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The Case for Socioeconomic Affirmative Action: A Jurisprudential Examination at the Disparity Between Privilege and Poverty in Higher Education Admissions

*Katelyn P. Dembowski**

It is hard for us Westerners, not that the freedom that men seek differs according to their social or economic status, but that the majority who possess it have gained it by exploiting, or, at least, averting their gaze from, the vast majority who do not.

– Isaiah Berlin

INTRODUCTION

Racial minorities in America have faced unequal representation and discrimination throughout history, which has made it hard for people of color to rise above the poverty line and overcome the subpar educational opportunities they receive in comparison to their white counterparts.¹ When signing the Civil Rights Act of 1964, President Lyndon B. Johnson asserted that, “you don’t just take a person who, for years hobbled by chains and liberate him, bring him up to the start line of a race, then say you are free to compete with all others, and still just believe that you have been completely fair.”² This long and hard-fought struggle for equal rights has not ended: today, without affirmative action programs, African Americans would make up only 2% of students in higher education.³

Affirmative action tears down the wall of separation between different members of society and give everyone the opportunity to bring their life experiences to a diverse classroom setting. While our nation has fought long

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1. Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, THE ATLANTIC (Feb. 29, 2016), [<https://perma.cc/UE9Q-U8DE>].

2. David Leonhardt, *Rethinking Affirmative Action*, N.Y. TIMES, (Oct. 14, 2012), at SR4.

3. Brandon Gaille, *19 Affirmative Action in College Admissions Statistics*, BRANDONGAILLE (May 30, 2017), [<https://perma.cc/9X48-PWXX>].

and hard to free marginalized peoples, affirmative action policies bridge the gap of inequality they face today. Race-conscious admissions programs have significantly benefited minority applicants since they rolled out in the 1960s; however, low-income students of all races are still struggling in the college application process. This article will examine the impacts of income disparity on students from low-income backgrounds in higher education admissions and argue that socioeconomic affirmative action policies will help bridge the gaps that race-based affirmative action policies did not fill. This article will also look at how low-income people of color are often overshadowed by the wealthy and what Anthony Abraham Jack calls the "privileged poor."⁴ Finally, I will postulate how our morality and beliefs about law, race, and power tie closely to how lawyers and judges argue and adjudicate affirmative action policies.

Section I will focus on the history of affirmative action policies and the Supreme Court's holdings to date. This section will examine the decisions in *Regents of the University of California v. Bakke*, 434 U.S. 810 (1977), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198 (2016), and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 308 F.R.D. 39 (2015) and how the Court's views on affirmative action have changed with every new case.⁵ This background section will show the struggle between individuals and the Court, looking specifically at why the Court decided to review these cases and how it determines if affirmative action policies are constitutional. It will also examine how the Court would potentially rule in future socioeconomic or race-conscious affirmative action cases.

Section II will focus on the litigators in these affirmative action cases, explaining the decisions behind the Supreme Court's justifications for the standard of review used and the difference between those and other racial discrimination cases brought before the Court.

Section III will look at socioeconomic affirmative action policies and critical race theory. Through the lens of critical race theory, this section will posit that our morality and beliefs of law, race, and power are closely tied to how judges, lawyers, and policy makers adjudicate and determine the course and scope of affirmative action policies. Critical race theory challenges the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole.⁶ Critical race theory redefines the way that racial justice has been understood

4. Clint Smith, *Elite Colleges Constantly Tell Low-Income Students That They Do Not Belong*, THE ATLANTIC (Mar. 18, 2019), [<https://perma.cc/52PX-L4LC>].

5. See also, *Regents of the University of California v. Bakke*, 434 U.S. 810 (1977), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198 (2016), and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 308 F.R.D. 39 (2015).

6. KIMBERLE CRENSHAW, GARY PELLER, NEIL GOTANDA & KENDALL THOMAS, *CRITICAL RACE THEORY* xiii (Kimberle Crenshaw et al. eds., 1995).

in discourse for the past several decades.⁷

Section IV will look at the systematic exclusion of low-income students in higher education and challenge the notion that race-based affirmative action policies are “enough” to propel America into a pluralistic future. While race-based policies are needed to, as the Court has said, “reach a critical mass” of underrepresented students in higher admissions, I will also argue that socioeconomic-based affirmative action would help determine how the wealthy and the “privileged poor” often overshadow low-income people of color.⁸

Finally, this article will discuss how to reconstruct public belief and opinions on equality and how society can begin accepting affirmative action policies. Specifically, how those already privileged by the collegiate system in order to justify these existing social hierarchies made up the very idea that society is a “meritocracy.”⁹ I’ll scrutinize the recent college admissions scandal and how children of wealthy celebrities were accepted to elite universities after their parents paid anywhere from \$100,000 to \$6 million to bribe their way in.¹⁰ While higher education today is hardly reflective of meritocracy, I aim to find a way to bring pluralism and legitimate equal opportunity to higher education admissions.

I. AFFIRMATIVE ACTION POLICIES FROM *BAKKE TO FISHER*

The term “affirmative action” arose in popularity in employment law legalese in the 1935 National Labor Relations Act, more commonly known as the Wagner Act.¹¹ The act established that employers found using discriminatory labor practices would be required to “take such affirmative action including reinstatement of employees.”¹²

In 1961, President John F. Kennedy used the term affirmative action to describe race-conscious policies as we know them today.¹³ In Executive Order 10925, President Kennedy instructed federal contractors to take “affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin.”¹⁴ This new definition was developed to redress the constant discrimination that persisted in

7. *Id.* at 128.

8. Clint Smith, *supra* note 4.

9. *Id.*

10. *College Admissions Scandal: Your Questions Answered*, N.Y. TIMES (Mar. 14, 2019), [<https://perma.cc/Q8T3-SAAF>].

11. Jackie Mansky, *The Origins of the Term “Affirmative Action”*, SMITHSONIAN (June 22, 2016), [<https://perma.cc/V43T-MC87>].

12. *Id.*

13. Borgna Brunner & Beth Rowen, *A History and Timeline of Affirmative Action*, INFOPLEASE (last visited Apr. 8, 2019), [<https://perma.cc/S6GP-628V>].

14. *More History of Affirmative Action Policies from the 1960s*, AMERICAN ASSOCIATION FOR ACCESS, EQUITY, AND DIVERSITY (last visited Apr. 8, 2019), [<https://perma.cc/FUV9-GSQY>].

