INEQUITIES PERPETUATED BY THE CURRENT COLLEGE ADMISSIONS MODEL, AND THE NEED TO IMPLEMENT A SOCIOECONOMIC-BASED APPROACH

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INEQUITIES PERPETUATED BY THE CURRENT COLLEGE ADMISSIONS MODEL, AND THE NEED TO IMPLEMENT A SOCIOECONOMIC-BASED APPROACH

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ABSTRACT

Originally developed during the 1960s as a means to ameliorate the economic standing of individuals who had been suppressed for generations, affirmative action programs in the academic setting have been historically misapplied and now largely work to the detriment of the students who they were intended to benefit. In addition, the policies have, in some degree, been co-opted by party politics and have been the subject of several high profile legal battles. The cases, which generally challenge race-conscious admissions policies on the grounds that they violate the Fourteenth Amendment’s Equal Protection Clause, have thus far been resolved by finding the policies to be constitutional. However, the Supreme Court’s precedent in this area of law continues to evolve and the fact that the Court routinely agrees to hear educational affirmative action cases suggests that the Court does not view the body of law to be settled.

Legality aside, race-based affirmative action programs in many cases actually end up benefiting minorities of substantial means, instead of the underprivileged applicants that the programs were originally intended for. In addition, colleges and universities are willfully obtuse to the many challenges facing low-income applicants, which further
benefits applicants from middle to upper income families. If colleges and universities were to adopt admissions policies that provided applicants with supplemental consideration based upon a finding of economic need rather than simply looking at an applicant’s race, they would not only provide a benefit to deserving individual applicants but would simultaneously promote a more robust academic experience for their entire student body. In addition, policies that provide favorable consideration to economically challenged individuals may actually help to improve race relations throughout the country as members of the minority community may finally begin to see the change that they yearn for while also lessening the resentment felt by some members of the white community for doing away with what they view as being a discriminatory social policy. However, simply changing the focus of college admissions offices will only solve one of the problems facing underprivileged applicants. Substandard public schools, confusing and chronically underfunded government assistance programs, and prohibitive, ever increasing costs of attendance are also major entrance barriers for many low-income students that should also be addressed.
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Racial inequality has plagued the United States throughout its history, dating all the way back to colonial times, and persists to this day. This enduring inequality has left many in the minority community feeling marginalized and bitter towards the government and society, generally. Occasionally, such sentiments have manifested in the form of anger and violence, as was the case during the race riots that occurred throughout the United States during the 1960s and most recently in places like Ferguson, Missouri, Chicago, and Charlotte. According to a July poll conducted by the New York Times, nearly 70 percent of African Americans said that they believed race relations in the United States to be “generally bad,” a figure not seen since the riots that erupted in Los Angeles following the acquittal of four white Los Angeles Police officers who were videotaped beating Rodney King, an unarmed African American male in 1991.\footnote{Kevin Sack and Megan Thee-Brenan, “Poll Finds Most in U.S. Hold Dim View of Race Relations,” \textit{New York Times}, July 23, 2015, accessed January 13, 2016, http://www.nytimes.com/2015/07/24/us/poll-shows-most-americans-think-race-relations-are-bad.html.}

Consequently, the issue of racial inequality has become a major point of emphasis for several of the candidates running for President of the United States in 2016. To that end, the leading candidates for the Democratic nomination for President, former Secretary of State Hillary Clinton and Vermont Senator Bernie Sanders, have devoted entire portions of their campaign websites for their plans to end racial stigmatization and
the promotion greater racial equality. Such policy goals were eventually incorporated into the official the Democratic Party platform for 2016.\textsuperscript{2} For its part, the Republican Party also addresses racial inequality in its platform but fails to provide any level of detail on its plan to address existing systemic racial discrimination, only saying, “[a]s the Party of Abraham Lincoln, we must continue to foster solutions to America’s difficult challenges when it comes to race relations today.”\textsuperscript{3}

While individuals’ bases for their own racial animus are likely multifaceted and perhaps inherited, the continued economic and educational suppression of minorities should be largely blamed for perpetuating racial stereotypes and stoking racial hostility. In addition, race-conscious policies may have the effect of magnifying the existing racial biases and have not historically resulted in leveling the playing field for the haves and have nots. This is not a new phenomenon in this country as the United States has historically struggled to mitigate the prejudices that lead to class and race-based hostilities.

As previously mentioned, the subjugation of minorities in the United States predates the country’s founding, and certainly no practice embodies this sordid history more than the detestable institution of slavery. It has been well documented that many of the founding fathers owned and maintained private slave populations, as the institution of slavery was extremely important to the agrarian economy of the southern states. Indeed,


when the U.S. Constitution was ratified, it contained explicit protections for the practice, and it was subsequently reinforced by the U.S. Supreme Court in the case, *Dred Scott v. Sanford*, which is widely regarded as the nadir of the Supreme Court.\(^4\)\(^5\) Four years subsequent to the *Dred Scott* decision, eleven southern states, dissatisfied by the North’s antipathy towards slavery and its industrial-based economy, seceded from the union and the nation found itself engulfed in a civil war. After four-plus years of war, the anti-slavery North emerged victorious and the process of reunifying the fractured county had already begun in Congress.

In the wake of the war, three amendments to the U.S. Constitution were ratified which sought to remedy the government-sanctioned societal ills that had plagued the nation since its founding. Both the Thirteenth and Fifteenth Amendments addressed the issue of slavery head-on, the former formally put an end to slavery throughout the United States while the latter guaranteed the right to vote could not be denied or abridged “on account of race, color or previous condition of servitude.”\(^6\) Just three years after the ratification of the Thirteenth Amendment, the Constitution was amended yet again as the Fourteenth Amendment was ratified, guaranteeing for all citizens the right to both due process and equal protection under the law. Both provisions of the Fourteenth Amendment were intended to protect the fundamental rights of individual citizens against

\(^4\)US Constitution, art. 4, sec. 2, cl. 3. commonly known as the “fugitive slave clause” stipulates that, “[n]o Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”

\(^5\)*Dred Scott v. Sanford*, 60 U.S. 393 (1857).

\(^6\)US Constitution, amend. 15, sec 1.
government intrusion and discrimination. However, unlike the Thirteenth and Fifteenth Amendments, the Fourteenth Amendment is drafted ambiguously, which has resulted in the amendment being applied unevenly in many respects, including in the educational realm.

Yet, despite having received newly ordained constitutional protections, minorities remained subordinated in the United States during the reconstruction era and throughout the much of the twentieth century. In the South, Jim Crow laws were implemented as a means to suppress newly freed African Americans and maintain the suddenly imperiled status quo. Once again, the Supreme Court interpreted the Constitution in a manner that allowed for a segregated United States, deciding in 1896 that separate accommodations were consistent with the Fourteenth Amendment so as long as they were ‘equal.’ As such, the United States entered the twentieth century functionally operating as two separate countries, and African Americans, who were overwhelmingly uneducated, remained relegated to the lowest-paying segments of the economy, reserved for unskilled workers. This lack of economic standing, combined with policies such as poll taxes and literacy tests, designed to disenfranchise minorities from the political process, resulted in African Americans having a dearth of political influence in both local and national affairs.

The economic, political, and social suppression of minorities continued throughout the first half of the twentieth century, but things began to change in 1953 when former California Governor Earl Warren was appointed by President Eisenhower to serve as the fourteenth Chief Justice of the United States Supreme Court. Just a year into

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7Plessy v. Ferguson, 163 U.S. 537 (1896).
Chief Justice Warren’s tenure, the Court issued its decision in *Brown v. Board of Education Topeka*, reinterpreting the intent of the Fourteenth Amendment’s equal protection clause and reversing its 1896 *Plessy* precedent, finally putting an end to the oxymoronic ‘separate but equal’ doctrine. The Court’s holding in *Brown* meant that governments could no longer operate segregated elementary and secondary schools or other public accommodations, including government-funded colleges and universities.

Despite the magnitude of this decision, racial minorities were still very much living as second-class citizens in their own country as a court’s decision was incapable of removing the racial biases that had existed in the country for generations. Additionally, remedying long-standing and multifaceted economic and social inequalities would not be accomplished overnight. In the year following the *Brown* decision the average wage for African American workers was nearly half that of their white counterparts. While such a disparity is certainly jarring, the larger problem for African Americans at the time was the means for social and economic advancement, post secondary education, was still viewed as being reserved for those of privilege, namely whites. According to the U.S. Census Bureau, in the year following the *Brown* decision, 2.24 million Americans were enrolled in post secondary educational institutions and of that total, only 155,000 or six percent were African American.

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While the *Brown* decision had a far-reaching impact on public elementary and secondary schools and public accommodations generally, its applicability to post-secondary institutions was less clear as colleges and universities, while prohibited from offering separate facilities or curricula for white and minority students, were still largely free to admit whomever they pleased. In addition, post-secondary institutions in the late 1950s and early 1960s, were able to easily explain the low minority enrollment rates as the lingering effects of substandard segregated elementary and secondary schools rendered many minority applicants ill-equipped for post-secondary education when compared to their white counterparts. If that were not enough, many potential African American college matriculants were forced to forgo the opportunity to attend a college or university because they simply couldn’t afford the tuition or needed to enter the workforce to support their family.

As the United States took steps during the 1960s to redress its sordid history with respect to its treatment of racial minorities, notably through President Lyndon Johnson’s ‘War on Poverty,’ colleges and universities began to incorporate race as a factor to be considered in their admissions decisions.\(^\text{11}\) The reasoning being, such policies would enhance historically suppressed minorities’ ability to advance their education, which would in turn improve their standing economically and in society, generally. In addition, race-conscious admissions policies would simultaneously increase diversity within the student body, which would enrich the overall educational experience for all students. However, in the fifty-plus years since race-conscious admissions policies were first

implemented, many now argue that they are outmoded, incongruent to the realities of the
21st century, and may even perpetuate and inflame racial animus. In addition, it has been
argued, as this thesis does, that the blind application of race-conscious admissions
policies tends to benefit middle to upper class minority applicants and may actually work
to the detriment of low-income minority students, whose advancement was the impetus
for the adoption of such policies in the first place.

The debate over the appropriateness of race-conscious admissions policies has not
been limited to social or academic settings. In fact, the constitutionality of such policies
has been argued before the United States Supreme Court on several occasions, most
recently last December when *Fisher v. University of Texas* came before the Court for a
second time and was decided by a splintered court over the summer. In addition to legal
challenges, proposed bans on higher education affirmative action policies have been
adopted through legislation or executive order in four states, and the issue has been
considered on ballot initiatives in eight states, only being narrowly defeated once in
Colorado in 2008.\(^\text{12}\)

In this thesis, I will argue that colleges and universities should discontinue the
consideration of race in the admissions process, and instead adopt policies that take into
account applicants’ socioeconomic profiles. Such a policy shift will ensure that minority
students from low-income backgrounds will receive optimal consideration for college
admission, which maintains fidelity to the policy’s original intent. In addition, a
colorblind socioeconomic admissions preference will make it easier for disadvantaged
students of all races to attend a college or university and improve both their economic

\(^\text{12}\)National Conference of State Legislatures, “Affirmative action: Sate Action,”
April 2014, accessed February 21, 2016,
standing and cultural diversity. Adopting a socioeconomic based admissions policy also removes the divisive social issue of race from the admissions process, which has led to the aforementioned legal and political challenges.

