth, fiftieth, and seventy-fifth percentile of scores from a student's high school. *Id.*

[28] Goldstein, *supra* note 26.

[29] *Environmental Context Dashboard FAQs*, *supra* note 26.

[30] *Detailed Data Description*, COLL. BD. (July 12, 2019). A list of the thirty-one data points considered for the "[c]ontextual data" portion of the Dashboard can be found in Figure 1. The family, housing, and educational measures were "based on a factor analysis of the data from the American Community Survey." *Id.* Neighborhood data was drawn from "all census tracts represented in a given high school." *Id.*

Percentage of households with food stamps	Percentage of households with food stamps
Percentage of families that are single-parent families with children and in poverty	Percentage of families that are single-parent families with children and in poverty
Percentage of families that are single-parent families with children	Percentage of families that are single-parent families with children
Percentage of housing units that are rental	Percentage of housing units that are rental
Percentage of housing units that are vacant	Percentage of housing units that are vacant
Rent as a percentage of income	Rent as a percentage of income
Percentage of adults with less than a 4-year college degree	Percentage of adults with less than a 4-year college degree
Percentage of adults with less than a high school diploma	Percentage of adults with less than a high school diploma
Percentage of adults with agriculture jobs	Percentage of adults with agriculture jobs
Percentage of adults with nonprofessional jobs	Percentage of adults with nonprofessional jobs
Percentage unemployed	Percentage unemployed
College-going behavior	College-going behavior
Probability of being a victim of a crime	

Figure 1: Contextual Data on the Neighborhood and High School Environment

Each of the thirty-one factors were displayed as a percentile between one and one-hundred, with a uniform distribution.[31] A score of "1" indicated the least amount of disadvantage, while a score of "100" represented the most disadvantage in a particular

[31] *Id.* A uniform distribution refers to a distribution with constant probability. James Chen, *Uniform Distribution*, INVESTOPEDIA, https://www.investopedia.com/terms/u/uniform-distribution.asp [https://perma.cc/PNJ8-AM6Q] (last updated Feb. 2, 2021).

category.[32] The College Board then weighted the factors equally to generate a scaled score for both the student's high school and neighborhood.[33] This "Adversity Score" was available as a percentile normed at the state and national levels.[34] Again, scores were displayed on a scale of one to one-hundred, with a score of "50" representing an "average" level of socioeconomic disadvantage.[35]

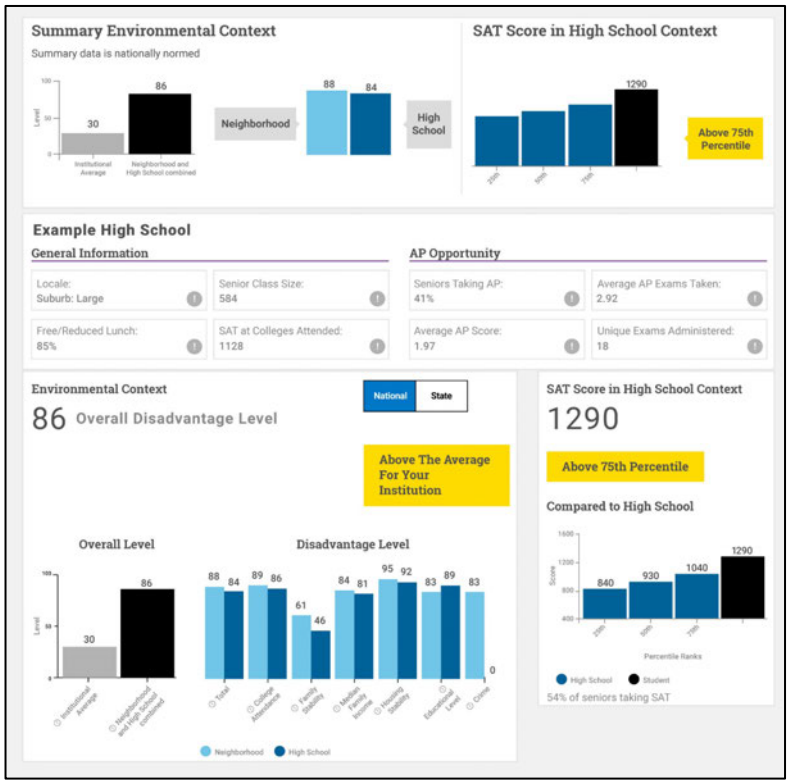

Figure 2: The Original Environmental Context Dashboard

[32] *Detailed Data Description*, *supra* note 30.

[33] *Id.*

[34] *Id.*

[35] *Id.* Figure 2 depicts a hypothetical student's Dashboard. *Id.* The "Environmental Context" portion represented the "Adversity Score," which provided a scored "Overall Disadvantage Level." *Id.*

Importantly, the Dashboard did not "directly reflect an individual student;" all data was aggregate and pertained to the census tract in which a student lived.[36] Moreover, although the program's goal was to "find students who have transcended their environments by examining factors that are correlated, according to research, with lower academic achievement and lower lifetime earnings," none of the contextual measures included race or ethnicity.[37] The College Board elected for a holistic approach, hoping to provide a "bigger package of data" about applicants.[38]

In developing the Dashboard, the College Board drew from the research of economist Raj Chetty, who studied the impact of neighborhood lifetime earnings on scholastic achievement.[39] The College Board also consulted with Richard D. Kahlenberg, a Senior Fellow at the Century Foundation and proponent of class-based affirmative action.[40] Kahlenberg recommended a measure of socioeconomic disadvantage be included at the school and neighborhood levels.[41] Although Kahlenberg also believed the Dashboard should have contained information about a student's family, he described the program as "an enormous step forward."[42] During the program's three-year pilot phase, colleges and universities reported the Dashboard "made it easier to

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[36] Goldstein, *supra* note 26.

[37] *Id.* (The Dashboard "contains no information on the student's race or ethnicity, or on the racial makeup of the student's neighborhood or school.")

[38] *Id.*; *see also Future Admissions Tools and Models Initiative*, COLL. BD., https://professionals.collegeboard.org/higher-ed/future-admissions-tools-and-models-initiative [https://perma.cc/DG4G-B5CF] (last visited Mar. 23, 2021) (describing how the Dashboard emphasized "holistic and individualized review").

[39] Goldstein, *supra* note 26; *see generally* Raj Chetty, et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q. J. OF ECON. 1553 (2014).

[40] Anemona Hartocollis & Amy Harmon, *SAT Adversity Index: A Drive Toward Diversity Without Discussing Race*, N.Y. TIMES (May 17, 2019), https://www.nytimes.com/2019/05/17/us/sat-adversity-race.html [https://perma.cc/TK4Y-GMAJ]. *See generally* RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996).