America despite civil rights laws and the constitutional guarantees of the Fourteenth, Fifteenth, and Sixteenth Amendments.¹⁵ President Johnson followed in President Kennedy's footsteps by signing the Civil Rights Act of 1964 and making it a national effort to "seek not just equality as a right and a theory, but equality as a fact and as a result."¹⁶

From the beginning, affirmative action policies were meant as a temporary means of leveling the playing field for all; yet over fifty years later, we see startling statistics that show we still need these policies. For example, in the fall of 2001 only 17% of incoming freshman at UC's were underrepresented minorities.¹⁷ Research from the Education Trust shows that the academic rigor of high school classes is the most important predictor of college completion, even more so than GPA and SAT scores.¹⁸ However, in California only 25% of African American and 22% of Latino students successfully completed the high school course requirements for admission to UC and CSU universities.¹⁹ Despite stark differences in funding, quality of teachers, curriculum, and class sizes, the prevailing view among the majority of Americans is that if students do not achieve success, it is their own fault.²⁰ In predominately minority schools, enrollment is larger than average, class sizes are fifteen percent larger than similarly sized schools, curriculum offerings and materials are lower in quality, and teachers are much less qualified in education, certification, and training in the fields they teach.²¹ In schools with high minority enrollment, students have less than a fifty percent chance of getting math and science teachers with a license or degree in that field.²² This disparity in college preparation has a significant impact on low-income and minority students when trying to navigate the college admissions process, and once they have made it on campus they continue to struggle.

In this section, this article will dive deeper into the history of affirmative action policies in higher education, specifically looking at the Supreme Court cases that changed the way universities made and enforced affirmative action policies in the last fifty years. It will focus on the case history but also on how each case has changed with shifts in the Supreme Court and what we can look for in the future of affirmative action.

15. *Id.*

16. *Id.*

17. CALIFORNIA SENATE SELECT COMMITTEE ON COLLEGE AND UNIVERSITY ADMISSIONS AND OUTREACH, DIVERSITY IN CALIFORNIA PUBLIC EDUCATION, S. 1147, at 7 (2002).

18. *Id.*

19. *Id.* at 8.

20. Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), [<https://perma.cc/6MRY-FW5U>].

21. *Id.*

22. *Id.*

A. From Racial Quotas

In 1978, the U.S. Supreme Court heard the first affirmative action case, *Regents of the University of California v. Bakke*, 438 U.S. 265.²³ Allan Bakke, a white male, applied to UC Davis Medical School in both 1973 and 1974 and was denied under general admission.²⁴ He sued, arguing that the university's use of "racial quotas" excluded him based on race and that the quotas were a violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.²⁵ A racial quota is when a university sets aside a specific number of seats for minority applicants in the admissions pool.²⁶ The university argued that there was a compelling government interest to admit more minority applicants to the medical school to serve the growing number of minority patients in America.²⁷

The California Supreme Court determined that the special admissions program was not the "least intrusive way" to combat the issue. Using strict scrutiny, they held that the admissions program did not "[achieve] the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients."²⁸ The U.S. Supreme Court upheld the decision and ordered UC Davis to admit Allan Bakke because they could not show that, absent the special quota program, he would not have been admitted.²⁹ More importantly, the court held that racial quotas violated the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment, while the use of race otherwise in college admissions was constitutionally permissible.³⁰ After *Bakke*, universities could no longer "set aside" a number of seats for minorities, but could use race in other ways that were not strict quotas.

B. To "A Critical Mass"

After the abrogation of the use of racial quotas in affirmative action, universities created broader policies to combat the same diversity issues but in legally acceptable ways. In 2003, the University of Michigan's Law School had an admissions policy that was following the rules set forth in *Bakke*.³¹ Not only did the admissions team look at LSAT scores and undergraduate GPA, they looked beyond academic merit at what they called

23. *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

24. *Id.* at 276.

25. *Id.* at 277-278.

26. *Id.* at 279.

27. *Id.*

28. *Regents of University of California*, 438 U.S. at 279-80.

29. *Id.* at 320.

30. *Id.* at 311-12.

31. *Id.* at 306.

“soft variables” that contribute to the overall life experience of a student.³² This included the recommenders’ enthusiasm, the quality of the personal statement, quality of the undergraduate institution, and the difficulty of undergraduate courses.³³ In addition, the admissions policy reaffirmed the university’s commitment to diversity, “with the inclusion of African American, Hispanic, and Native American students.”³⁴ Through these efforts, the University of Michigan’s goal was to reach a “critical mass” of underrepresented students on campus in order to have a diverse classroom experience for all.

In the fall of 2003, the law school denied Barbara Grutter, a white female, from admission.³⁵ She sued, alleging that the school used race as a “predominant factor,” which violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.³⁶ The university argued that they were furthering a compelling state interest in creating broader educational diversity among their student body.³⁷ The District Court held that the University of Michigan did not meet the strict scrutiny standard of review because the interest in achieving diversity was not a compelling state interest.³⁸ The Court of Appeals for the Sixth Circuit reversed, holding that *Bakke* established diversity as a compelling government interest and that the “critical mass” goal was not equivalent to a quota.³⁹

Finally, the United States Supreme Court held that Michigan’s policy was constitutional because it narrowly tailored a compelling government interest and did not violate the Equal Protection Clause.⁴⁰ Moreover, the court held that affirmative action programs would need to be in place *at least* another twenty-five years before the United States would reach a “critical mass” of underrepresented minority students in higher education.⁴¹ The Law School defined a “critical mass” as a “meaningful number” or “meaningful representation,” which was a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.⁴²

C. Affirmative Action Today

After the Supreme Court announced in *Grutter* that affirmative action policies were needed for at least another twenty-five years, no one expected them to grant certiorari to another race-based affirmative action case for

32. *Grutter v. Bollinger*, 539 U.S. 315 (2003).

33. *Id.*

34. *Id.* at 316.

35. *Grutter*, 539 U.S. at 316.

36. *Id.* at 317.

37. *Id.*

38. *Id.* at 321.

39. *Id.* at 321.

40. *Id.* at 326.

41. 539 U.S. 306, 343 (2003).

42. *Id.* at 318.

quite some time. Yet in 2008, just five years post-*Grutter*, Abigail Fisher was denied admission from the University of Texas at Austin.⁴³

The state of Texas had a history of racial segregation and discrimination that the university sought to combat in their admissions process. The University of Texas adopted its current program after the Court decided *Grutter* and followed the decision that race could be used as one factor among many.⁴⁴ In order to create a more equal program, the Texas Legislature adopted Texas House Bill 588, also known as the Top Ten Percent Plan.⁴⁵ The plan says that, if a student is in the top 10% of their graduating class at any Texas high school, they would be automatically admitted to all state-funded institutions, including the University of Texas – Austin.⁴⁶ The students admitted to UT-Austin under the Top 10% rule make up, on average, 75% of the incoming class.⁴⁷ The other 25% are holistically reviewed. The holistic review process bases admissions decisions on the applicants' "Personal Achievement Index" (PAI).⁴⁸ Included in the PAI is the applicant's essays, leadership and world experience, extracurricular activities, community service, and other "special characteristics that might give the admissions committee insight into a student's background."⁴⁹ Post-*Grutter*, the University decided to add race as a subfactor within the PAI scale.⁵⁰ Considered with all other factors, race is part of the decision process for all individual applicants.⁵¹