Ultimately, I will use this thesis to examine the concept of justice in the setting of higher education, given that it has been demonstrated that there is a direct correlation between an individual’s level of education and their resulting socioeconomic status. Specifically, I will argue that implementing a system that provides students of limited economic means, irrespective of race, with enhanced opportunities to attend institutions of higher education comports with the American ideal of justice as these students currently find themselves at a distinct disadvantage to gain admission to colleges or universities when compared to students of middle to upper-class backgrounds. Such a policy also carries the potential that students who hail from economically depressed and undereducated areas will return, following the completion of their university studies, and will make economic and cultural investments in these areas, benefitting the entire community.

In the over fifty years since colleges and universities began adopting affirmative action admissions policies, they have misappropriated such programs to the point that their original intent has been lost. Rather than working to ensure that economically disadvantaged individuals are given the opportunity to advance in society through education, colleges and universities have administered their affirmative action programs by looking almost exclusively at race, claiming that it is necessary to obtain the academic benefits associated with increased diversity. The misapplication of affirmative action programs also raises serious constitutional questions as government sponsored-policies that make racial distinctions are generally considered unconstitutional under the
Fourteenth Amendment. The original intent of affirmative actions programs and their resulting misapplication in higher education admissions, along with an analysis of the jurisprudence of educational affirmative action cases will be explored in greater detail in chapters two and three.

While the abandonment of the current admissions paradigm in favor of a colorblind socioeconomic admissions policy would be an encouraging start to realizing a more equitable system for access to higher education and social advancement, in order to make such an admissions policy effectual, institutions of higher education and the government must have policies in place that will ensure economically disadvantaged students will actually be able to afford the cost of attendance. Otherwise, even if such students were the beneficiaries of an economically conscious holistic admissions process, their ultimate inability to attend an institution on account of cost would render the policy nominal. Ensuring that admissions and financial aid policies are administered in a manner that is mindful of the many challenges low-income students face is a shared responsibility between the institutions of higher education and the government. This topic will be explored in greater depth in Chapter Four.

At its core, the United States regards itself as the land of opportunity where individuals of limited means, through hard work, could make a better life for themselves and their family. This concept comports with the American ideals of justice and equal opportunity. However, as currently situated, the realities of American society are incongruent to these ideals. All too often individuals are locked into the socioeconomic class that they are born into, irrespective of how hard they work. In Chapter Five of this thesis I will explore the societal benefits that can be realized through reforming the colleges admissions and financial aid models that currently work counter to the interests
of low-income individuals. To that end, I will assert that recalibrating admissions programs to focus on economic background instead of race could actually lessen the racial tension that is currently embroiling the country. Indeed, providing low-income students with a viable path to college is not simply just, it could yield many tangential social benefits.
CHAPTER 2
ORIGINS OF A NOW CO-OPTED POLICY

In his book, *The Remedy: Class, Race, And Affirmative Action*, higher education historian Richard Kahlenberg illustrates how educational affirmative action policies were originally devised. According to Kahlenberg, during the administration of President Lyndon Johnson, then Department of Labor Assistant Secretary Daniel Patrick Moynihan was instrumental in shaping Johnson’s civil rights agenda.¹ Both Johnson and Moynihan held the belief that if the United States did not put forth a formal policy that would provide redress for past racial discriminations, it would instead perpetuate the inequality that spawned from decades of racial animus.

Under Moynihan’s guidance, in March 1965 the Labor Department issued the first, and to date, only formal governmental report that comprehensively examined and provided official commentary on the plight of an entire race. The report, entitled, *The Negro Family: The Case for National Action*, was a scathing indictment of the United States’ treatment of African Americans and called the group’s struggle for equality in post-Brown America, “the most important domestic event of the postwar period in the United States,” comparing it to the importance of the American Revolution.² To that end, the report opined that the eventual achievement of economic and social equality amongst


the races would ultimately result in the United States achieving “the full promise of the
Declaration of Independence.”

The report chronicled the myriad of seemingly never-ending struggles African
Americans have faced in the United States, from the dawn of the American Revolution
through the widespread suburbanization that occurred following the conclusion of World
War II. In particular the report thoroughly examined African Americans’ quest to escape
the vestiges of slavery in the post-reconstruction era United States and why the effort was
not much further along almost one hundred years later in the 1960s. According to the
Department of Labor, the reasons for the stagnation were multi-faceted, but an
overarching unbreakable, self-replicating cycle of poverty, largely attributable to a dearth
of educational opportunities available to African Americans, was largely to blame as the
report stated, “because the needs of children are greater today it is very possible that the
education and opportunity gap between the offspring of these [African American]
families and those of stable middle-class unions is not closing, but is growing wider. . .
low education levels in turn produce low income levels, which deprive children of many
opportunities, and so the cycle repeats itself.”

Yet, despite providing an exhaustive examination of the circumstances that gave
rise to the continued suppression of African Americans, the report was bereft of details
on ways the government, and society generally, could remedy the systemic racial
inequalities present in the United States. The report’s authors stated the want of policy
solutions offered in the report was deliberate as their intent was to simply “define a

\[3\] Ibid.

\[4\] Ibid.
problem, rather than propose solutions to it.”⁵ It wasn’t that the authors didn’t think formal action was required to finally begin the process of closing the enduring racial achievement gap in the United States, they did. Rather, they explained the choice not to offer policy solutions in the report was attributable to the political climate that existed at the time and cited three major ideological beliefs that were generally held by those within the government and the general public: (1) those who felt that race-based problems were overstated and to the extent that any problems did exist, it was the role of the free market to ameliorate them and that this would eventually happen over time, (2) those who felt the sheer complexity of the plight facing African Americans at the time was such that offering specific policy solutions would have been an effort in futility, the first step needed to be beginning the national conversation by recognizing that a problem existed, and (3) those who felt the plight of African Americans was beyond repair and that the government was wasting its time attempting to fashion a remedy to the situation.⁶

However, despite declining to offer specific policy solutions that would begin the process of ameliorating the economic and social chasm that separated white and African Americans, the report’s last sentence served as a portent of the actions that would be forthcoming in the country, stating definitively, “[t]he policy of the United States is to bring the Negro American to full and equal sharing in the responsibilities and rewards of citizenship. To this end, the programs of the Federal government bearing on this objective shall be designed to have the effect, directly or indirectly, of enhancing the

⁵Ibid.

⁶Ibid.
stability and resources of the Negro American family.”\footnote{Ibid.} Initially, the report was intended only to be distributed internally to support the Administration’s ‘war on poverty’ agenda, but the Johnson Administration later made the decision to distribute the report to the press and to the general public. Upon its release, Moynihan, who later went on to serve as the U.S. Ambassador to the United Nations in addition to being a four-term senator from New York, was largely criticized for crafting a report that was perceived by many as being too paternalistic towards African Americans.\footnote{Daniel Geary, \textit{Beyond Civil Rights: The Moynihan Report and Its Legacy} (Philadelphia, PA: University of Pennsylvania Press, 2015), 148.} Alternatively, many scholars assailed the report’s critique of the degradation of the nuclear family in the African American community, claiming that Moynihan had engaged in ‘victim blaming’ instead of placing more of an onus on society for the sustained oppression of African Americans.\footnote{Ken Gewertz, “Four decades later, scholars re-examine the Moynihan Report,” \textit{Harvard Gazette}, October 4, 2017, accessed May 11, 2016, http://news.harvard.edu/gazette/story/2007/10/four-decades-later-scholars-re-examine-%E2%80%98moynihan-report%E2%80%99/.
} Following the enactment of the Civil Rights Act of 1964, which, among other things, ended segregation in public accommodations and prohibited workplace racial discrimination, the Johnson Administration endeavored to pursue a more comprehensive public policy program that would promote upward economic and social mobility for historically disadvantaged minorities. This initiative would come to be known as ‘affirmative action’ and would be adopted throughout the federal government and in the private sector. While many Americans may credit the Johnson Administration with
developing affirmative action, the concept was actually first contemplated by the Kennedy Administration. In 1961 Kennedy first introduced the concept of remedial government action on matters related to race and affirmative action programs by issuing an Executive Order that established an official presidential committee focused on equal employment opportunities.\(^{10}\)

Pursuant to the action taken by Kennedy, Johnson, who was vice-president at the time, was charged with chairing the newly formed President’s Committee on Equal Employment Opportunity. At the committee’s first meeting, which occurred on April 11, 1961, Johnson made clear that the Committee intended to be forward-thinking in its approach to crafting policies that would effectuate opportunity equality among the government workforce, saying, “[t]he President’s Executive Order is framed not merely in the negative terms of avoiding discrimination, but in the positive direction of taking steps to make sure that all persons . . . have a full opportunity to participate in [government-funded] employment.”\(^{11}\)

Under Johnson’s leadership, the Committee was successful in promoting greater minority workforce participation by brokering Plans for Progress (PFP) agreements with

\(^{10}\)Executive Order 10925, which was signed by President Kennedy on March 6, 1961, established the President’s Committee on Equal Employment Opportunity, which was tasked with examining policies related to government policies and employment practices in order foster an environment that would allow for “full equality and employment opportunity.” In addition, the order required private entities, when fulfilling a contract with the federal government, to take “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”

the nation’s largest government contractors, which were individually tailored plans that delineated the steps each employer would take to increase the number of minorities they employed as well as their efforts to promote sustained equal opportunity.\textsuperscript{12} In just a little over two years, the Committee developed one hundred fifteen PFP agreements, which increased the number of minority employees in PFP companies by twenty-three-and-a-half percent and increased minority management positions by forty-six-and-a-half percent.\textsuperscript{13} The Civil Rights Act of 1964 replaced the Committee with the Equal Employment Opportunity Commission (EEOC), which is a permanent federal agency tasked with enforcing federal nondiscrimination laws in addition to developing initiatives to promote greater workplace participation for groups that are disproportionately underrepresented.

With the EEOC functioning as the dedicated federal agency on employment nondiscrimination matters, Johnson, now President, turned his attention to broadening the mission of the Equal Opportunity Employment Committee that he once chaired. To launch this initiative, Johnson relied heavily upon the Moynihan Report’s findings, criticisms notwithstanding, and chose the 1965 commencement address at Howard University, a historically black college located in Washington, D.C., as being the ideal location to publicly convey his intentions. In his address, Johnson made the case for the underlying logical justification for affirmative action programs, saying, “[y]ou do not take a person who, for years, has been hobbled by chain and liberate him, bring him up to

\textsuperscript{12}Ibid., 49.

the starting line of a race and then say, you are free to compete with all the others,’ and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.”