[41] Richard D. Kahlenberg, *An Imperfect SAT Adversity Score is Better than Just Ignoring Adversity*, THE ATLANTIC (May 25, 2019), https://www.theatlantic.com/ideas/archive/2019/05/defense-sat-adversity-score/590278/ [https://perma.cc/5CX3-5X4P]. Kahlenberg argued that "an imperfect adversity score is better than failing to account for the difficulty so many students overcome" because research found that "the most disadvantaged students, on average, score a whopping 784 points lower on the SAT . . . than the most advantaged." *Id.*

[42] Goldstein, *supra* note 26.

incorporate contextual information,"[43] which resulted in more offers to low-income applicants.[44]

However, the Dashboard was not without its critics. First, several education experts argued the Dashboard was overgeneralized and should have included individualized student data.[45] One professor opined, "[i]f you're a really well-educated, higher-income family living in a poor neighborhood, this measure is going to overstate the disadvantage you face."[46] Others criticized the Dashboard for being underinclusive, insofar as the SAT scores of low-income students living in wealthy neighborhoods or attending charter schools were misrepresented.[47]

Second, many critics complained the Dashboard was a façade for race-based affirmative action.[48] One thinktank member called the College Board's plan "a back door to racial quotas in college admissions"[49] because housing patterns linked to race "are not random, but are intentional, showing that race matters."[50] Still, some law professors believed the Dashboard's failure to

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[43] *Environmental Context Dashboard FAQs*, *supra* note 26.

[44] Goldstein, *supra* note 26.

[45] *Id.*

[46] *Id.*; *see also* Darin Bartram, *New SAT 'Adversity Score' is Another College Board Effort to Commodify My High Schooler*, USA TODAY: VOICES, https://www.usatoday.com/story/opinion/voices/2019/05/29/sat-adversity-score-college-board-unfair-column/1250576001/ [https://perma.cc/X2TK-JM3M] (last updated May 29, 2019, 5:49 PM). Bartram observed that students "whose parents joined the trend toward gentrifying old, low-income neighborhoods may benefit from historically high rates of crime, poverty and vacancy based on Census figures that do not reflect the current environment." *Id.*

[47] Nick Anderson & Susan Svrluga, *Coming Soon to the SAT: An 'Adversity Score' Offering a Snapshot of Challenges Students Face*, WASH. POST (May 16, 2019), https://www.washingtonpost.com/education/2019/05/16/coming-soon-sat-an-adversity-score-offering-snapshot-challenges-students-face/ [https://perma.cc/Z85E-VL28] ("[The Dashboard] doesn't work well for, say, a low-income student on scholarship at a New England boarding school . . . ."); *contra* Bartram, *supra* note 46 ("[S]tudents who leave their assigned high school to attend a magnet program at a school in a more disadvantaged area . . . may find their adversity score inflated.").

[48] Scott Jaschik, *College Board Will Add Adversity Score for Everyone Taking the SAT*, INSIDE HIGHER ED (May 20, 2019), https://www.insidehighered.com/admissions/article/2019/05/20/college-board-will-add-adversity-score-everyone-taking-sat [https://perma.cc/8U2Y-9MGJ].

[49] *Id.* ("[T]hanks to racial preferences, many black high school students know they don't need to put in as much scholarly effort as non-'students of color' to be admitted to highly competitive colleges. The adversity score will only reinforce that knowledge.").

[50] *Id.*

include race as an explicit factor was problematic.[51] They lamented "[n]ot having [racial] information is a true oversight if you really are interested in understanding adversity."[52]

B. Landscape: What We Know and What We Don't

Because of these criticisms, the College Board announced it was abandoning the Dashboard in September 2019 and replacing it with a new "transparent" initiative called Landscape, which "no longer display[s] a single 'score' combining high school and neighborhood information."[53] The College Board also reduced the number of contextual factors from thirty-one to six.[54]

These changes aside, Landscape's purpose and methodology largely remains the same as its ill-fated predecessor. Landscape's goal is to provide "consistent high school and neighborhood information for all [college] applicants to help admissions officers fully consider every student, no matter where they live."[55] The College Board again emphasizes Landscape is "[o]nly one part of admissions" and does not alter a student's SAT score in any way.[56] Similarly, Landscape does not replace other traditional components of a student's application, such as grade point average, letters of recommendation, and personal statements; the data therein is part of a holistic admissions approach and no applicant can be "offered or denied admission because of Landscape."[57] However, aside from a cursory list of

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[51] Goldstein, *supra* note 26.

[52] *Id.* David Coleman, Chief Executive Officer of the College Board, responded that race is less of a predictor of academic success than certain "resourcefulness" factors: "It turns out in America that within every racial group . . . there are large numbers of people who show resourcefulness within very limited circumstances." Hartocollis, *supra* note 10.

[53] Newsroom, *supra* note 2.

[54] Anemona Hartocollis, *SAT 'Adversity Score' Is Abandoned in Wake of Criticism*, N.Y. TIMES (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/us/sat-adversity-score-college-board.html [https://perma.cc/C4AV-BNTD].

[55] Landscape, *Consistent High School and Neighborhood Information for Colleges*, COLL. BD., https://pages.collegeboard.org/landscape [https://perma.cc/N94H-LZCE] (last visited Mar. 23, 2021). The College Board offered the following justifications: Colleges typically "consider what students achieved in the context of where they've learned and lived"; colleges can rely on Landscape to fill information gaps because they receive applications from around the world; and colleges benefit from consistency when making admissions decisions. *Id.*

[56] *Id.*

[57] *Id.*

"Appropriate Usage Guidelines," there is no guarantee individual institutions will use Landscape in this manner.[58]

All colleges using Landscape agree to adhere to the following appropriate use principles:	
Colleges agree that:	**Colleges agree to:**
Landscape is to be used only as supplemental information to the large amount of individual information contained in the application. The general neighborhood and high school information will never replace student-specific application information. The information in Landscape will never be used as a primary or sole determinant of an admission decision.	Participate in collaborative research to improve the resource and track and understand the impact of its use on admissions, enrollment, and retention. Ensure that all staff who review applications receive training on the appropriate use of Landscape. Abide by the ethical standards set forth by the National Association for College Admission Counseling (NACAC) for the practice of admissions.

Figure 3: Landscape Appropriate Usage Guidelines

Landscape also uses data practically identical to that used in the Dashboard. Landscape is divided into three categories of information: high school characteristics, test score comparison, and contextual high school and neighborhood data (relative to

[58] *Landscape Appropriate Usage Guidelines,* COLL. BD., https://professionals.collegeboard.org/landscape#usage [https://perma.cc/E4RL-G8ZD] (last visited Mar. 23, 2021) (Figure 3). The College Board has no way to enforce the promise that Landscape "will never be used as a primary or sole determinant of an admissions decision." *Id.*

state and national averages).[59] High school characteristics include locale (e.g. urban, suburban, rural), senior class size, percent of students eligible for free and reduced-price lunch, average SAT scores at colleges attended, and AP participation and performance.[60] The test score comparison displays students' SAT scores within the range of test scores at their high schools.[61]

However, unlike the Environmental Context Dashboard, which identified thirty-one unique contextual indicators, Landscape contains "six key indicators about applicants' communities and high schools."[62] These indicators are: college attendance, household structure, median family income, housing stability, education level, and crime rate.[63] Although the College Board no longer provides a single score for a student's

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[59] Landscape, *Consistent High School and Neighborhood Information for Colleges*, COLL. BD., https://secure-media.collegeboard.org/landscape/what-you-need-to-know-counselors.pdf [https://perma.cc/85VD-HBTX] (last visited Mar. 23, 2021).