Abigail Fisher, a white female, applied for admission to UT-Austin for the fall of 2008.⁵² She was not in the top 10% of her graduating class and was denied admission through the holistic review process.⁵³ She sued the university, arguing that the use of race as a factor in admissions disadvantaged her and other white applicants, in violation of the Equal Protection Clause.⁵⁴ The University argued that the race-conscious program was furthering the compelling government interest of having a diverse student body, like that stated in *Grutter*.⁵⁵

The District Court granted summary judgment for the University, and the Fifth Circuit affirmed.⁵⁶ In 2013, the case came to the Supreme Court for the first time ("*Fisher I*"), and the Court remanded, holding that the Fifth Circuit did not hold the University of Texas to the demanding burden of strict

43. *Fisher v. University of Texas at Austin* ("Fisher 2"), 136 S.Ct. 2198, 2207 (2016).

44. *Id.* at 2205-06.

45. TEX. H.B. 588, 1998, Leg., 75th Sess.

46. *Id.*

47. *Fisher*, *supra* note 43, at 2206.

48. *Id.*

49. *Id.*

50. *Fisher*, 136 S.Ct. at 2206.

51. *Id.* at 2207.

52. *Id.*

53. *Id.*

54. *Id.* at 2208.

55. *Id.* at 2214.

56. *Fisher v. University of Texas at Austin* ("Fisher 1"), 570 U.S. 297, 306-7 (2013).

scrutiny as articulated in *Grutter and Bakke*.⁵⁷

On remand, the Court of Appeals affirmed the decision in favor of the University.⁵⁸ The Supreme Court granted certiorari once again (“*Fisher 2*”) and this time held that the race-conscious admissions program used by the University of Texas was lawful under the Equal Protection Clause of the Fourteenth Amendment.⁵⁹ The Court said that the Top 10% Plan was a constitutional way for the state to mend the negative history of minorities in state-run higher education.⁶⁰ By creating a program that aimed to create a more diverse student body, the University of Texas proved that the program was furthering a compelling government interest and able to withstand strict scrutiny analysis.⁶¹

After the decision in *Fisher v. University of Texas-Austin* in 2016, there has been a significant change in public opinion about affirmative action. In July of 2016, Gallup released a poll that said 65% of Americans disapprove of the Supreme Court’s ruling in *Fisher v. Texas*.⁶² Seven in ten Americans say that merit should be the *only* basis for college admissions, and 50% of African Americans favor merit-based policies over race preference.⁶³ Donald Trump was elected President of the United States just months after the Supreme Court ruling in *Fisher*. Immediately, Trump made policy and administrative changes that will affect the future of affirmative action. While Trump himself has not made comments about affirmative action, he has hired people to work in the White House and other branches of government who have vehemently opposed affirmative action policies.⁶⁴ Attorney General Jeff Sessions was labeled “anti-affirmative action” by the NAACP in 2006, while the newly appointed Supreme Court Justices Neil Gorsuch and Brett Kavanaugh are likely to rule against any race-based affirmative action policy that comes before the Court.⁶⁵

In 2014, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* became the most recent case in the long line of assaults on affirmative action.⁶⁶ Students for Fair Admissions brought this action against Harvard, alleging that the university’s consideration of race and ethnicity in its undergraduate admissions policy violated the Equal

57. *Id.*

58. *Fisher*, *supra* note 43, at 2207.

59. *Id.*

60. *Fisher*, 136 S.Ct. at 2209.

61. *Id.* at 2212.

62. Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, GALLUP (July 8, 2016), [<https://perma.cc/4DMH-AT6D>].

63. *Id.*

64. Julia Glum, *After Supreme Court Decision in Fisher Case, 5 Things That Happened With Race in Admissions*, NEWSWEEK (Aug. 3, 2017, 12:09 PM), [<https://perma.cc/MN66-AUCG>].

65. *Id.*

66. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 807 F.3d 472 (2015).

Protection Clause and Title VI of the Civil Rights Act.⁶⁷ While Harvard considers an applicant's race as a factor among many others, they do so in order to "increase student body diversity, including racial diversity."⁶⁸ Asian American applicants sued, positing that their applications received a lower personal rating than applicants of other minority races.⁶⁹ They argue that Harvard admissions counselors have "fallen prey to racial stereotyping" and have expressed an unconscious bias against Asian Americans.⁷⁰ Harvard contends, as every University in the past has, that their policies are furthering the compelling government interest of adding diversity to higher education.⁷¹ The District Court ruling is still pending, but there is almost a guarantee that the Supreme Court will hear this case in the coming years. As discussed above, there are now two more conservative justices on the Supreme Court who will likely vote against any affirmative action cases.⁷² Could *Students for Fair Admissions v. Harvard* be the case that overturns race-conscious affirmative action policies as we know them?

While there is a lot of uncertainty for the future of race-based affirmative action, socioeconomic-based policies may be what America needs to move towards a more pluralistic society. In the same post-*Fisher* Gallup poll, only 9% said that race or ethnicity should be a major factor in admissions decisions, yet 31% said a family's economic circumstances should be a major factor.⁷³ Race-based policies are still needed to combat racial disparities in America, but socioeconomic-based affirmative action could be a supplement to those policies that would address the ever-growing wealth gap and how it effects students throughout the country.

67. *Students for Fair Admissions, Inc.*, 807 F.3d at 474.

68. *Id.* at 472.

69. Eric Hoover, *At One Final Hearing, Harvard and Students for Fair Admissions Squared Off. Here's What Happened*, CHRONICLE (Feb. 13, 2019), [<https://perma.cc/E63T-VQ4R>].

70. *Id.*

71. *Id.*

72. Donald Trump appointed Justice Neil Gorsuch and Justice Brett Kavanaugh on April 10, 2017 and October 6, 2018, respectively. Justice Gorsuch has been noted to be a reliable conservative on the bench; who would likely vote to limit gay rights, uphold restrictions on abortions, and invalidate affirmative action programs (see Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (Feb. 1, 2017) [<https://perma.cc/C5HH-BKBF>]). Justice Kavanaugh has always been an outspoken opponent of affirmative action programs. In 1999 he wrote an amicus brief on behalf of the Center for Equal Opportunity, a group that opposes race-based affirmative action in college admissions. The brief argued that a Hawaii law allowing only native Hawaiians to vote in elections for the Office of Hawaiian Affairs was unconstitutional in prohibiting people from voting because of their race. (The Supreme Court agreed with that argument in a 7-2 decision.) (See, Dan Diamond, *Brett Kavanaugh's Track Record*, POLITICO (July 9, 2018) [<https://perma.cc/6FHH-4U3U>]).