However, the concept of colorblind economic fairness permeated Johnson’s address. While there is no doubt that centuries-old economic repression of minorities provided the impetus for the development of affirmative action policies, Johnson made clear that he was seeking to advance a forward-looking policy that would provide the economically repressed of all races with enhanced opportunities for development. This is due to the fact that the root cause of socioeconomic stagnation was economic repression and its self-replicating cycle, not race, though in many instances they go hand in hand, especially during the 1960s. To Johnson, economic and political upward mobility was largely dictated by assessing the totality of the circumstances that were present in an individual’s life, saying, “ability is stretched or stunted by the family that you live with, and the neighborhood you live in--by the school you go to and the poverty or the richness of your surroundings.” Indeed Johnson thought his proposed affirmative action program should have broad application because he “knew that not all blacks lived in disadvantaged families and bad neighborhoods or attended deficient schools, and that some whites did.”

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15 Ibid.

In the wake of Johnson’s address, colleges and universities across the country began to revisit their admissions policies, allowing minority candidates to receive more favorable consideration based upon their race. Yet, it should be argued that the decision by colleges and universities to adopt race-only affirmative action admissions policies was voluntary and inapposite with economic realities of the time as well as Johnson’s original intent for affirmative action programs. Additionally, the adoption of such admissions policies did not serve as a panacea that cured, or even quelled, the racial tensions that were present in the United States during the 1960s as just two years after Johnson’s address at Howard University and the adoption of affirmative action policies, riots erupted in cities across the country protesting the two-tiered society that persisted in the United States.

In response to the disturbing rash of violence, which largely erupted along racial lines, President Johnson issued an Executive Order to establish the National Advisory Commission on Civil Disorders which was tasked with investigating the riots’ root causes and for formulating recommendations on what the government could do to avert future violent outbursts.17 The eleven-member commission, which was chaired by then Illinois Governor Otto Kerner Jr., also included New York City Mayor John Lindsay, and Roy Wilkins who, at the time, was the Executive Director of the National Association For the Advancement of Colored People, a major non-profit organization dedicated to promoting economic and social equality for minorities.

The Commission spent seven months investigating the circumstances that gave rise to the race riots of the 1960s and similar to the aforementioned Moynihan Report, the

Commission found that the disparate economic conditions that existed amongst the races was the precipitating factor that led to the violent outbursts. To emphasize this point, and illustrate the desperation largely felt by economically disadvantaged minorities, the Commission summarized its findings by bluntly stating, “[t]his is our basic conclusion: our nation is moving toward two societies, one black, one white--separate and unequal.”\textsuperscript{18}

However, while the Commission was undoubtedly highly critical of the widespread racism that permeated the country at the time, it was more concerned with the resulting self-replicating poverty that many minorities found themselves living in and the sense of helplessness that such a socio-economic status breeds. In fact, the Commission reported a deep-seeded anger existed amongst economically disenfranchised members of the minority community, due in large part to the “unfulfilled expectations” of the societal change that was envisioned to flow from the public policy initiatives associated with the Civil Rights Movement, including affirmative action programs.\textsuperscript{19}

While much of the Committee’s report focused on the ongoing struggle of the African American community, it also emphasized that economic and societal disfranchisement was not limited to one particular race. Rather, a combustible, self-perpetuating sense of hopelessness could just as easily be felt by economically disenfranchised white Americans, despite the fact that disfranchisement was not as widespread in the white community as it was amongst minorities. Nevertheless, the Committee opined, “[t]he] nation is confronted with the issue of justice for all its people – white as well as black, rural as well as urban,” and it was incumbent on the government


\textsuperscript{19}Ibid., 3.
and society to address ensure that all citizens, regardless of race, had a cognizable path to social and economic advancement. In summation, the Committee found that the manifestation of violence was, “more apt to be a product of social and economic class than of race.”

Despite this compelling evidence, which underscored that the opportunity chasm that existed between middle to upper class Americans and those living in poverty was the primary root cause of social strife and the impetus for affirmative action programs, colleges and universities continued to offer applicants with supplementary favorable consideration using a race-based paradigm. Over the approximately fifty plus years since colleges and universities began factoring race into their admissions policies, such policies have been challenged both in the court of public opinion and in the federal courts; a complete examination of the legal challenges to race-based admissions policies will be examined in the subsequent chapter.

It should be noted that in the time since race-conscious admissions policies were implemented, the social standing of African Americans and minorities has improved substantially. According the Department of Education’s National Center for Education Statistics, the percentage of Hispanic students enrolled at degree-granting institutions more than tripled from four percent to fifteen percent between 1976 and 2012. Similarly, the percentage of African American students enrolled at post-secondary institutions

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20 Ibid., 13.

21 Ibid.
increased from ten percent to fifteen percent during the same time period. Resultantly, minorities have seen positive economic yields over the past five decades thanks to increased household incomes and less unemployment, though on average, the black or Latino family in the U.S. has a household income that is still about twenty thousands dollars less a year than the average white American family.

But despite this progress, it is evident that much is left to be done as African Americans are still twice as likely to be unemployed, three times as likely to live in poverty and an astonishing six times as likely to be incarcerated as compared to white Americans. In addition, a closer examination of the admissions statistics related to minority post-secondary students also reveals some troubling data. While it is indisputable that the number of minority students enrolled in colleges and universities has risen steadily over the past five plus decades, it is important to fully examine the socioeconomic makeup of these students. In essence, the fundamental question that needs to be addressed is: do colleges and universities, especially selective ones, predominately admit middle to upper class minority students in order to maintain an unwritten diversity quota and preserve their accreditation, which could be at risk should the accreditors determine that the particular post-secondary institution does not meet its diversity criteria. In fact, in a study of enrollment figures at twenty-eight selective U.S.

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24 Sheryll Cashin, Place Not Race (Boston, MA: Beacon Press, 2014) 23.
colleges, Derek Bok and William Bowen, former presidents of Harvard and Princeton Universities, found that eighty-six percent of enrolled African American students came from either middle to upper class economic backgrounds.\textsuperscript{25} Such data is completely incongruent to the spirit of affirmative action policies, which were intended to ensure that the economically disadvantaged were afforded the optimal opportunity to progress in society.

The findings of Bok and Bowen do not appear to be a statistical anomaly, but rather provide credence to the notion that a college education is still somewhat of a status symbol; there is a direct correlation between a student’s economic affluence and the prominence of the institution they attend. The reasons underlying low-income students’ propensity to attend less selective institutions is multi-faceted as they may be not be able to afford the tuition generally charged by highly ranked schools, they may be academically unprepared on account of substandard public schools or they may not receive the proper guidance or encouragement from family members or overburdened school officials.

Whatever the case may be, for the low-income students who choose to pursue a post-secondary education, many elect to attend institutions that limit their upward social mobility or alternatively do not provide them the support they need. This reality was highlighted by the Obama White House as evidence of the need to change the current college matriculation paradigm, noting, “[r]elative to their high-income peers, low-income students are less likely to attend colleges and universities that give them the best chances of success. Too few low-income students apply to and attend colleges and

\textsuperscript{25}William Bowen and Derek Bok, \textit{The Shape of the River} (Princeton University Press, 1998), 49.
universities that are the best fit for them, resulting in a high level of academic undermatch – that is, many low-income students choose a college that does not match their academic ability.”

Data from the U.S. Census Bureau, which charted post-secondary enrollment over a twenty-year period, buttresses the White House’s position as the Bureau’s data illustrates that the overall enrollment gap between students from high to moderate income families and low income remained basically unchanged over a two decade period, despite the application of affirmative action programs. Overall, sixty-six percent of American high school students enroll in a post-secondary education program immediately following high school graduation. However that percentage plummets for low-income students as over seventy percent of high school graduates from low-income families fail to enroll in post secondary education programs following high school. 

Yet while the overall percentage of low-income students attending four-year degree granting institutions is remarkably low, the number of low-income students attending selective colleges and universities is alarmingly low; an examination of the number of matriculants at various institutions receiving Pell Grants, which are financial awards given by the Department of Education to economically disadvantaged students, illustrates this postulate. At elite universities such as the University of Chicago and Yale, the number of students receiving Pell Grants generally hovers around ten to fifteen percent of the student body. Interestingly, there is an inverse correlation between an

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institution’s academic approbation and the percentage of students who are economically disadvantaged. At well-respected, though not elite institutions, such as the Ohio State University and Indiana University Bloomington approximately twenty percent of incoming students receive Pell Grant assistance. Whereas at lesser regarded schools such as Keystone College, a less selective private college in northeastern Pennsylvania, the percentage of the student body who are economically disadvantaged skyrockets with approximately sixty percent of students receiving Pell Grant assistance.\textsuperscript{28}

If matriculating at the nation’s most selective colleges and universities is viewed by the economically disadvantaged as being unattainable, the result, whether manifested acutely or subconsciously, will be mentally injurious to these students. This only perpetuates the socioeconomic stratification that has existed in the country for decades, if not centuries. A college admissions paradigm that continues to stymie the economically disadvantaged, creating de facto second-class citizens, could be accurately characterized as maintaining the twenty-first century’s ‘segregation legacy’ which is a term coined by Kahlenberg to describe the futile struggle African Americans faced in the 1960s to advance economically.\textsuperscript{29} Kahlenberg’s theory holds that African Americans were largely unable to attend college since many were poor and undereducated, which placed entry into professions such as law or finance out of reach, perpetuating the middle and upper classes’ dominance of these influential industries.

In the majority opinion in the case \textit{Grutter v. Bollinger}, infra, Justice Sandra Day O’Connor echoed Kahlenberg’s concern and lamented such a scenario as she noted the


high number of U.S. Senators and federal judges who attended elite law schools, which highlighted that in many cases, simply attending college is not enough. Rather, attending the right college or university often serves as a prerequisite for many individuals to be accepted into the upper echelon of American society; this tenet especially rings true in the legal or political professions where many firms won’t even consider applicants who did not graduate from one of a select few prestigious law schools and Ivy League degrees are found in abundance amongst high ranking executive branch officials or U.S. Senators. In Justice O’Connor’s estimation it was of paramount societal importance for all individuals, regardless of economic or racial background, to have a legitimate belief that they too will have the opportunity and means to attend an institution that could offer a pathway for significant social advancement, saying, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”

Another concern that has been voiced regarding the current admissions paradigm is that colleges and universities, in admitting less qualified students of color, could in fact be setting these students up for failure instead of future academic and career success. It has been demonstrated that at many upper-tier colleges and universities, students of color often lag behind their fellow classmates, at least initially. In terms of grade point average and enrollment retention, about half of black college students rank in the bottom twenty percent of their classes and minorities make up the vast majority of the bottom ten

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percent of law school graduating classes.\textsuperscript{31, 32} In addition, data suggests that black law school graduates are four times as likely than their white counterparts to fail state bar exams, which could potentially spell doom for a legal career before it even gets off the ground.\textsuperscript{33}

Such statistics may in fact serve to perpetuate feelings of inferiority amongst minority students while simultaneously stoking resentment and racial tensions in students who failed to gain admission to an institution and may feel as though ‘their’ would-be spot was unfairly given to an underserving minority student. Such a scenario was a paramount concern for African American Supreme Court Justice Clarence Thomas who went out of his way to comment on colleges and universities’ predilection to consider race in the admissions process, calling the practice a ‘social experiment on other people’s children.’\textsuperscript{34} Thomas lamented that the paradigm was not only legally infirm but that it also perpetuated societal defects as well, saying, “[i]nevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race. These programs stamp

\begin{footnotesize}


\textsuperscript{33}Ibid.