[60] Landscape, *Data and Methodology Summary 1*, COLL. BD. (last visited Mar. 23, 2021), https://secure-media.collegeboard.org/landscape/data-methodology-summary.pdf [https://perma.cc/5XQD-QRT6]. Locale is based on high school location and relies on NCES classifications. *Id.* Senior class size denotes the three-year average graduating class size and is obtained from the NCES Common Core of Data and Private School Survey. *Id.* The percent of students eligible for free or reduced price lunch is also drawn from NCES, and the information is only available for public schools. *Id.* Average SAT scores at colleges attended refers to the "[a]verage of first-year student SAT scores at four-year colleges attended by the three most recent cohorts of college-bound seniors from the applicant's high school." *Id.* AP participation and performance includes the "[n]umber of seniors taking AP courses; [the] average number of AP Exams taken per student; [the] average AP score; [and the] number of unique [AP] exams administered." *Id.*

[61] *Id.* A student's SAT score is presented alongside the twenty-fifth, fiftieth, and seventy-fifth percentiles at the student's high school, based on a three-year average. *Id.*

[62] *Id.* Like the Dashboard, neighborhood is defined by a student's census tract, and high school-level data incorporate the census tracts of seniors at a high school. *Id.*

[63] *Comprehensive Data and Methodology Overview*, *supra* note 27. College attendance is "the predicted probability a student from the neighborhood/high school enrolls in a four year college," and is derived from "aggregate College Board and National Student Clearinghouse data." *Id.* Information about household structure is obtained through ACS and considers the number of single parent, married, or coupled families, and children living under the poverty line. *Id.* Median family income is calculated among persons in the neighborhood/high school by the ACS. *Id.* Housing stability includes ACS statistics about vacancy-rates, rental and home ownership, and mobility/housing turnover. *Id.* Education level pertains to "[t]ypical educational attainment in the neighborhood/high school" assessed by the ACS. *Id.* Crime rate data is provided by Location.Inc, an online risk assessment tool, and is defined as "[t]he predicted probability of being a victim of a crime in the neighborhood or neighborhoods represented by the students attending the high school." *Id.*

neighborhood and high school, the end result is practically the same because these six indicators "are averaged and presented on a 1–100 scale to provide a Neighborhood Average and High School Average."[64] As was true of the Dashboard, "[a] higher value on the 1–100 scale indicates a higher level of challenge related to educational opportunities and outcomes."[65]

One is left wondering whether there is any meaningful difference between the Dashboard and its successor. A September 2019 letter to the editor puts the current state of affairs into perspective:

> If the College Board can bamboozle people into believing that its "overall disadvantage level" has been materially changed by calling it "Landscape," the organization can boast that it can fool practically all of the people all of the time. . . . Now, the single number is gone, although colleges and universities can distill the information into a, well, single number. Oh, and Landscape is "transparent."[66]

Landscape is undoubtedly controversial. In the coming years, the College Board will likely become the target of various lawsuits as Landscape attracts more public attention. If we are to assess the legal viability of the program, we must combine prescriptive precedent with contextual foresight to examine its constitutionality.

II. THE DEVELOPMENT OF AFFIRMATIVE ACTION IN HIGHER EDUCATION

A. Overview of Modern Equal Protection Jurisprudence

Equal Protection cases fall within a three-tiered framework in which courts apply different levels of scrutiny to different kinds of "classifications."[67] On one extreme, classifications based on race receive the most exacting form of judicial scrutiny.[68] To withstand strict scrutiny, laws must be narrowly tailored to compelling government interests.[69] On the other extreme, laws

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[64] *Id.*

[65] *Id.*

[66] Richard E. Vatz, Opinion, *Revamped SAT Plan, Same End Result*, WASH. POST (Sept. 1, 2019), https://www.washingtonpost.com/opinions/the-sats-scale-for-disadvantaged-students-reeks-of-social-engineering/2019/09/01/e04a1830-ca95-11e9-9615-8f1a32962e04_story.html [https://perma.cc/M82F-K88G].

[67] Clark v. Jeter, 486 U.S. 456, 461 (1988).

[68] *Id.*

[69] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

involving other classifications—excluding gender—receive rational basis review and must be "rationally related to a legitimate governmental purpose."[70] Absent animus,[71] courts will uphold "imperfect" classification schemes "[i]n the area of economics and social welfare."[72] If the socioeconomic classification has "some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' "[73]

For example, in *San Antonio Independent School District v. Rodriguez*, the plaintiffs brought suit on behalf of school-aged minority children living in impoverished urban school districts with a low property tax base.[74] The plaintiffs argued Texas' school finance system, which relied on local property taxation, violated the Equal Protection Clause because "substantial interdistrict disparities in school expenditures" perpetuated a system of wealth-based discrimination.[75]

However, the Supreme Court held the school financing system did not discriminate against any definable suspect class.[76] The Court reasoned disparities in wealth are "large, diverse, and amorphous" and the plaintiffs were "unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[77] Furthermore, the Court observed "[t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment."[78] Therefore, the Court determined the public-school finance system only needed to "bear some rational relationship to legitimate state purposes."[79] While

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[70] *Clark*, 486 U.S. at 461; *see also* Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 491 (1955).

[71] Romer v. Evans, 517 U.S. 620, 632 (1996).

[72] Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[73] *Id.* (quoting Lindsley v. Nat. Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

[74] 411 U.S. 1, 4–5 (1973).

[75] *Id.* at 15.

[76] *Id.* at 28.

[77] *Id.* This "large" and "amorphous" class is comparable to the "large and amorphous" class of persons with intellectual disabilities in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985). In *Cleburne*, the Court noted "it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others." *Id.* at 445.

[78] *Rodriguez*, 411 U.S. at 28.

[79] *Id.* at 40.

the state's reliance on property taxation caused "some inequality" in expenditures across school districts, the manner in which Texas achieved its proffered rationale was "not alone a sufficient basis for striking down the entire system."[80]

The Court's holding is unsurprising given the low threshold for rational basis review. Nevertheless, the Fourteenth Amendment still requires "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."[81] Once a right to equal treatment is recognized, later classifications affecting that right may not, "by later arbitrary and disparate treatment," value one group over another.[82] At its core, Equal Protection "applies as well to the manner of [the right's] exercise."[83] Therefore, classifications which implicate another right to equal treatment—whether in the context of ballot-counting[84] or education[85] across geographic lines—should not be so arbitrary as to render them irrational. Yet, "perfection is by no means required."[86] Even if a classification "is to some extent both underinclusive and overinclusive," it will withstand rational basis review.[87]

B. Race Based Affirmative Action in Higher Education

Although Landscape does not use racial classifications, a brief review of analogous race-based affirmative action precedent is necessary to establish a comparative legal framework. The Court's first encounter with affirmative action was *Regents of the*

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[80] *Id.* at 50–51.

[81] Bush v. Gore, 531 U.S. 98, 109 (2000). The holding in *Bush v. Gore* was narrow: "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104–105. However, a broader principle can be extracted. Just as the Fourteenth Amendment demands that votes are counted the same across county lines, classifications based on neighborhood must be logically related to a legitimate state interest.

[82] *Id.* at 104.

[83] *Id.*

[84] *Id.* at 104-05.

[85] The Court has never recognized a fundamental right to education, Plyler v. Doe, 457 U.S. 202, 223 (1982), but did recognize a right to *equal treatment* in public educational institutions. In Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954), the Court emphasized "the importance of education to our democratic society" and recognized that "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

[86] Phillips Chem. Co. v. Dumas Sch. Dist., 361 U.S. 376, 385 (1960).

[87] Vance v. Bradley, 440 U.S. 93, 108 (1979).