73. Newport, *supra* note 62, at 1.

II. LITIGATING RACE: HOW DO WE DO IT?

In the last fifty years, race-based affirmative action programs have been an integral part of the societal push to relieve historical racial tensions from slavery, segregation, and Jim Crow laws. Race-conscious policies have been used to help rectify these past social injustices against African Americans, however there is a gap between the societal benefits conferred by race-conscious affirmative action policies and the amount of change needed for a more equal society.

Racial minorities are still struggling to get into competitive universities and if they make it in, they have to prove their worth each and every day in order to succeed.⁷⁴ Similarly, students from low-income backgrounds are finding that the systematic failures of the public education system follow them when they apply to college. This section will look at the disparity between racial and socioeconomic background in the eyes of the court. Why are whites awarded strict scrutiny review in affirmative action cases, while racial minorities are afforded only rational basis review in discrimination cases?

A. Strict Scrutiny for the White Man

Strict scrutiny review requires that a law is narrowly tailored to further a compelling government interest. As the most stringent standard of review by the courts, strict scrutiny requires that the challenger of the law prove that there is no compelling state interest for the law at hand. What is a compelling government interest? A compelling government interest can be the determining factor in deciding the constitutionality of a statute that restricts the practice of a fundamental right or distinguishes between people due to a suspect classification.⁷⁵

Affirmative action policies are facially discriminatory laws since they call for additional minorities and fewer whites in the incoming class of a university. Facially discriminatory laws apply strict scrutiny and typically are challenged by white applicants.⁷⁶ The Supreme Court has ruled that the need for diversity in higher education admissions is a compelling government interest.⁷⁷ While whites have not been very successful with their affirmative action challenges, the laws they are challenging must be written extremely well in order to fulfill the requirements of strict scrutiny. Universities must constantly reevaluate their affirmative action policies and make sure they have legitimate reasons for their admissions decisions that do not relate solely to race.

74. Smith, *supra* note 4, at 1.

75. *Strict Scrutiny*, BLACK'S LAW DICTIONARY (11th ed. 2019).

76. *Students for Fair Admissions*, *supra* note 66, at 474.

77. *Bakke*, *Grutter*, *Fisher*, *supra* note 5.

B. Rational Basis for People of Color

For minorities, challenging a racially discriminatory law is significantly harder. Under a rational basis standard of review, the law must be “rationally related” to a “legitimate” government interest. The Supreme Court has never set forth a standard or test to determine what constitutes a legitimate government interest.⁷⁸ Most laws intended to discriminate against minorities are not facially discriminatory because they would immediately be overruled.

Today, when minorities sue for race discrimination, they sue under disparate impact. Disparate impact occurs when a practice or standard is neutral on its face and non-discriminatory in intention, but the practice disproportionately affects individuals from a particular group.⁷⁹ Disparate impact claims are significantly harder to prove because the law is facially neutral and the government only needs to show that the law rationally relates to a legitimate government interest.⁸⁰

Further, rational basis review is extremely protective of the government. Since the courts have never laid out a foundation for what a “legitimate government interest” is, they are more inclined to uphold government laws and regulations under rational basis.⁸¹ Challengers face the tough task of negating every conceivable fact that might support the law.⁸² In cases like *Washington v. Davis*, 426 U.S. 229 (1976); *Palmer v. Thompson*, 403 U.S. 217 (1971); and *Village of Arlington Heights v. Metropolitan Housing Development Co.*, 429 U.S. 252 (1977); the Court continually held that if a law is neutral on its face and rationally related to a legitimate state interest it is constitutional, even if it impacted a particular race disproportionately.⁸³ For these cases to arise, an *entire* group (or race) needs to be disproportionately impacted, while white complainants can bring an affirmative action claim on an individual basis. These are claims of systematic discrimination; yet, the minorities that bring the actions are told that the laws will likely be upheld under rational basis review and that they do not have any other remedy.

78. Julie Nice, Professor, Lecture at UC Hastings College of the Law, Constitutional Law 2 (Feb. 2-5, 2019).

79. *Id.*

80. *Id.*

81. See *Washington v. Davis*, 426 U.S. 229 (1976), *Palmer v. Thompson*, 403 U.S. 217 (1977), and *Village of Arlington Heights v. Metropolitan Housing Development Co.*, 429 U.S. 252 (1977) (anything that is not facially discriminatory can be upheld and will likely pass rational basis review).

82. Nice, *supra* note 78.

83. *Washington*, *supra* note 81, at 242.

III. JURISPRUDENTIAL ARGUMENT FOR SOCIOECONOMIC AFFIRMATIVE ACTION

The Supreme Court's tailoring of race-based policies has helped us get closer to a more equal opportunity of education in college admissions. However, these race-based policies only get us so far. In 2010, Georgetown Law's Anthony Carnevale, found in his empirical study that students from the most socioeconomically disadvantaged backgrounds are predicted to score 399 SAT points lower than students from the most advantaged backgrounds.⁸⁴ Comparatively, minorities have a much smaller difference; scoring on average 56 points lower than white test takers.⁸⁵ Not only do socioeconomic-based programs help low-income minorities, they increase the number of low-income white students as well. These programs help all students from poor, disadvantaged communities succeed in college.

Richard Kahlenberg, the lead legal scholar arguing for a shift to socioeconomic-based policies postulated that, "socioeconomic affirmative action is much easier to sustain legally than race-based affirmative action because it only has to pass the rational basis test."⁸⁶ Kahlenberg argues that, while not mandated by the court, socioeconomic background could be reviewed under strict scrutiny and survive the test.⁸⁷ Even though wealth is not a suspect classification, if universities can argue that socioeconomic affirmative action policies are used to further a compelling government interest, the policies will pass strict scrutiny and it will be harder for challengers to bring suit.

By looking at socioeconomic background in college admissions, universities are furthering a compelling government interest of diversity in the classroom setting because they are increasing the number of racial minorities as well as students from all socioeconomic backgrounds. The Supreme Court has given considerable deference to universities in defining those intangible characteristics they believe are needed to further the compelling government interest.⁸⁸ Only suspect classifications like race, nationality, and ethnicity are legally reviewed by the court under strict scrutiny. Race-based policies have been determined by the Court to further the government interest to rectify past injustices, and socioeconomic policies would likely follow suit. Since socioeconomic affirmative action policies are reviewed under rational basis, universities that choose to adopt socioeconomic policies only need to prove that the policy is furthering a legitimate government interest. In order to show that a specific policy is

84. Anthony Carnevale & Jeff Strohl, *How Increasing College Access is Increasing Inequality, and What to Do About It*, in REWARDING STRIVERS: HELPING LOW-INCOME STUDENTS SUCCEED IN COLLEGE 171 (Richard Kahlenberg ed., 2010).