\end{footnotesize}
minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences."  

Indeed one could see this postulate play out on a daily basis by visiting the anonymous messages boards of higher education discussion websites such as College Confidential or Top Law Schools where users congregate to share information related to the higher education admissions process. Oftentimes minorities face ridicule on these websites for having more robust admissions prospects than their non-minority peers despite, in some cases, having lower standardized test scores and other academic qualifications. In fact, minorities are even labeled with a special moniker on these websites, ‘URM,’ which is short for ‘underrepresented minority.’ Seeing such racial degradation displayed for the entire world online may serve to deepen to feelings of inadequacies amongst some minorities and these on-line biases could follow minority students from cyberspace to their college campuses. If colleges and universities excised race from the admissions process and substituted socioeconomic status in its place, they would actually be subjecting their minority students to less derision on campus. This is due to the fact that students wouldn’t be able to assume that, based solely upon a physical characteristic, a fellow classmate gained an unfair advantage in the admissions process and thus is likely not on the same level intellectually.

It should be noted that there is no reason to believe that academic performance statistics, similar to those described above, would not manifest for economically disadvantaged would-be matriculants whose admission prospects are bolstered under the proposed revised admissions paradigm. Therefore, in order to remain fidelitous to their proffered imperative of advancing the socioeconomic standing of minorities and the

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35 Ibid., 373.
economically disadvantaged, colleges and universities must ensure that applicants, whose admission prospects are aided through remedial admissions programs, are put in a position where they can succeed and eventually thrive both academically and socially. It is imperative that institutions do not adopt a ‘sink or swim’ attitude in regards to applicants that arrive on campus after having been provided with enhanced admissions prospects by the college or university. Failure to do so will only continue to stifle the economically disadvantaged while wealthier students, who are generally more academically well-prepared thanks to having attended elite high and prep schools, are able thrive in college which generally translates into post-college career success.

This was precisely the point the Obama White House attempted to convey through the issuance of a January 2014 comprehensive report aimed at increasing low-income students’ access to higher education. Framed as a ‘call to action’ the report noted, “[l]ow-income high-school students are also less likely to take courses that prepare them for college,” in addition to very rarely being offered advanced placement courses and “are less likely to complete a core curriculum than students from higher-income families.” In order to place less prepared students on a pathway for success, the report provided colleges and universities with several recommendations such as regular academic monitoring of students during the course of their college careers, offering additional remedial courses, and operating ‘bridge the gap’ programs that would

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acclimate students to the demands of college prior to their arrival on campus.\textsuperscript{37} Encouragingly, many colleges and universities have begun to offer bridge the gap style programs for students who may be less academically prepared than their fellow classmates, with some institutions even making the offer of admission contingent upon enrollment in the program. Studies have demonstrated that students who participate in bridge the gap styled programs outperform their classmates in core first-year college classes, paving the way for future academic success.\textsuperscript{38}

Ultimately, colleges and universities must balance their duty to maintain their institutional academic integrity while simultaneously attempting to facilitate societal change, when possible, by admitting disadvantaged applicants who otherwise might not have the opportunity to pursue post-secondary educational opportunities. Achieving the ideal balance between the sometimes-competing interests is difficult, but it is imperative for colleges and universities to endeavor, whenever possible, to further the public interest by admitting economically disadvantaged students and ensuring they are given the best chance for success. However, as demonstrated, the current admissions paradigm is failing minority students by thrusting them into academic environments that they are ill equipped to handle while simultaneously turning a blind eye to the students who need and deserve assistance the most, those who come from economically distressed backgrounds. If the outcome and policy failures of race-based admission policies were not enough, the practice has consistently come under exacting scrutiny from the federal judiciary based

\textsuperscript{37}Ibid.

upon the fact that courts are loathe to uphold government policies that expressly take race
into account, given the country’s sordid history on the subject.
CHAPTER 3

LEGAL CHALLENGES

Colleges and universities’ use of race-conscious admissions policies has also drawn the attention of legal scholars and on several occasions, the United States Supreme Court, which recognizes the constitutional and social infirmaries that can arise when government-backed institutions explicitly provide preferential treatment to individuals based upon race. Indeed the question of what the Constitution permits the government to do in order to promote equality and provide redress for past mistreatment is one the Court has struggled with for nearly four decades, and in recent years has garnered increased attention and skepticism from the Court.

The legal challenges to these polices are generally predicated on the Fourteenth Amendment’s Equal Protection Clause, relevant provisions of state law, and Title VI of the Civil Rights Act of 1964 which provides, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”1 Yet, despite the fairly straightforward langue of Title VI questions about the statute’s scope continued to persist and on June 23, 2000 then President Bill Clinton endeavored to further refine Title VI by issuing an executive order, which stipulated that the statute was to encompass educational and training programs

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conducted by the federal government.\textsuperscript{2} Contained within an explanatory clause of the underlying executive order, President Clinton made specific mention of the Administration’s understanding that Title VI permitted the application of affirmative action policies, noting, “[t]his order does not apply to, affect, interfere with, or modify the operation of any otherwise lawful affirmative action plan or program.”\textsuperscript{3} Yet notwithstanding such a statement by the President, if a court determined that the Constitution or the Civil Rights Act did not allow for race-based affirmative action programs, the Administration’s statement would be rendered legally ineffectual.\textsuperscript{4}

The first time the Court addressed the issue of race-based admissions polices came in 1977 when it heard a challenge to the University of California at Davis Medical School’s dual track admissions policy. The case, \textit{Regents of the University of California v. Bakke}, was brought to the Court by a white male who had twice applied to the medical school only to be rejected on both occasions. At issue was the medical school’s admissions policy, which operated under dual tracks, a ‘regular’ admissions program and a ‘special’ program that was reserved for ‘disadvantaged minorities.’\textsuperscript{5} Applicants who utilized the special admissions program were subjected to a less rigorous admissions review in comparison to candidates who applied to the school via the regular program. In addition, the university reserved 16 spots in their class of 100 for students applying via


\textsuperscript{3}Ibid.


the special program and no white economically disadvantaged students were admitted under the program.\(^6\)

The applicant brought suit challenging the medical school’s use of the special admissions program under the Fourteenth Amendment, the California Constitution and Title VI of the Civil Rights Act. As previously mentioned, the applicant was twice denied admission to the medical school, despite the fact that he had a significantly higher grade point average and Medical College Admission Test score than some who were offered admission via the special admissions program. In fact, on the applicant’s first attempt to gain entry to the medical school, he was rejected despite the fact the medical school still didn’t fill the spaces it had set aside for special program applicants.\(^7\)

In turning to the merits of the legal questions presented by the case, the Court found that in the context of affirmative action programs, the prohibitions of Title VI of the Civil Rights Act were ambiguous. As such, the Court reasoned that Congress undoubtedly intended for the Civil Rights Act to comport with the Fourteenth Amendment, and thus to resolve the legality of race-based admissions programs, the Court would have to resolve the question under the Fourteenth Amendment’s Equal Protection Clause.\(^8\) In making this determination, the first issue the Court would have to resolve is what level of judicial review does the issue necessitate.

\(^6\)Ibid., 266.

\(^7\)Ibid., 277.

\(^8\)Ibid., 287.
Under the Fourteenth Amendment cases are generally evaluated under the strict scrutiny level of review or the far less stringent rational basis standard.\textsuperscript{9} If a court decides that a case should proceed under the rational basis level of review, it will look to see if the government’s action is rationally related to advance a legitimate governmental interest; the party challenging the government’s action has the burden of proving that a legitimate governmental interest is either not being sought or that the action is not rationally related to the advancement of a permissible goal. Conversely, under the strict scrutiny standard the burden is on the government to prove that its action is the least restrictive means necessary to meet a compelling governmental interest. Should the government fail to prove either criterion, the action in question will be declared unconstitutional.

Supreme Court Fourteenth Amendment Equal Protection Clause precedent dictates when the government action makes a distinction based upon race, it is making a ‘suspect’ classification and that action must be subject to strict scrutiny analysis.\textsuperscript{10} In the \textit{Bakke} case the Court reasoned that since the California medical school was making a distinction based solely upon race, the case should be examined using the strict scrutiny standard.\textsuperscript{11} Historically, federal courts have been loath to provide judicial affirmation to policies that make distinctions based upon race, upholding such policies little more than a

\textsuperscript{9}For cases where a governmental policy makes a distinction based upon gender, the courts will employ the intermediate scrutiny test, which tracks very closely to the strict scrutiny analysis.

\textsuperscript{10}\textit{See, Korematsu v. United States}, 323 U.S. 214 (1944).

quarter of the time. The exacting posture taken by the Court in strict scrutiny cases prompted noted constitutional law scholar, the late Gerald Gunther to famously remark about the standard, “strict in theory, fatal in fact.”

Justice Lewis Powell, writing for the Court in *Bakke*, recognized the peril facing both the government and the courts when either entity attempted to fashion remedies for past discrimination, stating:

. . . the white “majority” itself is comprised of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment . . . There is no principled basis for deciding which groups would merit “heightened judicial solicitude” and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups.

Yet in spite of its own exhortation to withdraw from matters relating to discrimination, the Court recognized the government’s substantial interest in ameliorating the *effects* of past discrimination. The Court’s decision to include the word ‘effect’ in its justification for finding a legitimate state interest in remedying past discrimination is significant as it implies that minorities have been tangibly harmed from past mistreatment, and the government has a significant interest in remedying these harms, which are often economic in nature that result from long-standing prejudices. However,

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15 Ibid., 308.
Justice Powell, who wrote the lead opinion in *Bakke*, warned colleges and universities against implementing programs that would lead to a predetermined racial makeup, saying, "[p]referring members of anyone group for no reason other than race or ethnic origin is discrimination for its own sake."16

Though in *Bakke*, the Court declined to examine whether the medical school’s admissions policy was a legitimate tool to advance the government interest in remediying past discrimination, finding that this was not the medical school’s intent when it crafted its policy. Rather, the Court turned its attention to the school’s claim that its ‘special’ admissions policy was adopted as a means to achieve a diverse student body, which the Court found to be a compelling, constitutionally permissible goal. Central to the Court’s reasoning was the confluence of colleges’ and universities’ academic missions and the First Amendment’s guarantees to freedom of speech and expression. Yet the Court was quick to acknowledge that racial diversity, while important, was but one of several considerations a school should assess when attempting to engender academically stimulating diversity, stating, “[e]thnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”17

After acknowledging that the promotion of diversity in academic settings was a compelling state interest, the Court’s task was to determine whether the medical’s special admissions program, which set aside 16 spots in its incoming class for disadvantaged minorities, was sufficiently narrowly tailored for the purposes of the Fourteenth

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16 Ibid., 307.

17 Ibid., 314.
Amendment. On this point, the Court found the medical school’s race-based admissions policy to be constitutionally infirmed due to its sole reliance on race in so far as it maintained a minimum racial quota system. In fact, the Court, in declaring the special admissions policy to be unconstitutional, remarked that the school’s sole focus on race may actually hinder diversity in the academic setting, remarking, “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single, though important, element. Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder, rather than further, attainment of genuine diversity.”