University of California v. Bakke,[88] which struck down a state medical school's voluntary affirmative action program that reserved sixteen seats in the entering class for minority applicants.[89] The Court held the university's racial quota system was unconstitutional under the Equal Protection Clause because it "totally excluded [non-minorities] from a specific percentage of the seats in an entering class."[90]

In the subsequent *Grutter* and *Gratz* decisions, the Court clarified the constitutional status of racial admissions preferences. In *Grutter v. Bollinger*, University of Michigan Law School applicants who were denied admission challenged the university's race-conscious admissions policy which sought to enroll a "critical mass" of minority students to promote "racial and ethnic diversity."[91] Yet, the policy did not "define diversity 'solely in terms of racial and ethnic status.' "[92] The school provided a "flexible assessment of applicants' talents, experiences, and potential" by considering LSAT scores, grade-point averages, personal statements, and letters of recommendation.[93]

Accordingly, the Court upheld the law school's admissions policy.[94] The Court conceded race-based affirmative action programs, though remedial, must receive strict scrutiny.[95] However, "[s]trict scrutiny is not 'strict in theory, but fatal in fact.' "[96] Race-based affirmative action programs are constitutional provided they are narrowly tailored to a compelling state interest.[97] In this spirit, the Court noted the

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[88] 438 U.S. 265 (1978).

[89] *Id.* at 271, 289.

[90] *Id.* at 319 ("No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, [non-minorities] are never afforded the chance to compete with applicants from the preferred groups.").

[91] 539 U.S. 306, 316 (2003). The Director of Admissions testified " ' "critical mass" means "meaningful numbers" or "meaningful representation," ' . . . a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." *Id.* at 318.

[92] *Id.* at 316.

[93] *Id.* at 315.

[94] *Id.* at 343–44 ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

[95] *Id.* at 326.

[96] *Id.* (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).

[97] *Id.* at 327.

important role of education and reiterated *Bakke*'s presumption of deference to "complex" academic judgements.[98] For the first time, the Court explicitly held a university's "interest in attaining a diverse student body" was compelling.[99] Furthermore, the Court held the Law School's policy was sufficiently narrowly tailored because, unlike the quota system in *Bakke*, the program did not admit "some specified percentage of a particular group merely because of its race or ethnic origin."[100] Instead, race and ethnicity were "plus" factors[101] in the otherwise individualized, holistic consideration of each applicant's file.[102]

However, the Court arrived at the opposite conclusion about the University of Michigan's undergraduate admissions policy in *Gratz v. Bollinger*.[103] Like the admissions policy in *Grutter*, the admissions policy in *Gratz* considered factors such as an applicant's grades and standardized test scores.[104] Yet, unlike the admissions policy in *Grutter*, the policy in *Gratz* used "predetermined point allocations"[105] and guaranteed admission to applicants receiving a score of one-hundred points or greater.[106] Students from underrepresented racial and ethnic groups were automatically awarded twenty points.[107] Consequently, "virtually

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[98] *Id.* at 328–29; *accord* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319, n.53 (1978).

[99] *Grutter*, 539 U.S. at 328. The Court was "informed by [its] view that attaining a diverse student body is at the heart of the Law School's proper institutional mission." *Id.* at 329.

[100] *Id.* at 329; *contra Bakke*, 438 U.S. at 315 (an admissions policy which uses quotas to "insulat[e] each category of [racial and ethnic minority] applicants with certain desired qualifications from competition with all other applicants" is not narrowly tailored).

[101] *Grutter*, 539 U.S. at 334.

[102] *Id.* at 337 ("[T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races.").

[103] 539 U.S. 234, 275 (2003) ("[B]ecause the University's use of race . . . is not narrowly tailored to achieve [the] asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause . . . .").

[104] *Id.* at 253.

[105] *Id.* at 279 (O'Connor, J., concurring).

[106] *Id.* at 255 (majority opinion). Applicants could receive a maximum of one-hundred-and-fifty points on a selection index that was divided into the following ranges: "100–150 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 and below (delay or reject)." *Id.*

[107] *Id.* at 244 ("[E]very applicant from an underrepresented racial or ethnic minority group is automatically awarded 20 points of the 100 needed to guarantee admission.").

every qualified . . . [minority] applicant" was admitted to the University's undergraduate program.[108]

Although the Court recognized a compelling interest in attaining a critical mass of racially diverse students,[109] it nonetheless held that the University's policy was not sufficiently narrowly tailored.[110] The Court reasoned each applicant must be evaluated on an individualized basis, and the admissions program must assess "all of the qualities [an] individual possesses, and in turn, evaluat[e] [an] individual's ability to contribute to the unique setting of higher education."[111] The University's admissions policy did not provide the requisite "individualized consideration" because its mechanical, predetermined points system awarded twenty points to an applicant's race or ethnicity—one-fifth of the points needed to guarantee admission.[112] This practice "ensure[d] that the diversity contributions of applicants [could not] be individually assessed," and was therefore unconstitutional.[113]

Several years later, the Court reaffirmed its commitment to the *Grutter-Gratz* framework in *Fisher v. University of Texas at Austin*.[114] In *Fisher II*, the University of Texas automatically admitted the top ten-percent of high school students graduating from their class,[115] and filled the remaining seats by combining an applicant's SAT score and grade point average with a "Personal Achievement Index" [116] (PAI)—a scaled number between "1" and "6" that was comprised of the average score on two essays and a separate review of these essays along with supplemental information including an applicant's resume, letters of recommendation, and "special circumstances."[117] Among the special circumstances that the University considered were:

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[108] *Id.* at 254.

[109] *Id.* at 268; *accord* Grutter v. Bollinger, 539 U.S. 306, 327–33 (2003).

[110] *Gratz*, 539 U.S. at 270 ("[T]he University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity . . . .").

[111] *Id.* at 271; *accord* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

[112] *Gratz*, 539 U.S. at 271–72.

[113] *Id.* at 279 (O'Connor, J., concurring).

[114] 136 S.Ct. 2198, 2214 (2016).

[115] *Id.* at 2205.

[116] *Id.* at 2206.

[117] *Id.*

> [T]he socioeconomic status of the applicant's family, the socioeconomic status of the applicant's school, the applicant's family responsibilities, whether the applicant lives in a single-parent home, the applicant's SAT score in relation to the average SAT score at the applicant's school . . . and, finally, the applicant's race.[118]

The Court acknowledged the University could consider race as "a positive feature of a minority student's application" and found race was but a "factor within a factor" in the holistic review process.[119] Thus, consistent with *Grutter*,120 the Court held PAI was narrowly tailored to "the decision to pursue 'the educational benefits that flow from student body diversity' "[121] because the plaintiffs did not proffer an "available" and "workable" race-neutral alternative.[122]

Fisher II is the Court's final word on the constitutionality of race-based affirmative action programs in higher education. However, class-based affirmative action programs have received little judicial attention despite discussion in the legal community.[123] After reviewing relevant scholarship, this Note returns to the question of whether Landscape would survive an Equal Protection challenge.

C. The Viability of Class-Based Affirmative Action

Several legal scholars have suggested alternatives to traditional race-based affirmative action programs.[124] For

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[118] *Id.* PAI is similar to the College Board's Landscape profile in many respects.

[119] *Id.* at 2207.

[120] 539 U.S. 306, 339 (2003) ("[N]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative.").