85. *Id.* at 170.

86. Richard D. Kahlenberg, *The Future of Affirmative Action*, The Century Foundation (June 19, 2014), [<https://perma.cc/L7KJ-FTKB>].

87. *Id.*

88. Nice, *supra* note 78.

rationally tailored to further a legitimate government interest, they need to show that wealth inequality and the disparity between poverty and privilege are specific to the societal issues in that state.

Critical race theory (CRT⁹⁰) challenges the ways in which race and racial power are constructed in American legal culture. Duncan Kennedy argues for a large expansion of cultural diversity in law schools through affirmative action policies.⁸⁹ He calls the dominant understanding of race and merit in academia “the color-blind meritocratic fundamentalism.”⁹⁰ This fundamentalist view does not preclude the adoption of affirmative action policies, so long as we recognize that they conflict with meritocratic allocation at a social cost or loss.⁹¹ Kennedy argues that affirmative action is supposed to be seen as peace making, reparation, or integration, about increasing the pool of minority applicants, in a way that allows us to preserve a sharp boundary between meritocratic decisions and race-conscious decisions.⁹² Kennedy believes that by keeping meritocracy and race-conscious affirmative action separate, we will be able to see the biggest difference in minority acceptances.⁹³

Other critical race theorists have viciously attacked race-conscious affirmative action policies for not doing enough to change society.⁹⁴ According to Carlos Nan in *Adding Salt to the Wound: Affirmative Action and Critical Race Theory*, rates of employment and educational opportunities should be spread evenly across races and genders because of affirmative action programs.⁹⁵ Many critical race theory scholars are skeptical of the effectiveness of affirmative action programs, specifically calling the programs “the latest contrivance society has created to give blacks the sense of equality while withholding its substance.”⁹⁶ They argue that traditional affirmative action programs can be burdensome for communities of color and create a façade of equal opportunity in the face of worsening racial disparities.⁹⁷

Where does that leave other critical race theory scholars who see the benefits of affirmative action policies? Most CRT scholars agree that we should be a culturally pluralist society that structures our institutions in a way that social classes can share the wealth and power.⁹⁸ At a minimum, this would mean structuring the competition of racial and ethnic communities and social classes in such a way that no community or class is

89. Crenshaw, *supra* note 6, at 159.

90. *Id.*

91. Crenshaw, *supra* note 6, at 161.

92. *Id.* at 161-162.

93. *Id.*

94. Carlos J. Nan, *Adding Salt to the Wound: Affirmative Action and Critical Race Theory*, 12 LAW AND EQUALITY: A J. OF THEORY AND PRAC. 553 (2017).

95. *Id.*

96. *Id.* at 13.

97. *Id.* at 20.

98. Crenshaw, *supra* note 6, at 162.

systematically subordinate.⁹⁹ Lawyers, educators, admissions counselors, and activists need to look at socioeconomic and racial barriers that student's face when applying to colleges. These historical underpinnings have unjustly affected certain groups of people. By looking broadly at both socioeconomic and racial barriers from CRT, we can better understand how to break down white supremacy and racial power and look at the ways in which the law has contributed to the current system.¹⁰⁰ By continuing to act as if race and socioeconomic background play no role in higher education, job opportunities, and career advancement, we will continue to live in a world where discriminatory factors determine merit and success.

Some on the political left believe that CRT does not do enough to help minorities as a whole. They specifically look at how intersectionality scholarship is not the only means to achieving diversity and that there is a "murkiness" to the theoretical, political, and methodological aspects of intersectionality and CRT.¹⁰¹ Jennifer C. Nash, in *Re-thinking Intersectionality*, focuses on four tensions within intersectionality scholarship: the lack of defined intersectional methodology; the use of black women as quintessential intersectional subjects; the vague definition of intersectionality; and the empirical validity of intersectionality.¹⁰² Nash looks at the issues surrounding the notion that interlocking and mutually reinforcing vectors of race, gender, class and sexuality form identity.¹⁰³ She argues that intersectionality has become a "buzzword" in the race debate, that black women are used as the prime example in intersectional discourse and how that excludes other marginalized groups.¹⁰⁴ Nash discusses how Crenshaw attacks antidiscrimination laws and argues that black women are compelled to assert either race-based or gender-based discrimination claims instead of causes of action that wholly reflect their positions as intersectional subjects.¹⁰⁵ In contrast, Nash posits that the problem with critical race theory is that it offers little attention to the ways in which race and gender function as social processes in distinctive ways for particular black women.¹⁰⁶ That is, that the intersectional usage of "black women" treats *all* black women a certain way.¹⁰⁷

Nash theorizes that the one 'so what' question that remains unexplored by intersectional theorists is the way in which privilege and racial oppression can be co-constituted on the subjective level.¹⁰⁸ Yes, looking at the intersectionality of black women as a whole can create disadvantages for

99. Crenshaw, *supra* note 6, at 162.

100. *Id.* at xiv.

101. Jennifer C. Nash, *Re-thinking Intersectionality*, 28 FEMINIST REV. (2008).

102. *Id.*

103. *Id.* at 3.

104. Nash, *Re-thinking Intersectionality*, at 4.

105. *Id.* at 6.

106. *Id.* at 7.

107. *Id.*

108. *Id.* at 11.

groups of black women. Similarly, looking at black people as a group in affirmative action programs can also disadvantage specific groups within the black community more than others. A 2004 survey found that 86% of African American students at universities- with and without affirmative action programs-were from the upper or middle class.¹⁰⁹ Socioeconomic affirmative action looks at these issues through the intersection of race and class instead of race and gender. By focusing on class and race, together, socioeconomic policies are more beneficial to the overall goals of critical race theory and intersectionality to find racial harmony in society.

IV. THE SYSTEMATIC EXCLUSION OF LOW-INCOME STUDENTS IN HIGHER EDUCATION

A. The Future? Socioeconomic Affirmative Action Policies

In the 2016 *Fisher v. Texas* case, Justice Kennedy, writing the majority opinion, left open the possibility of future changes, stating that “it is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admission policies.”¹¹⁰ Universities will continue to face scrutiny by applicants so long as affirmative action plays a role in admissions. They will need to reevaluate their standards and application processes every year to show that they continue to update policies with the changing times if and when they are sued for unconstitutional admissions practices. Even so, white students will continue to feel that their privilege and entitlement to a higher education is diminished by the acceptance of minority students.