In its ruling, the Court did not foreclose colleges and universities from considering race in their admissions processes. Rather, the role of race or ethnicity in the admissions process, according to the Court, was limited to the characteristics possibly being considered a ‘plus’ factor, provided that such favorable consideration would contribute to increased educational pluralism. However, in the wake of the Bakke decision, proponents and opponents of race-conscious admissions policies were vexed, simultaneously heralding and assailing the Court’s decision. The American Civil Liberties Union (ACLU) estimated the Court’s newly announced Equal Protection Clause standard would preserve, "90 percent or more of existing affirmative action programs." Despite the organization’s confidence that race-conscious affirmative action admissions

18Ibid., 315.

19Ibid., 317.

programs would survive judicial scrutiny, then ACLU chairman Norman Dorsen was concerned that even the specter of litigation would have a chilling effect on such policies and would "sap the will" of the administrators responsible for fostering diversity at colleges and universities.\(^{21}\)

Ultimately Dorsen’s fears did not come to fruition as an analysis of minority enrollment figures at colleges and universities, taken ten years after the Court’s decision in *Bakke* was handed down, illustrated that the decision was not the death knell for affirmative action nor did it have a significant effect on the racial and ethnic makeup of college and universities as there was little to no change in minority enrollment figures when compared to the years preceding the case being brought before the Court.\(^{22}\)

Following *Bakke*, it would be another twenty-five years before the Court would revisit the issue of race-conscious admissions policies when a pair of cases came to the Court that challenged the use of race in University of Michigan’s undergraduate and law admissions programs. As will be illustrated, the cases evince the Court’s growing uneasiness with allowing colleges and universities to incorporate race in their admissions policies and may foretell the posture the Court may take in the future.

The first case, *Gratz v. Bollinger*, was brought by two Caucasian in-state applicants who were denied admission to the University of Michigan’s College of Literature, Science, and the Arts, despite being classified as “well qualified” and

\(^{21}\)Ibid.

“qualified” pursuant to the college’s written admission guidelines. At issue for the petitioners in the case was the University’s policy of automatically awarding twenty points of the one hundred points necessary to guarantee admission to applicants the University considered to be “underrepresented minorities.” Specifically the petitioners argued the University’s policy unconstitutionally relied solely on race without giving any regard to an applicant’s economic status. Acting in accordance to this admissions policy, the University acknowledged that “virtually every” qualified underrepresented minority gained admission to the University while many similarly qualified Caucasian students did not.

Once again, the University’s admissions policy was challenged under the Fourteenth Amendment’s Equal Protection Clause as well as Title VI of the Civil Rights Act. To resolve the constitutional question, the Court maintained precedent and employed the strict scrutiny test, attributable to the state university’s use of a policy that makes a racial classification. According to the Court, the underlying justification for employing the most exacting level of review for race-conscious cases is rooted in the notion of justice as it observed, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny.”

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24 It should be noted that the University later revised its admissions policy to incorporate, *inter alia*, applicants’ socioeconomic standing and life challenges, though such revision does not inoculate its prior race-based points policy being examined by the Courts.

25 Ibid.

Applying the strict scrutiny test the Court determined that the University’s admissions policy was unconstitutional on account that its automatic awarding of points, predicated solely on race, was not narrowly tailored to meet the University’s stated goal of creating a diverse student body. In the Court’s estimation Michigan’s admissions policy ran afoul of the precedent set in *Bakke* because it did not allow for applicants to be examined on an individual level to determine how applicants could potentially add to the diversity of the student body, racial or otherwise.27 Interestingly, in its opinion the Court declined to comment whether the attainment of racial diversity in colleges and universities was a compelling state interest for the purposes of satisfying the Fourteenth Amendment.

*Gratz’s companion case, Grutter v. Bollinger,* which was decided on the same day by the Court, ironically examined the constitutionality of the University of Michigan’s Law School admissions policy. Unlike the admissions policy seen in *Gratz,* which employed a rigid race conscious point system, the law school’s policy utilized a holistic approach to its admissions examination. Notably, the law school’s written policy required admissions officers to eschew rigid formulas in their evaluations, and instead directed them to evaluate candidates on an individual basis, taking into account an applicant’s academic credentials and “soft variables” that could contribute to the diversity of the incoming class, enriching the academic environment. The law school did not place restrictions on what soft variables a counselor was permitted to employ in the process. However, it made clear that race and ethnicity should play a significant role in the admissions evaluation, saying that priority should be given to “racial and ethnic diversity

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27Ibid., 271.
with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.”

The law school’s commitment to providing minorities with a racial preference was illustrated by the testimony provided at the district court level by a statistician who testified that an applicant’s minority status was “an extremely strong factor in the decision for acceptance,” and that minority applicants “are given an extremely large allowance for admission” as compared to applicants who did not meet the law school’s definition of underrepresented minority. The law school did not dispute the statistician’s postulate, instead justifying the policy by contending that absent this racial preference, the rate of minority admittance to the law school would drop from thirty-five to approximately ten percent.

After having laid out the case’s pertinent facts, the Court turned its attention to determining whether the law school’s race-conscious admissions policy satisfied both prongs of the strict scrutiny test that had been established under Fourteenth Amendment jurisprudence; for the first time in an Equal Protection Clause higher education cases, the Court found that the challenged race-conscious admissions policy did pass the strict scrutiny test and was thus constitutional. Despite finding the policy to be constitutional, the Court’s endorsement was tepid. In resolving the question whether the government had a compelling interest in promoting a diverse student body, the Court opined, that

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29 Ibid., 321.
given colleges’ and universities’ unique place in our society, the promotion of racial diversity was a compelling state interest so as long as it advanced the university’s educational mission. In reaching this conclusion, which essentially amounts to a restatement of Bakke, the Court found data that was offered at trial, which illustrated the societal benefits derived from diversity to be very impactful. Buttressing the empirical evidence was testimony offered by leaders from a cross-section of industries, including the military, that extolled the benefits of diversity.\(^{30}\)

In making its determination that the promotion of racial diversity was a compelling governmental interest, the Court also took heed of the law school’s argument that maintained colleges and universities must be viewed as being accessible to minority children so that they do not grow up feeling that they only have limited upward societal mobility. The U.S. Department of Justice submitted a brief to the Court in furtherance of this postulate, articulating the government’s interest in maintaining race-conscious admissions policies, stating, “ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective . . . nowhere is the importance of such openness more acute than in the context of higher education.”\(^{31}\) Unprompted, the Court advanced the aspirational justification for race-conscious admissions policies one step further, highlighting the number of elected leaders who possess law degrees and stated, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is

\(^{30}\)Ibid., 331.

\(^{31}\)Ibid., 332.
necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

However, as was seen in Bakke, the advancement of a compelling governmental interest on its own is not sufficient to pass constitutional muster. The policy must also be the most narrowly tailored means the government could employ to achieve the stated goal. In other words, the method employed by the government must be one that is the least discriminatory to others while still allowing the compelling governmental interest to be accomplished. In Grutter, the Court repudiated the use of racial quotas or rigid point systems, instead endorsing a holistic method of review where race, among other traits, could be considered a ‘plus factor’ in the admissions process. To that end, the Court found that the law school’s admissions policy that evaluated individual candidates based upon a myriad of different factors, including race, met the definition of narrowly tailored that is required under the Fourteenth Amendment.

It has been asserted that the Court did not sufficiently challenge the law school on potential alternatives to its race-conscious admissions policy, namely lowering its admissions standards to ensure that a greater number of minorities would be able gain admission to the law school without having to be aided by an admissions policy that rewards individuals based upon the color of their skin. Justice Antonin Scalia echoed this point in his dissent in Grutter opining, “Michigan's interest in maintaining a "prestige" law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is.”

Scalia does raise

\[32\] Ibid.

a valid point because in essence what the University of Michigan was asking the Court to do in *Grutter* was to uphold its race-conscious admissions policy, but to do so in a manner that would not threaten its enviable position in the ubiquitous *U.S. News and World Report* rankings. Maintaining a requisite level of nominal prestige provides schools with greater access to prestigious law firms and judicial clerkship opportunities and thus fundraising opportunities.

Ultimately, the Court’s majority opinion did not address whether a state has a compelling interest in maintaining an elite law school, as Justice Scalia insinuated was Michigan’s concern in the case, though the case’s ultimate resolution implies that the judicial system will not force colleges and universities to lower their overall admissions standards in order to admit a greater number of minorities. Yet despite this implication and finding the law school’s admission program to be constitutional, the Court warned that simply eschewing racial formulas or quotas was not enough to make a race-conscious admissions program narrowly tailored. Rather, the Court opined that the constitution requires every application be evaluated on its individual merits and that race should only be one of several factors considered in the admissions process saying:

> That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.\(^{34}\)

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\(^{34}\)Ibid., 337.
Despite the Court’s guidance, the admissions statistics of many colleges and universities, particularly law schools, have cast doubt as to whether race isn’t the predominant factor in their admissions evaluations. It is possible that such admissions outliers are products of the individualized admission approach seen in *Grutter* or quite plausibly they may be attributable to pressure applied on colleges and universities by accrediting bodies like the American Bar Association who have their own vision of education and may punish schools that, in the accreditor’s eyes, are not advancing this vision. For example, early in the year 2000 George Mason University’s Law School was visited by the American Bar Association (ABA) for its normally routine reaccreditation inspection. Yet despite being an established, respected law school in the Washington, D.C. metropolitan region, its accreditation was not renewed.

At issue for the ABA was that in its estimation the law school was "unwilling to engage in any significant preferential affirmative action admissions program," which caused the organization to have “serious concerns” with its admissions policy. As such, the law school’s accreditation was held in abeyance for six years and was not renewed until after the law school saw its minority enrollment figure increase more than threefold and it chartered a ‘minority recruitment council’.35

However, it should be noted that the ABA’s action in this instance came about prior to the Court’s decision in *Grutter*, which defined that, under the Constitution, race should be but one factor, among several, a school may consider when attempting to foster diversity. In the wake of the *Grutter* decision, the ABA revised its diversity requirements.

so that it would judge law schools by ‘the totality of their actions’ in regards to promoting a racially diverse student body. Yet, this policy was still seen by many as overly prescriptive and draconian, which prompted the U.S. Department of Education to scrutinize and ultimately challenge the new standard, though the Department did not end up stripping the ABA of its accrediting privileges. The ABA’s diversity requirement remains a component of the association’s accreditation process, evidenced by its inclusion in its most recent accreditation handbook:

Standard 206. DIVERSITY AND INCLUSION
(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.  