[121] *Fisher II*, 136 S.Ct. at 2208 (quoting Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 310 (2013)). Although "an interest in the educational benefits of diversity" is compelling, the interest "cannot be elusory or amorphous." *Id.* at 2211. Instead, a university's goals "must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." *Id.* The Court found the University "articulated concrete and precise goals" and provided a "reasoned, principled explanation" for pursing them. *Id.*

[122] *Id.* at 2214. Narrow tailoring "impose[s] 'on the university the ultimate burden of demonstrating' that 'race-neutral alternatives' that are both 'available' and 'workable' 'do not suffice.' " *Id.* at 2208 (quoting Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 312 (2013)). However, the plaintiff's suggested alternative—an admissions system using class rank as the sole metric—was not "available" and "workable" for the University. *Id.* at 2213–14.

[123] *See infra* Section II.C.

[124] *See, e.g.*, Kahlenberg, *Class-Based Affirmative Action*, *supra* note 14; Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1914–15 (1996).

example, Richard Kahlenberg has written extensively about the merits of a class-based affirmative action system that "recognizes the very real legacy of discrimination, but also acknowledges that there are better, more productive ways of addressing that legacy than through the use of racial preferences."[125]

First, Kahlenberg argues class-based affirmative action is morally justified because it more effectively provides equal opportunity than typical race-based programs.[126] Children who are born into poverty—even those who are "just as naturally talented and hard working" as their peers—have less economic prosperity and social mobility than children born in the upper classes.[127] In this vein, Kahlenberg claims class-based affirmative action could "indirectly compensate for past discrimination, bring about natural integration, and provide a bridge to a color-blind future."[128] Whereas racial preferences benefit wealthy racial minorities, class preferences "adjust for the latent potential of those who have faced obstacles and done fairly well nonetheless."[129]

Second, Kahlenberg justifies class-based affirmative action because of what he calls the "great legal irony."[130] Unlike race-based programs, which trigger strict scrutiny,[131] class-based programs "provide a constitutional way to achieve greater racial and ethnic diversity[ ] because they do not [involve] a suspect category . . . ."[132] Today, "most of the racial laws being subjected to strict scrutiny are not those that hurt people of color," but instead are "remedies intended to help them."[133] Therefore, rational basis review provides class-based affirmative action

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[125] Kahlenberg, *Class-Based Affirmative Action*, *supra* note 14, at 1037–38.

[126] *Id.* at 1060.

[127] *Id.* at 1060–61 (citing a 1979 study finding children born into the wealthiest fifth of society could expect to earn anywhere from 150 percent to 186 percent of the national average, whereas children born into the least advantaged fifth could expect to earn only 56 percent to 67 percent of the national average).

[128] *Id.* at 1060.

[129] *Id.* at 1061.

[130] *Id.* at 1064.

[131] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."). Kahlenberg warned that the *Adarand* decision could be disastrous for race-based affirmative action programs. Kahlenberg, *Class-Based Affirmative Action*, *supra* note 14, at 1039.

[132] Kahlenberg, *Class-Based Affirmative Action*, *supra* note 14, at 1064.

[133] *Id.*

programs with a legal viability that race-based programs do not enjoy.[134]

Kahlenberg also illustrates how class-based affirmative action programs would function in practice. He dispels criticism about the "difficulties of measuring disadvantage"[135] and articulates three principles that should guide class-based programs.[136] First, the system must emphasize "genuine equality of opportunity, where natural talents may flourish in their full potential."[137] When individuals demonstrate potential to succeed despite socioeconomic impediments, society should invest in their personal development.[138] Second, the system must be administrable and use verifiable information including parental income, education, and occupation.[139] Finally, the program must be "politically palpable."[140] The strongest support for class-based affirmative action would likely occur at early "meritocratic crisis points," such as when disadvantaged students apply to college.[141]

Crucial to Kahlenberg's proposal is the definition of socioeconomic "class."[142] Kahlenberg outlines simple, moderate, and sophisticated definitions.[143] The simple definition uses family income as the sole indicia of socioeconomic status, which is easily ascertained by reviewing tax returns.[144] The moderate definition also accounts for parental income, education, and occupation.[145] The sophisticated definition considers these

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[134] *See id.*

[135] *Id.* at 1065. The Citizens' Commission for Civil Rights cautioned " '[t]he difficulties of measuring disadvantage seem insurmountable' " and The National Women's Law Center objected " '[t]here isn't one simple or generally accepted way to identify or determine 'need.' " *Id.* n.150.

[136] *Id.* at 1066.

[137] *Id.*

[138] *Id.* ("[W]e should create an obstacles test, which says that if a given individual did quite well, despite various impediments, then she is very talented and/or very hardworking; she deserves an edge because she has great long-run potential."). The College Board's rhetoric mirrors Kahlenberg's first principle. *See* Hartocollis, *supra* note 10.

[139] Kahlenberg, *Class-Based Affirmative Action*, *supra* note 14, at 1066.

[140] *Id.*

[141] *Id.* at 1067 ("[C]lass preferences make sense in the university admissions process . . . because applicants are still generally young. In many ways, colleges . . . are the modern gatekeepers, deciding who gets ahead and who does not . . . .").

[142] *See id.* at 1073.

[143] *Id.* at 1074.

[144] *Id.* (noting that "income is a good proxy for a whole host of economic disadvantages (such as bad schools, or a difficult learning environment).").

[145] *Id.* at 1075.

factors, as well as net worth, quality of secondary education, neighborhood influences, and family structure.[146] Kahlenberg favors the sophisticated definition because the multiplicity of factors reduces the likelihood of fraud or manipulation.[147] Furthermore, the sophisticated definition is administrable: "Its use is most compelling in the context of university admissions" because "admissions officials already have access to a wealth of information."[148]

Landscape, which is partially the invention of Kahlenberg,[149] provides colleges with an ideal alternative to race-conscious admissions by incorporating factors from his "sophisticated definition" of socioeconomic class.[150] Furthermore, Landscape comports with Kahlenberg's policy principles for class-based preferences.[151] The program's purpose—to provide "consistent high school and neighborhood information for all applicants to help [colleges] fully consider every student, no matter where they live"[152]—emphasizes "genuine equality of opportunity."[153] Likewise, the program is administrable because it uses verifiable census tract data.[154] Landscape appears to be "just right," however the Goldilocks principle[155] is not used to resolve Equal Protection disputes. If Landscape is to withstand constitutional scrutiny, it must be evaluated within the Fourteenth Amendment's three-tiered framework. The first inquiry is whether the state action requirement is satisfied.

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[146] *Id.* at 1078. Wealth correlates with annual income; net worth "accumulates over time" and fills gaps. *Id.* Quality of education is objectively quantified by considering "readily available figures, such as the percentage of students at each school who receive free or reduced price lunches, mean test scores on standardized tests, and/or per pupil expenditure." *Id.* at 1079. Neighborhood influences are measured by zip code or census tract, and include the percentage of households living in poverty, median family income, average unemployment, the percentage of female-headed households, and crime rate. *Id.* at 1080–81. Family structure primarily refers to "the absence or presence of two parents" *Id.* at 1081.

[147] *Id.* at 1083.

[148] *Id.*

[149] Kahlenberg, *supra* note 41.

[150] Kahlenberg, *Class-Based Affirmative Action*, *supra* note 14, at 1078; *Comprehensive Data and Methodology Overview*, *supra* note 27.

[151] *See supra* notes 142–148 and accompanying text.

[152] *Improved Admissions Resource*, *supra* note 5.