In 1982, the highest-earning 1% of families received 10.8% of the wealth income in America, while the bottom 90% received 64.7%.¹¹¹ Thirty years later in 2012, the top 1% received 22.5% of the income while the bottom 90%’s share of the wealth had fallen to 49.6%.¹¹² Today, the top 1% has more of the country’s wealth than nine out of ten Americans think they *should* have.¹¹³ And if those statics did not reveal how wealth inequality works in America, these do: the top 1% of Americans own half of the country’s stocks, bonds, and mutual funds, while the bottom 50% own only half of one percent.¹¹⁴ At elite colleges, there are more students from families in the top 1% than from the entire bottom half of the income

109. Richard Kahlenberg, *Reflections on Richard Sander’s Class in American Legal Education*, 88 DENV. U. L. REV. 719 (2011).

110. *Fisher*, *supra* note 43, at 2215.

111. Drew Desilver, *5 Facts About Economic Inequality*, Pew Research Center (Jan. 7, 2014), [<https://perma.cc/2DPT-UAUX>].

112. *Id.*

113. Politazine, *Wealth Inequality in America*, YOUTUBE (Nov. 20, 2012), <https://www.youtube.com/watch?v=QPKKQnijnsM>.

114. Politazine, *Wealth Inequality in America*.

curve.¹¹⁵ Socioeconomic affirmative action programs further the interest of the American government to combat the extreme wealth gap. By giving students from low-income household's opportunities in higher education, we change the stigma that higher education is only for the wealthy, white, and the powerful.

Higher education needs a new approach to affirmative action. In 2016, after the decision in *Fisher v. Texas*, Gallup published a poll that 65% of the public does not believe race should be used as a factor in college admissions. Only 9% of the public believed race should be a "major factor" in admissions, while 31% said we should consider a family's economic circumstances. Society does not really understand affirmative action and the benefits, but they do understand that we should give preferential treatment to those from the lower socioeconomic classes instead of using strict race-conscious policies.

B. Income Disparity And Race: How These Policies Can Work Together

The statistics on wealth inequality in America are staggering. The richest 0.1% of Americans take in 188 times as much income per year as the bottom 90% all together.¹¹⁶ Since 1969, the top 1% have doubled their income, while the number of families in poverty has held steady.¹¹⁷

Many communities in America that have been disproportionately disadvantaged by race-conscious admissions policies. Areas like Appalachia, Flint, Michigan, and South-Central Los Angeles are home to widespread poverty and the rest of America often neglects them. Cynthia Duncan writes, "I think that chronic poverty in rural areas, and urban areas for that matter, really represents long-term neglect and lack of investment- a lack of investment in people as well as communities. And in the rural areas that I know in America, that lack of investment began as deliberate efforts by those in power—local elites and employers—to hold people back."¹¹⁸ This long-term chain of poverty has spread across generations, making it harder and harder for the newer generations to rise above their current economic positions.

Growing up in economically depressed regions with little room for growth, children often have no idea how to apply to colleges and lack the basic secondary education to succeed when they are accepted. While race has been at the forefront of affirmative action debates for decades, there are children who have been socioeconomically disadvantaged and face

115. Evan Gertsmann, *Thinking About Race-Based Affirmative Action and White Privilege on MLK Day*, FORBES (Jan. 21, 2019), [<https://perma.cc/B5U3-UWEG>].

116. INEQUALITY.ORG, *Income Inequality in the United States*, [<https://perma.cc/F77W-NB86>] (last visited Apr. 8, 2019).

117. *Id.*

118. Interview with Cynthia Duncan, author of *Worlds Apart: Why Poverty Persists in Rural America*, FRONTLINE (Dec. 29, 2005), [<https://perma.cc/6Z58-GELV>].

significant educational barriers, much like those of racial minorities. Schools in rural America are teaching students how to get low-skill, low-wage jobs, not how to go to college.¹¹⁹

As the economic vitality of these communities has slowly—or in some cases, quite abruptly—declined, the opportunities for educated young people to return to their communities have also declined. Rural public schools have simply become engines of exodus. The result is that instead of providing a pathway for youths to go out of their communities and potentially return with a knowledge base of new experiences, rural public schools have simply become engines of exodus, educating students for labor markets and communities located elsewhere.¹²⁰

Due to the lack of resources, students from these areas must move away or find a low-wage job at home.¹²¹ However, these students then struggle to find work outside of the area because they have consistently lacked educational and economic opportunities that would prepare them for the world outside.¹²²

When we look to affirmative action as a way to help people who have been systematically discriminated against, or largely ignored, we cannot only use race-conscious policies to remedy the situation. In areas such as Appalachia, regional and economic disadvantages have hindered students the ability to move forward with their education and careers. “Today, residents of Appalachia are viewed by many Americans as uneducated and unrefined, resulting in culture-based stereotyping and discrimination in many areas, including housing and employment.”¹²³ We have continually underinvested in these areas, not only affecting people of color, but also low-income whites in places where unemployment and disability rates are on the rise due to long-term neglect by government resources.¹²⁴

We see these same issues in areas like Flint, Michigan. Flint has been the subject of long-term environmental racism.¹²⁵ Flint has a population of 98,000, over 50% are black and over 25% of the population lives below the poverty line. The average family of four in Flint lives off less than \$25,000 a year.¹²⁶ The automobile industry controlled the area surrounding Flint for most of the twentieth century, yet in the 1980s, General Motors downsized

119. Catherine Biddle & Daniella Hall, *How Education is Failing Rural America: No, Low Educational Attainment Isn't Why Trump Won*, PERSPECTIVES ON AMERICAN EDUCATION-FURMAN BLOGSPOT (Jan. 17, 2017), [<https://perma.cc/2QXL-X9HY>].

120. Biddle & Hall, *supra* note 119.

121. *Id.*

122. *Id.*

123. *Id.*

124. Frontline, *supra* note 118.

125. Environmental racism is the pollution and depletion of resources that systematically affect people of color and low-income communities.

126. GREATER FLINT HEALTH COALITION, COMMUNITY HEALTH NEEDS ASSESSMENT REPORT 4-5 (2016).

and laid off over 80,000 people—leaving only 8,000 employed.¹²⁷ In 2012, Flint came into the national spotlight when they were looking for a cheaper water supply.¹²⁸ During the transition, they decided to use the water from the Flint River. Within months of the switch, residents started complaining about the taste and color of the water.¹²⁹ In 2015, they discovered that the pipes in Flint were contaminated with lead poisoning.¹³⁰ In communities like Flint, residents face higher crime rates, exhibit poorer physical and mental health, and tend to go to low-performing schools with higher dropout rates.¹³¹ These barriers imposed on them from a young age—and further complicated by environmental crimes—makes it harder for them to climb the economic ladder. It has been seven years since the Flint Water Crisis was uncovered, and to this day, there is no sign of when the people of Flint will have clean drinking water.