Conspicuously absent from the ABA’s accreditation criteria is a requirement for schools to actively recruit and admit students from disadvantaged economic backgrounds, irrespective of race. Thus while the letter of the law states that a school may consider race in its attempt to foster diversity, the reality is that universities, at least law schools, must factor race into their admissions decisions if they want to survive. For example, many United States jurisdictions require individuals, who are applying for admission to the bar to have graduated from an ABA accredited law school; in states that permit bar

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applications from non-ABA accredited law school graduates, the application process is generally much more arduous for non-ABA accredited law school graduates. Thus if a law school endeavors to provide their students with the best chance for professional success, it will ensure that it is ABA accredited. It is also worth noting that under the precedent set by the *Bakke* and *Grutter* decisions, if the ABA was a state actor its actions would likely be considered unconstitutional under the Fourteenth Amendment since it mandates a de facto racial quota and compels schools to consider race.\(^{37}\)

The Court’s decision to uphold the University of Michigan’s Law School admissions policy should actually be considered the second most important detail to emerge from *Grutter*. Despite the limited circumstantial affirmation of the University of Michigan’s Law School admissions policy, Justice Sandra Day O’Connor, writing for the Court, stated that it was the Court’s expectation, “that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”\(^ {38}\) This exhortation by Justice O’Connor implies that the Court’s approval of racial preferences are rooted, at least in part, in a restorative economic justification since the social benefits yielded by diversity are not time limited. Even the law school acknowledged race’s waning utility in the admissions process saying, "[it] would like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable.\(^ {39}\)

\(^{37}\)Generally, the Fourteenth Amendment only applies in circumstances when action is undertaken by a government actor, not a private entity.


\(^{39}\) Ibid.
Justices Ginsburg And Breyer joined with the majority in finding the law school’s admission policy to be constitutional, but filed a separate opinion to address the Court’s contention that race-conscious admissions policies should be unconstitutional in twenty-five years. It wasn’t that they believed educational affirmative action programs should exist in perpetuity, rather the Justices took issue with the Court expressing such a firm date for the termination of the polices’ constitutionality. Central to the Justices’ concern was that, in their estimation, an incongruence of educational opportunities still existed amongst the races and it was unforeseeable when “genuinely equal opportunity will make it safe to sunset affirmative action,” though the eventual elimination of race-conscious polices was the end society should strive to achieve.  

Once again, reading between the lines, one could glean that economic restitution was among the chief reasons the Justices felt the need to advocate for the continued use of race-conscious admission policies as unequal educational opportunities and resulting inequitable societal standing go hand in hand. However, the Justices were hamstrung in stating that rationale because earlier Supreme Court precedent dictates that the government’s providing a racial preference to provide recompense for previous societal discrimination is not a compelling state interest and thus unconstitutional. Thus, in order to provide the desired social outcome, it is more constitutionally appropriate and equitable for the Justices to insist that, if distinctions are going to be made by colleges and universities in the admissions process, the schools’ focus should be centered upon the

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applicants’ socioeconomic status as such an analysis will not run afoul of the Constitution and will remediate past economic and educational discrimination.42

It didn’t take another twenty-five years for the issue of higher education race-conscious admissions policies to once again reach the Court as it heard Fisher v. University of Texas just nine years after issuing its decisions in Gratz and Grutter. The Court’s decision to reexamine the issue of educational affirmative action so quickly is evidence in and of itself of the Court’s skepticism regarding the constitutionality of such programs.43 At issue in the case was the University of Texas’s conscious consideration of race in the admissions process despite recruiting many minority students via the state’s ‘ten percent’ plan, which was enacted by the Texas state legislature in 1997. Under this plan, Texas high school students who graduate in the top ten percent of their high school class would be guaranteed admission to any public college or university in the state of Texas, including the University of Texas at Austin.44 The ten percent plan is applied uniformly and does not take race into consideration. In fact, minority admissions at the University of Texas at Austin actually rose after the colorblind ten percent plan was put


into force, replacing the University’s previous admissions policy that factored in applicants’ races and ethnicities.\textsuperscript{45}

However, following the Supreme Court’s decisions in \textit{Gratz} and \textit{Grutter}, the University once again began to consider race in the admissions process in addition to being subject to Texas’s ten percent plan law. Consistent with the dictates of \textit{Grutter}, the University did not provide race with a numerical value in the admissions process, but rather considered minority status to be a plus factor in its evaluation.\textsuperscript{46} Not surprisingly, it didn’t take long for the University’s reconfigured admissions policy to find its way to the courts as a white female applicant, who was denied admission to the University of Texas at Austin, brought suit under the Equal Protection Clause of the Fourteenth Amendment, alleging that she suffered a constitutional injury on account of her race.

In defending its decision to once again incorporate the consideration of race in the admissions process, the University represented to the Court that minority admissions attributed to the ten percent plan were insufficient due to the fact that the plan drew students from traditionally segregated (and poor) Texas neighborhoods.

\textsuperscript{45}Ibid.

\textsuperscript{46}Ibid.
This justification drew a strong rebuke from Associate Justice Samuel Alito during the case’s oral argument as he highlighted the incongruity in the argument being advanced by the University as he stated:

Well, I thought that whole purpose of affirmative action was to help students who come from underprivileged backgrounds . . . The top 10 percent plan admits . . . lots of Hispanics and a fair number of African Americans. But you say, well, it’s faulty because it doesn’t admit enough African Americans and Hispanics who come from privileged backgrounds. If you have an applicant whose parents are -- let's say one of them is a partner in your law firm in Texas, another one is a corporate lawyer. They have income that puts them in the top 1 percent of earners in the country, and the parents both have graduate degrees. They deserve a leg-up against, let's say, an Asian or a white applicant whose parents are absolutely average in terms of education and income?"  

Consistent with the educational affirmative action Equal Protection Clause cases discussed above, the Court in Fisher held that the University’s admissions policy should be examined under the strict scrutiny standard. However, the Court did not consider the merits of the case due to the fact that it found that the United States Court of Appeals for the Fifth Circuit erred in its application of the strict scrutiny standard as that court held that an applicant could only challenge “whether [the University’s] decision to reintroduce race as a factor in admissions was made in good faith,” and that deference should be given to the University. This misapplication of established precedent and the strict scrutiny standard caused the Supreme Court to remand Fisher back to the Fifth Circuit so that it could be adjudicated under the appropriate legal standard.

The Fifth Circuit, after having received the case once again, ruled in favor of the University saying that it is “settled that universities may use race as part of a holistic

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47 United States Supreme Court, Oral Argument Transcript, Fisher v. University of Texas Oral Argument, No. 11-345, 44, October 10, 2012.

admissions program where it cannot otherwise achieve diversity.” In its view the University was presented with a dearth of options, with the exception of considering race in the admissions process, which would allow it to yield a “critical mass” of incoming diverse students. The purported want of race-neutral alternatives was sufficient enough for the Court to deem the University’s use of race in its admissions decisions to be narrowly tailored enough so as to comport with the Bakke and Grutter decisions. However, as will be seen, at the case’s reconsideration at the Supreme Court, some Justices did not seem overly deferential to the University on this point.

A little over a year after the Fifth Circuit reissued its opinion in Fisher, the case was once again argued before the Supreme Court. Yet during the course of the arguments, some of the Justices lamented the Fifth Circuit’s denial of a motion that would have remanded the case back to the district court so that a more complete evidentiary record could be complied and examined. In fact, Justice Kennedy remarked, “[i]t’s as if nothing has happened [in the three years since the Court first heard that case].” In essence what the Justices were interested in examining were the potential race neutral admission options available to University, which would allow it to

49 Fisher v. University of Texas, No. 09-50822 (5th. Cir. 2014).

50 Ibid.

51 Ibid.

52 In the U.S. legal system, trial courts, district courts at the federal level, are the venues where evidence is presented and considered by the judge or jury when rendering a verdict. Conversely, appellate courts such as the federal circuit courts and the Supreme Court are the bodies that evaluate whether the lower courts correctly applied the law, but do not engage in the consideration of evidence de novo.

meet its diversity goals without the need to resort to employing race in the admissions process.

Indeed the arguments advanced in the 2015 iteration of *Fisher* were substantially similar to those put forth in 2013. For instance, Justice Alito once again challenged counsel for University on the intended function of affirmative action programs, saying “[w]asn't that the – the reason for adopting affirmative action in the first place because there are people who have been severely disadvantaged through discrimination and—and lack of wealth, and they should be given a benefit in admission?”54 The University did not dispute Alito’s postulate, but its reply lends credence to one of the arguments I am seeking to advance in this thesis, namely that universities are misapplying affirmative action programs and such policies should be abolished in their current form.

According to Texas, minority matriculation from students who gained admission via the state’s ten percent plan is insufficient to meet the University’s desired “critical mass” of diverse students. The number of minority students admitted under the ten percent plan was not the issue for the University, but rather the fact that minority students admitted under the ten percent plan came from largely underprivileged neighborhoods and underperforming schools.55 To put it another way, the University’s argument before the Court was that the supplemental consideration of race in the admissions process was necessary in order to admit minorities from more affluent backgrounds as opposed to those who are admitted under the ten percent plan; such a policy justification runs completely counter to the intended purpose of affirmative action. In essence what the

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54Ibid., 44.

55Ibid.
University is asking the Court to do is to allow it with the ability to assemble a ‘designer’ incoming class by ensuring that it has a sufficient number of middle-class and wealthy minorities to offset the indigent students admitted under the ten percent plan.

In the argument, the University was also challenged on what colorblind programs it considered as a potential avenues to boost its racial diversity, other than considering race in the admissions process. As noted previously, the Fourteenth Amendment strict scrutiny analysis only permits schemes that yield the least amount of entanglement with race as possible in order to achieve the government’s end goal; in response, the University did not offer the Court with any examples of non-race admissions schemes that it investigated before it settled upon the race-conscious policy that gave rise to the litigation. However, the Court did not press the University on its failure to consider potential supplemental non-racial admissions policies and this is an important issue to highlight as the Bake decision made clear, it is incumbent upon colleges and universities to prove that non-racial admissions schemes would not be an effective means to achieve the benefits sought by an institution.

The Supreme Court handed down its decision in the most recent iteration of Fisher on June 23, 2016, upholding the Fifth Circuit’s decision by a 4-3 vote, meaning that the precedents set in Bakke, Grutter, and Gratz remain undisturbed. Similar to the first iteration of Fisher, Associate Justice Anthony Kennedy, a judicial moderate, once

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56 Ibid., 52.

57 Ibid.


59 Associate Justice Kagan did not take part in the decision, given the fact that she previously advocated on behalf of the University’s position in her role as United States Solicitor General.
again drafted the Court’s lead opinion, affirming Texas’s use of race in the college admissions process, and once again the Court found the promotion of diversity in the academic setting to be a compelling state interest. However, the Court cautioned that the term ‘diversity’ should not simply serve as a proxy for race under the Fourteenth Amendment. Rather, the Court held that it was incumbent upon colleges and universities to routinely assess their admissions policies in order to be deemed constitutional, saying “[g]oing forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan. As the University examines this data, it should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values.”

Such a forceful statement from the Court invites the natural inference that economic diversity should be one of the primary goals of any revision of an admissions paradigm’s diversity goals. However, the Court’s opinion characterized the consideration of socioeconomic factors in the admissions process as being presently “unworkable” thereby ensuring that the Texas race-conscious admissions plan was able to meet the strict scrutiny test’s narrowly tailored requirement. The majority failed to expand on what factors led them to characterize socioeconomic-based admissions policies to be unworkable, but the Court’s dissenting members did not seem persuaded by the legal

\[60\text{Fisher v. University of Texas at Austin, 579 U.S. \text{___}, 11 (2016).}\]

\[61\text{Ibid.}\]
justifications for the Texas race-conscious plan that was advanced by both the University as well as the Court’s majority.