[153] Kahlenberg, *Class-Based Affirmative Action*, *supra* note 14, at 1066.

[154] *Improved Admissions Resource*, *supra* note 5.

[155] The Goldilocks principle states "something must fall within certain margins, as opposed to reaching extremes." Judith Curry, *The Goldilocks Principle*, CLIMATE, ETC. (Dec. 22, 2012), https://judithcurry.com/2012/12/22/the-goldilocks-principle/ [https://perma.cc/3HVA-SHKJ].

III. CROSSING THE THRESHOLD: THE COLLEGE-BOARD AS A STATE ACTOR

This Note argues the College Board functions as a state actor because of its "entwined" relationship with state and publicly-funded institutions. Generally, the Constitution prohibits only governmental infringement of Fourteenth Amendment rights; to bring a constitutional challenge, the alleged discriminatory activity must be attributed to a state actor.[156] However, private conduct can be brought within the purview of the Equal Protection Clause provided the state is significantly involved in the discriminatory action.[157] In *Brentwood Academy v. Tennessee Secondary School Athletic Association*,[158] the Court developed an "entwinement" test and found a not-for-profit athletic association that regulated sports among public and private high schools functioned as a state actor because of its entangled relationship with the state.[159] The Court held "[e]ntwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards."[160]

Though the underlying legal challenges in *Brentwood* are outside of this Note's scope,[161] the Court articulated "[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions . . . in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it."[162] The Court emphasized the Association was "an organization of . . . public schools to the extent of 84% of the total."[163] Moreover, interscholastic athletics played "an integral part" in

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[156] Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[T]he action inhibited by the [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.").

[157] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) ("[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved . . . .").

[158] 531 U.S. 288 (2001).

[159] *Id.* at 302.

[160] *Id.*

[161] Brentwood Academy, a private high school, brought a § 1983 suit against the Tennessee Secondary School Athletic Association after the Association initiated a regulatory enforcement proceeding against the school. *Id.* at 291–93.

[162] *Id.* at 298.

[163] *Id.*

public education because participating teams needed "some mechanism to produce rules and regulate competition."[164] Although "the 16% minority of private school memberships" prevented total entanglement with the public school system, "the entwinement up from the member public schools [was] overwhelming."[165] Thus, the Court concluded the Association should be treated as a state actor.[166]

Here, the *Brentwood* entwinement test is applicable to the College Board—a private, not-for-profit organization.[167] Although the Fourteenth Amendment "erects no shield against merely private conduct,"[168] the College Board's activities can be brought within the Amendment's scope provided that the "[s]tate in any of its manifestations has . . . become involved" in its affairs."[169] In *Tarkanian*, the Court acknowledged "[a] state university without question is a state actor."[170] Also beyond question is the fact that thousands of state and publicly-funded colleges and universities utilize the SAT—several of which participated in Landscape's pilot program (Florida State University,[171] Yale University, and Duke University[172]). This number will continue to grow, as the College Board expands Landscape to 150 schools for the 2019–2020 schoolyear and prepares to make the program "broadly available" in the

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[164] *Id.* at 299.

[165] *Id.* at 300, 302.

[166] *Id.* at 299–300 ("[T]o the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting . . . to provide an integral element of secondary public schooling."); *contra* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 198–99 (1988) ("[E]ven if we assume that a private monopolist can impose its will on a state agency . . . it does not follow that such a private party is therefore [a state actor].").

[167] *About the College Board*, *supra* note 1.

[168] Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961).

[169] *Id.* at 722.

[170] *Tarkanian*, 488 U.S. at 192.

[171] Jaschick, *supra* note 48. Florida State University is a senior member of the State University of System of Florida and receives funding directly from Florida's state legislature. *See* Amy Farnum-Patronis, *Florida State University Joins Nation's Top 20*, FLA. STATE UNIV. NEWS (Sept. 9, 2019), https://news.fsu.edu/news/university-news/2019/09/09/florida-state-university-joins-nations-top-20 [https://perma.cc/P35M-EHU5].

[172] Anderson & Svrluga, *supra* note 47. Yale University and Duke University receive funding from the federal government. *The US Colleges That are the Best at Getting Government Funding and are Secure for the Future*, BEST VALUE SCH. (Dec. 18, 2020), https://www.bestvalueschools.com/rankings/government-funded-colleges [https://perma.cc/BSW9-LE6Q].

future.[173] Given the public character of these institutions, the question becomes whether state action can be imputed to the College Board.

Under the *Brentwood* entwinement test, the answer is a resounding "yes." Although the College Board is "an ostensibly private organization," it "ought to be charged with a public character and judged by constitutional standards" because of its entanglement with state and publicly-funded institutions[174] and its virtual "monopoly" over college admissions.[175] Like the Association in *Brentwood*, the College Board deals extensively with state and publicly-funded universities.[176] Furthermore, thousands of public high schools also conduct business with the College Board,[177] a factor not present in *Brentwood*. If "entwinement up from . . . public schools is overwhelming," private actors must answer for Fourteenth Amendment violations.[178] This is especially true of education, because, as recognized by the Court in *Brown* , "education is perhaps the most important function of state and local governments."[179]

Similarly, just as the Association in *Brentwood* played "an integral part" in public education because teams needed "some mechanism to produce rules and regulate competition,"[180] the College Board serves an important, if not necessary, function in the college admissions process. Although several institutions have decided to follow a "test[-]optional" approach, the SAT remains the paramount assessment of college readiness and provides a "common yardstick" for evaluating a diverse pool of applicants.[181] Moreover, even if schools choose to abandon the

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[173] *Improved Admissions Resource*, *supra* note 5 ("In 2018–19 we piloted the dashboard with more than 50 colleges and universities. This year we anticipate between 100 and 150 colleges will participate in the pilot. Beginning in fall 2020, we plan to make the resource broadly available to colleges and universities for free.").

[174] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 302 (2001).

[175] *How Much Does the College Board Make off the SAT and AP Exams?*, FIN. SAMURAI, https://www.financialsamurai.com/how-much-does-the-college-board-make-off-the-sat-and-ap-exams/ [https://perma.cc/96SW-LX8G] (last visited Mar. 24, 2021).

[176] *See supra* notes 158–166 and accompanying text.

[177] *See The SAT and SAT Subject Tests Domestic Code List*, COLL. BD. 4–30 (2020), https://collegereadiness.collegeboard.org/pdf/sat-domestic-code-list.pdf.

[178] *Brentwood*, 531 U.S. at 302.

[179] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[180] *Brentwood*, 531 U.S. at 299.

[181] Jaschick, *supra* note 48; Scott Jaschick, *More Colleges Go Test Optional in Admissions*, INSIDE HIGHER ED. (Apr. 1, 2019, 3:00 AM),

SAT, test-optional institutions can still participate in Landscape.[182] By choosing to follow Landscape's uniform scoring system, admissions officials at these schools unquestionably delegate copious amounts of private authority to the College Board. Accordingly, the College Board is at least "pervasively entwined" with public institutions and must be treated as a state actor.[183]

IV. LANDSCAPE TESTED: EQUAL PROTECTION ANALYSIS

In light of established Equal Protection jurisprudence, the constitutional status of Landscape is initially unclear. On one hand, Landscape shares many characteristics with traditional race-based affirmative action programs that receive the "most exacting form of judicial examination."[184] On the other hand, Landscape is not about race.[185] At its core, Landscape embodies the tenets of a class-based affirmative action program.[186] Therefore, this Note argues Landscape should receive rational basis review. As Kahlenberg predicted, the "great legal irony"[187] provides the College Board's well-intentioned program with sufficient legitimacy to survive a Fourteenth Amendment challenge.