In Los Angeles, poverty has become more prevalent in the last thirty years.¹³² Eight percent of the tracts in the City of Los Angeles have concentrated levels of poverty.¹³³ Residents of these neighborhoods are disproportionately Latino and Black.¹³⁴ The number of people living in concentrated poverty quadrupled in Los Angeles during the 1990s.¹³⁵ Living conditions in areas such as South Central LA include scarcities of safe and decent housing, reduced mobility for committing to jobs or meeting household needs, lower levels of skill and education among working-age adults, lower levels of educational achievements among children, and increased disconnection from school and work among young adults.¹³⁶

The problem in all of these cases is that state and federal governments have underinvested in these areas and neglected the problems they face. Growing up in poverty, children do not realize their options span beyond that of their communities. They may see a doctor or lawyer on television, but they fail to associate those careers with opportunities that they may have.¹³⁷ They look to their aunts, fathers, neighbors, and other people in their community as signs of what they can accomplish.¹³⁸ We see this play out in higher education admissions with only 3% of students at competitive

127. Pat Shellenbarger, *In Downsized Flint, Desperate Retirees vs. Struggling Taxpayers*, Bridge (Nov. 11, 2013), [<https://perma.cc/RH3M-GM7D>].

128. CNN LIBRARY, FLINT WATER CRISIS FAST FACTS (Dec. 6, 2018, 5:16 PM), [<https://perma.cc/W66V-4655>].

129. *Id.*

130. *Id.*

131. GREATER FLINT HEALTH COALITION, *supra* note 126.

132. MICHAEL, MATSUNAGA, CONCENTRATED POVERTY NEIGHBORHOODS IN LOS ANGELES, 1-13 (2005), [<https://perma.cc/E5B9-MLB4>].

133. *Id.* at 4.

134. *Id.* at 5.

135. MICHAEL, MATSUNAGA, CONCENTRATED POVERTY NEIGHBORHOODS IN LOS ANGELES, 3.

136. *Id.* at 7.

137. FRONTLINE, *supra* note 124.

138. *Id.*

universities coming from the bottom 25% of our society.¹³⁹ Students from the top 25% of society make up 72% of students at these same competitive schools.¹⁴⁰ These students are competing against kids from higher socioeconomic backgrounds, with better educational opportunities since birth.

C. Reconstructing Beliefs on Equality through Affirmative Action

The term “white privilege” is the idea that all white people have advantages over people of color. Indeed, there can be whites who struggle with unemployment, paying doctors’ bills, and who cannot afford to send their kids to college.¹⁴¹ But it is true that whites, regardless of socioeconomic background, are less likely to be pulled over by a cop.¹⁴² They are less likely to be racially profiled at the airport. And they are less likely to have the burden in higher education of representing their entire race. That is white privilege in and of itself.¹⁴³ White privilege is the cause of systematic exclusion of minorities in higher education, but we need to look at how socioeconomic privilege plays in the college admissions system as well.

In March of 2019, news broke of a celebrity scam that would quickly be dubbed “The College Admissions Scandal.” The FBI arrested and federal prosecutors charged over fifty people in a scheme to secure spots at top colleges (Yale, Stanford, USC, etc.) in what prosecutors called the “largest college admissions scam ever prosecuted by the Department of Justice.”¹⁴⁴ The ringleader, William Singer, ran a college counseling business where he bribed coaches and test monitors, falsified exam scores, and fabricated student biographies to help wealthy parents secure spots for their children at desirable colleges.¹⁴⁵ These parents, some actors and celebrities, others tech CEOs and business owners, paid anywhere from \$100,000 to \$6.5 million for their children to get into these schools.¹⁴⁶ Their children posed with athletic gear, had faces cropped on the bodies of real athletes, and had proctors change their answers for them on SAT/ACT tests.¹⁴⁷ One student involved in the scandal, Olivia Jade, was actually vacationing for spring break on the yacht of the USC Board of Trustees Chairman in the Caribbean

139. Lauren Camera, *Poverty Preference Admissions: The New Affirmative Action?* U.S. NEWS (Jan. 12, 2016), [<https://perma.cc/5AD7-EW2Z>].

140. *Id.*

141. Gertsmann, *supra* note 115.

142. Gertsmann, *supra* note 115.

143. *Id.*

144. David Mcnew, *College Admissions Scandal: Your Questions Answered*, N.Y. TIMES (Mar. 14, 2019), [<https://perma.cc/99K3-JLUJ>].

145. *Id.*

146. *Id.*

147. *Id.*

when news of the scandal broke.¹⁴⁸ They had to turn the yacht around.¹⁴⁹

The College Admissions Scandal came just weeks after Ohio mom, Kelley Williams-Bolar was charged and imprisoned for lying about her address to get her children into a better school district.¹⁵⁰ Four years ago, she decided to send her daughters to a highly ranked school in the neighboring district.¹⁵¹ She used her father's address—who she lived with part time—and falsified documents that said they lived there.¹⁵² In her home district right next door, her house was broken into and she as worried about the safety of her children.¹⁵³ She was sentenced in March of 2019 to ten days in jail and three years of probation.¹⁵⁴ Wealth influences a students' education well before the college application season.¹⁵⁵ A recent report by EdBuild found that predominately white school districts receive \$23 billion more in funding than school districts that primarily serve students of color and low-income communities.¹⁵⁶ If that does not surprise you, then you will not be shocked that while Kelley Williams-Bolar was sitting in jail for trying to give her daughters a better education, the parents of the college admissions scandal posted their \$1 million bail less than 24 hours after their arrests.¹⁵⁷

Patt Morrison, a contributor for the *Los Angeles Times*, wrote that the scandal showed just how desperate the privileged are to keep their privilege.¹⁵⁸ He argues that these children involved in the scandal have all the advantages in the world, and yet, they are still taking shortcuts where it matters.¹⁵⁹ This scandal has brought to our attention, not that there is an issue with distribution of opportunity, but the sense that because the people at the top have gone to good colleges and are supposedly smart, that their privileges are legitimate.¹⁶⁰ The system gives this depiction that there is meritocracy involved in the college admissions process, but this scandal has showed that we as a society reproduce privilege from generation to generation.

Everyone sat in awe when the scandal broke, but they clearly forgot that the wealthy have been doing this legally for years, in two ways. First,

148. Morgan Baila, *Olivia Jade & Her Friends Had to Literally Turn Their Yacht Around to Deal with the Cheating Scandal*, *Refinery* 29 (Mar. 14, 2019), [<https://perma.cc/9FK5-65KR>].

149. *Id.*

150. Andrea Canning & Leezel Tanglao, *Ohio Mom Kelley Williams-Bolar Jailed for Sending Kids to Better School District*, *ABC NEWS* (Jan. 26, 2011), [<https://perma.cc/Ry38-BA8F>].

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. P. R. Lockhard, *What the College Admissions Scandal Says About Racial Inequality*, *VOX* (Mar. 20, 2019), [<https://perma.cc/LWT3-W9VL>].