Similar to other affirmative action cases, the Court’s conservative flank took umbrage with the fact that, once again, the highest federal court in the land was providing legal validation for the government to make racially based classifications and determinations. According to Justice Thomas, the Constitution does not equivocate on the issue of race and should not be interpreted as doing so just because a race-conscious public policy position may potentially yield desirable social outcomes, saying, “[t]he Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. That constitutional imperative does not change in the face of a “faddish theor[y]” that racial discrimination may produce “educational benefits.”

Justice Alito wrote separately from Thomas and focused his dissent on the fact that in his estimation, Texas failed to satisfy the ‘narrowly tailored’ portion of the strict scrutiny test, noting that Texas failed to identify what outcome metrics, other than a blanket indefinite statement, it uses to measure the educational benefits that are attendant to increased racial diversity in the classroom. To Alito, the Court’s majority simply provided the state of Texas with an unintelligible degree of deference in regards to satisfying what should be the most difficult legal standard of all to meet, the strict scrutiny test. Alito illustrated this point by highlighting that Texas, when pressed

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regarding the educational benefits that would warrant diversity being considered a compelling interest for the purposes of the Fourteenth Amendment, was “shifting, unpersuasive, and, at times, less than candid.”

Indeed, one of the core tenets of strict scrutiny jurisprudence is that when the invocation of the test is deemed proper, government policies are by considered to be constitutionally infirmed by default and the government bears the burden of changing the court’s posture, not the party challenging the government’s actions. The Court’s holding in Fisher appears to turn that long-established paradigm on its head. If the Court’s radical deviation form Fourteenth Amendment precedent were not enough, the decision to uphold Texas’s race-conscious admissions policy ensured the temporary survival of a policy that has a historical track record of suboptimal social outcomes. In fact, Alito noted that in addition to the demonstrated failings of race-based admissions policies, Texas’s plan, as currently implemented, actually works to impede the achievement of a diverse student body as applicants from other underrepresented races such as Asian-Americans are in fact harmed by the University’s policy, thereby depriving students of the purported educational benefits associated with full diversity.

It should be noted, however, that the Court’s latest consideration of Fisher should not be considered the final word on the matter as Associate Justice Antonin Scalia, who in both Gratz and Grutter emerged to be one of the Court’s most vociferous opponents of race-conscious admissions policies, died before the

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64Ibid.


Court issued its decision. Had Scalia been alive, he would have likely cast a vote to declare race-conscious admissions policies to be unconstitutional once and for all. In addition, Scalia, a noted judicial scholar and oral advocate, could have influenced his fellow Justices during deliberations, potentially changing the case’s outcome.

Ironically, the Republican Party, traditionally staunch opponents of affirmative action policies, may be most to blame for the judicial reprieve race-based admission policies received in *Fisher*. Following the February 2016 death of Justice Scalia, both Senate Majority Leader Mitch McConnell and Judiciary Committee Chairman Chuck Grassley pledged to block any nominee President Barack Obama offered to fill the Court’s vacant seat, a sentiment that was echoed by most of the Party’s candidates for President.\(^\text{67}\) Undeterred by the Senate Republicans’ threats, Obama nominated Merrick Garland, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, to fill the Supreme Court’s vacant spot. Most legal pundits hailed the Garland nomination and pegged the long-serving judge as a judicial moderate, making it conceivable that if presented with the issue of educational affirmative action, he would have in fact voted to end the practice.\(^\text{68}\) However, presumably feeling the pressure of an angry voting base in an election year, Senate Republicans have made good on their


promise to block the President’s Supreme Court nominee thereby relegating educational affirmative action to judicial purgatory, making it uncertain when or if the issue will be taken up by the high court again.

In summation, the examination of the Court’s Fourteenth Amendment educational affirmative action jurisprudence illustrates that race-conscious admissions polices have been repeatedly challenged in the courts over the last four decades. Such constant high-profile litigation serves to stoke the fire of racial tension as the public debate, both in support and opposition to the continuation of race-conscious admissions policies, tends to coalesce around emotion rather than the policies’ legal merits. While it may be unrealistic to expect non-lawyers to debate the nuance of whether a policy is sufficiently “narrowly tailored” for the purposes of comporting with the Equal Protection Clause’s strict scrutiny test, the raw emotion attendant to matters that touch upon race makes the debate associated with the legality of racial preferences more combustible than perhaps any other issue that comes before the Court, with the possible exceptions of abortion and same-sex marriage.

The Court’s decisions illustrate that it is not obtuse to the raw, potentially pernicious, emotions associated with the highly divisive issue of racial preferences, and its precedents indicate that it is growing increasingly skeptical of the constitutional viability of such policies in the 21st century. In a tangentially related case that examined the constitutionality of Seattle’s use of a ‘racial tiebreaker’ in the apportionment of students in its public school system, Chief Justice John Roberts authored the Court’s majority opinion that declared Seattle’s policy to be unconstitutional and stated, “[t]he
way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Conversely, colorblind admissions polices that only make distinctions based upon socioeconomic status do not invite such legal challenges. This is due to the fact that policies that take into account applicants’ socioeconomic statuses would only need to meet the far less stringent rational basis test and thus are far less likely to be challenged in court. Therefore, the abandonment of race-based admissions polices in favor those that factor in applicants’ socioeconomic statuses will provide colleges and universities with much needed legal certainty in addition to serving to quell racial unrest while remaining faithful to the original intent of affirmative action policies.

Lastly, it is worth noting that the underlying justification for the implementation of race-conscious admissions policies has evolved since Johnson originally introduced the concept of affirmative action to the public during his Howard commencement address. Originally, the underlying argument to support the use of race in college admissions polices was one that was couched on providing redress for members of the minority community through the enhanced opportunity for economic and social mobility that comes with post secondary education. The policy justification did not rest upon achieving greater diversity in the student bodies of colleges and universities across the nation through the admissions process.

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Indeed, the Supreme Court has never provided judicial affirmation that the Fourteenth Amendment permits colleges and universities to adopt race-conscious admissions policies for the purposes of remedying past discrimination. This stance has not been lost on the lower federal courts as can been seen when the Ninth Circuit was presented with that very constitutional question, it noted, “the Supreme Court has never held that only a state's interest in remedial action can meet strict scrutiny.”

Recognizing this judicial posture, lawyers advocating to uphold race-conscious admissions polices have rested their constitutional arguments on the policies’ promotion of racial diversity in the academic setting, which, as noted above, has thus far received judicial approval, though tepid in nature.

The change in legal justification to support race-based policies, while perhaps just an example of clever lawyering, is worth noting due to the fact that it may alter the policy goals of college admissions counselors. To be sure, the promotion of diversity is a worthy and important goal, but it is only tangentially related to providing the economically disadvantaged with increased socioeconomic mobility through polices that advance a more equitable path to a postsecondary education. Yet, educational affirmative action policies illustrate an ever increasing focus on promoting classroom diversity, irrespective of an applicant’s economic standing, and less about remedying past discrimination or improving the standing of the economically disadvantaged. This is a disturbing trend and is an affront to affirmative action’s original intent.

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70 Hunter v. The Regents of the University of California, 190 F.3d 1064 (9th Cir. 1999), cert. denied, 531 U.S. 877 (2000).
CHAPTER 4
HIGHER EDUCATION AFFIRMATIVE ACTION IN PRACTICE

As a general rule it follows that children who hail from economically depressed families often attend academically deficient public school districts that all too often fail to adequately prepare them for the academic rigors of college. In addition to receiving substandard academic coursework, these disadvantaged students are also not adequately prepared by their school districts for the all too important standardized admissions tests that colleges and universities consider almost sacrosanct. Therefore, while their middle and upper class peers receive supplementary SAT or ACT private tutoring, low-income students simply struggle to get by day-to-day academically. Such a reality places low-income students at a distinct disadvantage in the college admissions process, but the disparity between the haves and have-nots is even starker when assessing students’ ability to gain admission to highly selective colleges and universities.

This is attributable to the fact that many elite schools, such as Brown and Dartmouth, require applicants to take at least two SAT subject tests, otherwise known as the SAT II to be considered for admission. While many others, like Georgetown and Princeton, do not formally require SAT II scores, they strongly encourage applicants to supplement their applications with SAT subject matter test scores. If low-income students consistently underachieve on the traditional standardized admissions tests, it is folly to think that they will be able to achieve a competitive, let alone exceptional, score on SAT subject matter tests. This is largely due to the fact that low-income students generally lack access to course offerings that are necessary to succeed on SAT subject
matter tests, with many inner-city schools struggling to provide all students with adequate access to advanced placement courses.¹ In predominantly white and poor rural America, the situation might actually be worse, with only about half of rural school districts offering any advanced placement courses whatsoever.²

As academia becomes both increasingly competitive and obsessed with maintaining a high ranking in publications such as *U.S. News and World Report* and the *Princeton Review*, institutions are reticent to admit students who may drag down their overall selectivity numbers. This is especially so because colleges and universities are inclined to admit students with less desirable academic credentials, provided they have a connection to the school or wealthy donors. Therefore, in order to minimize the impact to their admissions numbers and preserve their public ranking, institutions are forced to be much more discriminating when evaluating the overall applicant pool. These programs will be discussed later in this chapter.

Simply put, low-income students are not on level planes compared to their middle and upper class peers when it comes to college admissions. However, when examining the statistics for admission to elite colleges and universities, it is clearly evident that a sharp disparity exists amongst the classes. As demonstrated earlier, there is a direct correlation between the prestige of the college or university one attends and the resulting

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socioeconomic status. As currently situated, the American public education system only serves to perpetuate a system whereby the economically downtrodden will remain repressed for generations to come while students from middle to upper-class backgrounds will continue to seize upon opportunities for advancement, widening the income and opportunity gap.

As the competition to gain acceptance to the top-tier college and universities continues to stiffen, less fortunate students are further disadvantaged by the fact that their schools often lack the small class sizes and close working relationships elite prep and affluent public schools have with the admissions offices of the nation’s top postsecondary institutions. For example, New Hampshire’s Philips Exeter Academy, whose alumni include a former U.S. President, Treasury Secretary and Facebook founder Mark Zuckerberg, limits its maximum class size to twelve. The Academy, which costs over thirty-six thousand dollars a year, also hosts over two hundred fifty colleges and universities annually and provides its students with intensive college counseling. Resultantly, Exeter sends nearly a third of its graduates to Ivy League universities while the majority of its student body goes on to attend Ivy-peer institutions such as Williams College and the University of Chicago.³

Contrast that with the student experience seen at Forest Hills High School, located in a working class neighborhood in Queens, which currently enrolls over 4,000

students, nearly four times the school’s capacity. In fact, the school is so crowded that it is forced to stagger its students’ arrival and departure times in order to accommodate its outsized student body. It is also worth mentioning that most students attending Forest Hills High School are either white or Asian and over sixty percent of its students qualify for the federal free lunch program. However, unlike the students at Exeter, more than a quarter of Forrest Hills’ graduates fail to go on to college and for the ones that do, most attend an institution that is operated by the City of New York many of which are generally regarded as being less selective. Such numbers would be cause for alarm and prompt calls for wholesale reform at elite prep schools like Exeter or even at wealthier public schools like Hershey High School, located in a bucolic Pennsylvania suburb where nearly half the student body takes advanced placement courses and ninety percent of graduates pursue post secondary education. Contrastingly, at Forest Hills, the school’s performance is lauded as it outperforms most other public schools in the city.