A. The Argument Against Strict Scrutiny Review

Because of the Supreme Court's tendentious *Adarand* decision, all race-based affirmative action programs demand strict scrutiny.[188] On its face, Landscape seems to fall outside the scope of *Adarand* because it does not contain information about a student's race or ethnicity, or about the racial makeup of a

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https://www.insidehighered.com/admissions/article/2019/04/01/more-colleges-go-test-optional-admissions [https://perma.cc/9Q5D-QT4M].

[182] *Improved Admissions Resource*, *supra* note 5 ("Several test-optional institutions participated in the pilot and continue to participate.").

[183] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 442 F.3d 410, 419 (6th Cir. 2006).

[184] Regents of Univ. of California v. Bakke, 438 U.S. 265, 291 (1978).

[185] Goldstein, *supra* note 26.

[186] *See supra* notes 149–153 and accompanying text.

[187] Kahlenberg, *Class-Based Affirmative Action*, *supra* note 14, at 1064.

[188] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."); *see also* Kahlenberg, *Class-Based Affirmative Action*, *supra* note 14, at 1038–39.

student's neighborhood and school.[189] However, in *Washington v. Davis*,[190] the Court held that a policy "otherwise neutral on its face, must not be applied so as . . . to discriminate on the basis of race."[191] In other words, the policy cannot "be traced to a racially discriminatory purpose,"[192] that is "inferred from the totality of the relevant facts, including . . . that the [policy] bears more heavily on one race."[193] However, facially-neutral policies are not unconstitutional "simply because [they] may affect a greater proportion of one race."[194] "Disproportionate impact is not irrelevant, but . . . [s]tanding alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny."[195] Consequently, subsequent jurisprudence has been confined to "simplistic search[es] for a smoking gun—individual bad actors intentionally doing bad things."[196]

Here, the evidence fails to reveal a "smoking gun."[197] To the contrary, the College Board explicitly rejects the use of race in its calculus.[198] Chief Executive Officer David Coleman recently described why socioeconomic status is a better predictor of academic success than race: "It turns out in America that within every racial group . . . there are large numbers of people who show resourcefulness within very limited circumstances."[199] Indeed, skeptics have criticized Landscape as a "half-hearted effort to measure hardship" because it *excludes* information about the racial composition of a student's community.[200]

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[189] Goldstein, *supra* note 26.

[190] *See generally* 426 U.S. 229 (1976). In *Washington v. Davis*, African Americans who were denied police officer positions brought suit claiming the department's recruiting procedures, including a written test, were discriminatory. *See id.* at 232–34.

[191] *Id.* at 241.

[192] *Id.* at 240.

[193] *Id.* at 242.

[194] *Id.*

[195] *Id.* (disproportionate impact "is not irrelevant, but it is not the sole touchstone of . . . racial discrimination forbidden by the Constitution").

[196] Osagie K. Obasogie, Opinion, *The Supreme Court Is Afraid of Racial Justice*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/07/opinion/the-supreme-court-is-afraid-of-racial-justice.html.

[197] *See id.*; *see also supra* Part I. Sources consulted included the College Board's website, press releases, and official statements to media outlets.

[198] Hartocollis, *supra* note 10.

[199] *Id.*

[200] André J. Washington & Daniel Hemel, *By Omitting Race, the SAT's New Adversity Score Misrepresents Reality*, TIME (May, 21 2019, 4:00 PM), https://time.com/5592661/sat-test-adversity-score-race/ ("The [College Board] has

Similarly, because Landscape is still in its pilot phase,[201] there is no statistical evidence of disproportionate racial impact. However, assuming Landscape ultimately results in "a back door to racial quotas in college admissions"[202] because neighborhood structures and housing patterns are linked to race,[203] a facially-neutral policy will not receive strict scrutiny "simply because it may affect a greater proportion of one race than of another."[204] Even if Landscape disproportionately benefits minorities, a "smoking gun" statement from a College Board official is still necessary.[205] Absent such a statement, Landscape should not receive strict scrutiny.

B. The Argument for Rational Basis Review

Because Landscape measures a student's level of challenge using contextual high school and neighborhood indicators that depend heavily on socioeconomic classifications, rational basis review is appropriate.[206] For the reasons discussed in Part II.C, Landscape fits the mold of a class-based affirmative action program. The six contextual indicators—college attendance, household structure, median family income, housing stability, education level, and crime—align with Kahlenberg's "sophisticated" definition of class.[207] Although *Rodriguez* examined the constitutionality of an alleged class-based *discriminatory* policy, Kahlenberg convincingly argues *remedial* class-based affirmative action programs should receive the same

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conspicuously omitted a central factor shaping the lives of college applicants: race. As a result, a metric designed to guide admissions officers in their consideration of adversity threatens to mislead instead."). *See also* Goldstein, *supra* note 26 ("Not having [racial] information is a true oversight if you really are interested in understanding adversity.").

[201] *Improved Admissions Resource*, *supra* note 5 ("In 2018-19 we piloted the dashboard with more than 50 colleges and universities. This year we anticipate between 100 and 150 colleges will participate in the pilot.").

[202] Jaschick, *supra* note 48.

[203] *Id.* ("Centuries of racial animus and legislation have created and maintained steady segregation of wealth and educational accumulation. Decades of housing policy, practice and legislation have made sure that there are 'good' and 'bad' neighborhoods, where tax distribution and local funding separation has ensured the steady maintenance of 'good' and 'bad' schools.").

[204] Washington v. Davis, 426 U.S. 229, 242 (1976).

[205] *See id.* at 241.

[206] Classifications based on socioeconomic status do not operate to the disadvantage of an articulable suspect class. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973).

[207] Kahlenberg, *Class-Based Affirmative Action*, *supra* note 14, at 1078–83.

status because socioeconomic classifications, regardless of discriminatory intent, do not affect the rights of an articulable suspect class.[208] As a result, heightened scrutiny is unnecessary.

Similarly, even if Kahlenberg's argument is unavailing, Landscape would still receive rational basis review because the program extrapolates from geographic data to provide admissions officials with background about students' educational prospects. The dicta in *Bush v. Gore* is illustrative. At a minimum, all classifications require "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."[209] Arbitrary and irrational classifications are unconstitutional, particularly when these classifications impact other recognized rights.[210] *Brown* implicitly recognized a right to equal treatment in educational institutions.[211] Thus, Landscape cannot favor certain neighborhoods at the expense of others on the basis of random choice or personal whim. Nevertheless, "perfection is by no means required" to survive rational basis review.[212] Landscape is constitutional so long as its methodology is rationally related to some legitimate purpose.[213]

To reiterate, the purpose of Landscape is to recruit socioeconomically disadvantaged college applicants who have "transcended their environments" by providing admissions officials with consistent background data reflective of their high schools and neighborhoods.[214] The College Board asserts that contextual information is necessary because colleges typically "consider what students achieved in the context of where they[ ] learn[ ] and live[ ]."[215] Because the *Grutter* Court previously recognized a *compelling* interest in attaining a diverse student body,[216] the College Board unquestionably has a *legitimate* interest in the same. In his recent address, Chief Executive

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[208] *See supra* Section II.C.