156. *Id.*

157. *Id.*

158. Patt Morrison, *College Admissions Scandal Shows How Desperate the Privileged Are to Keep It That Way*, *L.A. TIMES* (Mar. 20, 2019), [<https://perma.cc/WQ9C-E8D5>].

159. *Id.*

160. *Id.*

students have long been admitted to elite universities as legacy students.¹⁶¹ A legacy student has family ties to an alumnus of an esteemed institution.¹⁶² Legacy students are often favored in the admission process because it will ultimately increase the pool of alumni and therefore the amount of funding a school will get from that family.¹⁶³ Harvard's incoming class of 2021 is made up of over 29 percent legacy students.¹⁶⁴ Legacy students tend to be wealthy and white, students who, as a group, are already disproportionately represented at elite universities.¹⁶⁵ One *New York Times* study found that at 43 universities, including five Ivy Leagues, Dartmouth, Princeton, Yale, Penn, and Brown, there are more students from families in the top one percent than students from the entire bottom sixty percent.¹⁶⁶

Second, parents have donated buildings in their family name ranging between a few years to a few months prior to a child applying to an elite college.¹⁶⁷ A fairly common practice among the uber rich, they wield their money and power without breaking the law to get their child into the best universities.¹⁶⁸ Richard Kahlenberg said that, "the college admissions systems, which favor legacy applicants and donors, is the [legal and] more polite version of what was exposed in the [admissions] scandal."¹⁶⁹ Ironically, rapper Dr. Dre bragged about his daughter getting into USC "on her own" just days after the scandal broke, clearly forgetting that he had donated \$70 million to USC in 2013 for the Jimmy Iovine and Andre Young Academy for Arts, Technology and the Business of Innovation.¹⁷⁰

With a clear majority of students at elite colleges being white and wealthy, you can't help but think about the repercussions building donations and legacy students have on the small amount of low-income minority students that get in. In Anthony Abraham Jack's book, *The Privileged Poor*, he outlines the differences between the "privileged poor" and the "doubly disadvantaged."¹⁷¹ The privileged poor are students who come from low-income backgrounds but attend wealthy private high schools on scholarship, giving them the familiarity they need in order to deal with the wealthy,

161. Morrison, *College Admissions Scandal Shows How Desperate the Privileged Are to Keep It That Way*.

162. Allison Wignall, *What is a College Legacy Student*, COLLEGE RAPTOR (Apr. 8, 2019), [<https://perma.cc/G8N7-H2H9>].

163. *Id.*

164. Yoni Blumberg, *Harvard's Incoming Freshman Class is One-Third Legacy—Here's Why That's a Problem*, CNBC (Sept. 6, 2017), [<https://perma.cc/9FAP-TM7W>].

165. *Id.*

166. *Id.*

167. Morrison, *supra* note 158.

168. Will Yakowicz & Carter Coudriet, *College Admissions: How Billionaires (Legally) Pump Millions of Dollars into Their Children's Schools*, FORBES (Mar. 15, 2019), [<https://perma.cc/DZ22-H9H9>].

169. *Id.*

170. Drew Costley, *Dr. Dre Catches Flak After Bragging About Daughter's Admission to USC*, SF GATE (Mar. 24, 2019), [<https://perma.cc/6ZZ8-3HLS>].

171. Smith, *supra* note 4.

entitled, students and faculty of most elite colleges.¹⁷² The doubly disadvantaged are students who arrive to these colleges, from their neighborhood public schools, and do not equip the sociocultural tools necessary to understand how elite schools are run.¹⁷³ They are the students who won't know what "office hours" are when the professor announces them, the one who will spend nights and weekends working in the dining hall, scrubbing the food off the plates of their classmates just to make it through, and the ones who won't be able to eat during breaks because the dining hall isn't open.¹⁷⁴ They receive daily reminders that they do not belong there and that the system is doing everything in its power to keep them out. *The Atlantic* contributor, Clint Smith, argues that "elite universities are a bundle of confusing contradictions: they bend over backwards to admit disadvantaged students into their hallowed halls, but then, once the students are there, they maintain policies that not only remind those students of their disadvantage, but even serve to highlight it."¹⁷⁵

CONCLUSION

Affirmative action has been transforming ever since *Bakke* opened the gates to these policies and cases in 1978. With each new case, the Supreme Court narrowly redefines the legalities behind affirmative action policies—making it harder for universities to write admissions programs that benefit students of color. While the Court has continued to tailor these policies and the country has continued to rebuke them, we have seen that additional steps are needed in order to continue moving towards a pluralistic society. There is no doubt that race will continue to be an issue in America for years to come. With the emergence of Black Lives Matter, an increased recognition of police brutality, and continued issues with the wealth gap and its relation to people of color, we will need race-based policies in order to bridge that gap of inequality and discrimination in America.

Socioeconomic-based admissions and support strategies not only promote greater economic diversity on campus, but they deliver a racially diverse student body as well.¹⁷⁶ The income-based achievement gap is twice the size of the race-based achievement gap today—we need to do more to address economic disadvantage while continuing to promote racial diversity.¹⁷⁷ At UCLA Law in 2011, they looked only at socioeconomic status as part of the admissions process.¹⁷⁸ That year, African Americans

172. Smith, *supra* note 4.

173. *Id.*

174. *Id.*

175. *Id.*

176. Richard Kahlenberg & Halley Potter, *Class-based Affirmative Action Works*, N.Y. TIMES (Apr. 27, 2014), [<https://perma.cc/L6WL-6ADS>].

177. *Id.*

178. Richard D. Kahlenberg, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, THE CENTURY FOUNDATION (2010), [<https://perma.cc>

were 11 times more likely and Latinos were 2.3 times more likely to be admitted.¹⁷⁹ In addition to the added benefit to minority students, white lower-class individuals who have been disadvantaged in poverty-stricken areas also benefit from socioeconomic affirmative action.

The system will never change if we continue to believe as a society that the children of the privileged will be judged as more meritorious than the children of the working class and the poor.¹⁸⁰ There has long been a misunderstanding about what affirmative action is meant to do. Many believe that affirmative action is “preferential treatment” to minorities, meaning that others are disadvantaged because of it. This is hardly the case. Affirmative action is meant to help *all* students by diversifying their classroom setting and introducing them to people of different backgrounds. Race-based policies have benefited an increasing number of minorities at universities, but it only helps so much. There is still a great disparity between students in the upper class and working/lower class on college campuses. Economic-based policies not only help racial and ethnic minorities significantly, but they provide a platform for all students from lower socioeconomic backgrounds to succeed in higher education. By combining race-based affirmative action with socioeconomic-based policies, we can progress more efficiently as a leading society in race and class equality.

/V4NS-FZTB].

179. Kahlenberg, *A Better Affirmative Action*.

180. Smith, *supra* note 4.