[209] Bush v. Gore, 531 U.S. 98, 109 (2000).

[210] *Id.* at 104–05 ("Having once granted [a] right . . . on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's [right] over that of another.").

[211] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[212] Phillips Chem. Co. v. Dumas Indep. Sch. Dist., 361 U.S. 376, 385 (1960).

[213] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

[214] Goldstein, *supra* note 26.

[215] *Improved Admissions Resource*, *supra* note 5. The College Board's justification resembles the University of Michigan's "critical mass" rationale in United States v. Grutter, 539 U.S. 306, 316 (2003).

[216] *Grutter*, 539 U.S. at 328.

Officer Coleman highlighted the importance of diversity in college admissions:

> Merit is all about resourcefulness . . . . This is about finding young people who do a great deal with what they've been given. It helps colleges see students who may not have scored as high [on the SAT], but when you look at the environment they have emerged from, it is amazing.[217]

The College Board understands the "educational benefits that flow from student body diversity,"[218] and "remain[s] mindful that diversity takes many forms" other than "[f]ormalistic racial classifications."[219] For this reason, the College Board "tailor[ed] its approach in light of changing circumstances," through "regular evaluation of data and consideration of student experience."[220] After receiving feedback about its pilot program, the College Board made several methodological changes to Landscape by eliminating the single "adversity score" combining high school and neighborhood information, and reducing the number of contextual factors from thirty-one to six.[221] Additionally, the College Board's interest in diversity is neither "elusory" nor "amorphous;" it articulates "concrete and precise goals" and provides a "reasoned, principled explanation" for pursuing them.[222] Because the record does not contain evidence of animus towards a particular socioeconomic class,[223] the proffered purpose of Landscape is, at the very least, legitimate.

Next, Landscape's methodology must be rationally related to the College Board's interest in student body diversity.[224] In other words, the "high school" and "neighborhood indicators" cannot be so arbitrary and irrational that they lack a discernible connection to Landscape's purpose.[225] Although Landscape is concededly imperfect (like many other policies that have withstood judicial

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[217] Hartocollis, *supra* note 10.

[218] Fisher v. Univ. Tex. Austin, 136 S.Ct. 2198, 2208 (quoting Fisher v. Univ. Tex. Austin, 570 U.S. 297, 310 (internal citations omitted)).

[219] *Id.* at 2210.

[220] *Id.*

[221] Newsroom, *supra* note 2.

[222] *See Fisher II*, 136 S.Ct. at 2211.

[223] *See* Romer v. Evans, 517 U.S. 620, 632 (1996). Landscape is not the "product of a system that is so irrational as to be invidiously discriminatory." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973). In fact, the College Board's program is entirely remedial and promotes equality in college admissions.

[224] *See id.* at 40.

[225] *See* Bush v. Gore, 531 U.S. 98, 104–05 (2000).

scrutiny),[226] it is part of a holistic initiative similar to the admissions policy in *Grutter*.[227] The College Board emphasizes that Landscape is only one part of admissions and provides colleges with a package of data about applicants by collecting information from reliable sources, including the NCES and the ACS.[228] This information is then organized into "high school" and "neighborhood" "indicators," which account for students who attend institutions other than their designated public high schools.[229]

Landscape also, however, shares characteristics with the admissions policy in *Gratz* because it assigns predetermined numerical values to information about an applicant's socioeconomic status; these numbers are averaged together to produce an aggregate score from 1–100.[230] Yet, unlike the policy in *Gratz*, Landscape does not effectuate a bonus system that guarantees admission.[231] Thus, Landscape lies somewhere between the admissions systems in *Grutter* and *Gratz*—a "mechanical plus factor" of sorts. The Court has not ruled on the constitutionality of this type of program,[232] but Landscape would still survive rational basis review because research shows these indicators are related to educational outcomes.[233] As the test-taking population continues to expand and diversify as a result of "SAT School Day,"[234] quantification is a reasonable means of comparison because it allows admissions officials to view SAT scores in context.[235]

The remaining criticisms relate to Landscape's over-inclusivity and under-inclusivity.[236] Some question how Landscape controls for low-income students living in wealthy neighborhoods or attending charter schools.[237] Others fear

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[226] *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

[227] *Improved Admissions Resource*, *supra* note 5 (Landscape is "just one of the many things that colleges look at when considering an applicant," including SAT score, GPA, and the personal essay); *see also supra* Section II.B.

[228] *Comprehensive Data and Methodology Overview, supra* note 27.

[229] *Id.*

[230] *Id.*

[231] *Contra* Gratz v. Bollinger, 539 U.S. 244, 271–72 (2003).

[232] Landscape would likely be unconstitutional if it were evaluated under strict scrutiny, a topic which is beyond the scope of this Note.

[233] *See generally* Chetty, *supra* note 39.

[234] *See SAT Results: Class of 2019*, *supra* note 22.

[235] Newsroom, *supra* note 2.

[236] *See supra* notes 45–47 and accompanying text.

[237] Anderson & Svrluga, *supra* note 47.

Landscape will misrepresent the disadvantage of wealthy students zoned for schools with lower average family incomes.[238] All of these concerns are valid. Landscape does not provide an individualized review of a student's financial situation.[239] Nonetheless, the College Board does not view Landscape as an ultimatum on college readiness. Applicants have multiple avenues to showcase how they have overcome individualized hardship. Personal statements, diversity statements, and letters of recommendation provide ample opportunity for students to demonstrate how past experiences have contributed to their academic development.

So long as admissions officials use Landscape as a supplemental resource, its imperfections are not fatal under rational basis review. Although Landscape may result in "some inequality," socioeconomic classifications do not require "mathematical nicety."[240] Landscape "is a single metric, and like any single metric, it will capture certain types of people and miss others."[241] For some, this reality is a difficult pill to swallow. Landscape is "to some extent both underinclusive and overinclusive,"[242] but would nevertheless survive an Equal Protection challenge.

CONCLUSION

Landscape raises important questions about the constitutionality of class-based affirmative action. In the past, class-based affirmative action was solely an invention of legal scholarship. However, Landscape will soon be made broadly available to colleges and universities across the United States at no cost to participating institutions. The College Board treads uncharted waters as the admissions process becomes more competitive and diverse, especially because of heightened skepticism about traditional race-based affirmative action.

This Note addressed the likelihood of a successful Equal Protection challenge to Landscape. Initially, the state action requirement is satisfied because the College Board maintains a virtual monopoly over college admissions and is "pervasively entwined" with public educational institutions. On the merits,

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[238] Goldstein, *supra* note 26.
[239] *See* Hartocollis, *supra* note 10.
[240] Dandridge v. Williams, 397 U.S. 471, 485 (1970).
[241] *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2213 (2016).
[242] Vance v. Bradley, 440 U.S. 93, 108 (1979).

Landscape should receive rational basis review because socioeconomic status and geographic locale are not suspect classifications. Unlike race-based affirmative action programs, Landscape will benefit from Kahlenberg's "great legal irony." To withstand constitutional scrutiny, the College Board need only show Landscape is rationally related to a legitimate purpose. Because the Supreme Court has affirmatively recognized that student body diversity is a compelling interest, it is surely legitimate. Moreover, even if Landscape's methodology is both overinclusive and underinclusive, perfection is by no means necessary to establish a rational relationship. Thus, despite its various flaws, Landscape is ultimately constitutional.