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praise speaks more to the dim expectations society holds for low-income students than it does the admirable efforts of the faculty at Forest Hills High School.

While the dearth of advanced placement courses and overcrowded classrooms certainly contribute to suboptimal educational outcomes, they are not the only institutional disadvantages faced by low-income students as the guidance departments in many public schools are also stretched to their limits thanks to budget stagnation and misguided school priorities. On average, there is one guidance counselor for every 1,000 students in low-income school districts, which is twice the national average. Given the sheer number of students that they need to serve in a limited period of time, it is simply unrealistic to think that school counselors will be able to provide students with the individualized attention that is required to conduct an effective college search and navigate the subsequent application process. That reality stands in stark contrast to the experience of affluent students who are often afforded ample access to their school’s guidance office; many elite preparatory schools showcase their guidance departments as a tool to recruit students to their school. For example, Regis High School, a private Jesuit-run High School on Manhattan’s Upper East Side, boasts on its website that the school ensures students’ guidance counselors work in tandem with individually assigned academic advisors who meet with students daily in order to provide students with the best opportunity for post-graduation success.  

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Despite having exemplary in-school guidance departments at their disposal, many students of means will also employ the services of private admissions consultants who will assist them in identifying target institutions and thereupon developing a strategic admissions application. The rise of college admissions consultants is a fairly recent phenomenon, only coming into the mainstream a little under a decade ago. Today the $400 million dollar a year industry boasts over 15,000 professionals, including many former college admissions counselors, and shows no signs of slowing down as the college admissions process becomes more competitive with each successive cycle. However these services come at a considerable cost, resulting in a boutique industry that caters exclusively to the rich and devoted middle class families. This is evidenced by the fact that a consultant’s services generally average a little over $4,000 per student for a single admissions cycle but those fees could run into the tens of thousands, depending on the length of engagement and counselor. For that sort of investment, customers expect results and the consultancies are eager to tout their successes, boasting, “100% of [students] get into one of their top three college choices and 93% get into their top college choice,” while displaying the names of the prestigious colleges where their clients went on to matriculate.

However as currently situated, in the eyes of college admission counselors, a minority student coming from Exeter Academy or Regis High School will receive more favorable supplemental admissions consideration than a white student who attends Forest

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12Ibid.
Hills High School despite likely benefiting from the many inherent advantages that go along with attending an elite preparatory school. This paradigm, whereby institutions turn a blind-eye to the socioeconomic backgrounds of their applicants, is not only nonsensical, it is downright immoral. How do these institutions plausibly believe that economically disadvantaged students will be able to overcome the many challenges they face and gain admissions to their school, despite competing against wealthy and middle class students for a precious few admissions slots?

Indeed, in many cases students of limited means likely have a better chance of winning the lottery than they do in gaining admission to the nation’s top colleges and universities. In spite of that fact, some have argued that industrious students will ultimately find their way to an institution, even if they don’t get into their first choice.\textsuperscript{13} However, even if this postulate is true, why should a well-deserving student be disadvantaged by an admissions office due to their socioeconomic status or the color of their skin?

This reality is not lost on over thirty admissions deans of some of the best colleges in the country who endorsed a January 2016 report authored by the Harvard Graduate School of Education. The report, entitled \textit{Turning the Tide Inspiring Concern for Others and the Common Good through College Admissions}, encourages colleges and universities to rethink the admissions process so that it encourages individual development thereby advancing the public good. Specifically, the report urges admissions counselors to be mindful of the many academic hardships faced by economically disadvantaged students saying that “it’s vital that the admissions process

consider this lack of access and opportunity [for economically disadvantaged students].”¹⁴ The report opines that admissions officers should place greater focus on a student’s entire body work, including extracurricular activities, while deemphasizing the importance of standardized admissions tests in the admissions process, even going so far as proposing making them optional.¹⁵

In spite of elite colleges and universities’ recent recognition of the incongruences existing between the haves and the have nots, their penchant for giving preferential treatment to applicants who have a familial connection to the institution represents another admissions impediment for low-income students. These so-called legacy admissions programs only serve to widen the opportunity chasm that exits between students who attend high-achieving secondary schools and those that attend struggling public schools. In sum, these programs work to the detriment of low-income students while providing privileged individuals with even more opportunities to attend elite institutions. For example an examination of the admissions data for Georgetown’s Class of 2018 illustrates the disparity that exists between legacy and non-legacy applicants. In this particular admissions cycle legacy applicants achieved a thirty-six percent admission rate, which was more than double the acceptance rate for applicants who lacked a familial connection to Georgetown as they garnered admission just sixteen percent of the time.¹⁶


¹⁵Ibid.

Not surprisingly, many of the students offered admission to Georgetown hail from very wealthy families as evidenced by the fact that elite boarding schools such as Phillips Andover Academy, the Lawrenceville School, and Choate Rosemary Hall are among the secondary schools that have the largest number of students attending the University.\footnote{Laura Owsiany, “Feeder Schools Deliver Diversity,” \textit{The Hoya}, March 28, 2014, accessed June 10, 2016, http://www.thehoya.com/feeder-schools-deliver-diversity/.}

However, this phenomenon is not unique to Georgetown as peer institutions such as Duke University and the University of Notre Dame also factor familial connections into their admissions calculus. In fact, at Notre Dame nearly a quarter of the student body is made up of legacy students.\footnote{Ibid.} That figure pales in comparison to the legacy admissions statistics seen at elite institutions like Harvard where forty percent of the incoming class is populated by legacy admits and an even greater percentage of legacy applicants, approximately seventy percent, populates its guaranteed deferred admission list.\footnote{Lexington, “Poison Ivy,” The Economist. September 21, 2006, accessed August 28, 2016, http://www.economist.com/node/7945858.} It is slightly ironic that Harvard admits wealthy legacy applicants at such a high rate despite its call for wholesale changes that would make the admissions process fairer for underprivileged students. Yet Harvard does not stand alone in the Ivy League as all eight of its institutions heavily factor an applicant’s legacy status into their admissions calculus.\footnote{Ibid.}

Needless to say admissions offices’ consciousness of an applicant’s connection to a particular institution does not work to the benefit of low-income applicants. It works to
their detriment. Conversely, it could be safely assumed the legacy admission programs at elite institutions provide applicants hailing from privileged backgrounds with enhanced admissions prospects at a time when admission slots are becoming increasingly scarce. For example, a quick survey of the admissions rates for some of the nation’s most selective institutions illustrates that they generally admit less than fifteen percent of their applicants, despite receiving tens of thousands of applications annually.  

Given the degree of competition associated with gaining admissions to the most exclusive colleges and universities, legacy admissions programs only serve to perpetuate the societal status quo by enhancing the prospects of applicants who come from wealthy backgrounds. This largely works to the detriment of low-income students and families, prompting some to label legacy admissions programs ‘affirmative action for the rich.’ By adopting legacy admissions programs, college and university admissions offices seem to operate more like a country club’s membership rather than the arm of an institution of higher education.

In the end, revising how admissions criteria are examined is only one piece of the puzzle that will make post-secondary education more accessible to low-income applicants. To truly make the pursuit of a post-secondary education realistically achievable for disadvantaged students, it will take a coordinated effort between post-secondary institutions as well as federal and state governments on a number of different fronts.


fronts. As has been demonstrated, in order to advance the greater public good, colleges and universities must commit to eschewing the formulaic admissions criteria that will garner them a high ranking in the ubiquitous *U.S. News and World Report* rankings. Instead, institutions should focus on developing an admission plan that will help to further societal advancement of the less fortunate while maintaining institutional academic integrity. Doing so also has the added bonus of being in the public good while enabling institutions to achieve the diversity that is so coveted by colleges and universities, assuming they are sincere in their legal justifications for educational affirmative action programs.

In order to effectuate the change that is needed, colleges and universities must commit the necessary resources to their admissions departments so that admissions officers aren’t overloaded thereby allowing them to fully examine an applicant’s credentials, including their socioeconomic background information. By providing that each applicant’s file will be given its due consideration thanks to adequately funded admissions departments, colleges and universities will also ensure that admission offers are extended to applicants whose qualifications align with the institution’s academic constitution. This investment is imperative given that colleges and universities continue to see record high numbers of applications every year, with applications often number in the tens of thousands.\(^\text{23, 24}\) For example, last year the University of California, Los


Angeles received over ninety-two thousand applications for a class size of nearly six thousand. This was six thousand more applications than the school received for its incoming class in 2014, which was a record at the time.\(^\text{25}\)

The precipitous rise in college applications can largely be attributable to the increased reliance on the Common Application, which is a standardized college application developed by a eponymous non-profit organization that is able to be submitted to over seven hundred colleges and universities. While the organization’s mission statement reads in part, “[t]he Common Application can mobilize the collective strength of our Membership to truly increase college access, especially for underserved students,” its near ubiquity may actually have the opposite effect for the underprivileged as it further inhibits admissions counselors’ ability to conduct a holistic and thorough application review.\(^\text{26}\) Perhaps comically unaware of the adverse effect high application numbers have on low-income applicants, the Common Application boasts on its website that it facilitated the submission of over four million applications last year.\(^\text{27}\) According to Stephanie Klein Wassink, a former admissions officer at Northwestern University, this glut of applications results in admissions officers only being able to spend a maximum of


seven minutes evaluating individual applications.28 That is barely enough time to measure a student’s SAT scores let alone read their essay or assess their socioeconomic background.

The deleterious net effect on low-income students attributable to one-size fits all applications was one of the driving forces behind the decision made by over ninety colleges and universities, including all of the Ivy League institutions, to break from the Common Application and develop their own application process that is designed to promote a more equitable admissions process.29 Known as the Coalition for Access, Affordability, and Success, the organization’s holistic oriented application platform will be available for student use for the upcoming 2017 admissions cycle. The platform enables students to create a virtual ‘locker’ through which they are able to provide admissions officers with a wide-range of application materials taken throughout a student’s high school career, ranging from school projects to highlights of extracurricular activities. However, this new initiative is not without its shortfalls as it requires students to have substantial access to the Internet, not a given for many low-income students, and requires applicants to navigate a very intricate web platform while simultaneously working on applications for schools that are not members of the Coalition.

Yet even if colleges and universities are successful in revising their admissions policies that would better facilitate the admission of deserving underprivileged students,


more must be done to ensure that these students actually have the opportunity to attend the institution. Currently as many as forty percent of low-income students who are admitted to colleges or universities ultimately choose not to attend because of non-academic factors such as cost of attendance. Therefore, in order to avoid rendering the offer of admission nominal, colleges and universities must also take action that addresses low-income students’ likely inability to afford the ever-increasing cost of attendance. In an era of sustained tepid inflation in the United States, averaging less than three percent annually over the past twenty years, the cost of a pursuing a post-secondary education stands as an exception to this trend. To illustrate, over the same time period the cost of attending college in the United States has risen by three hundred percent and averages nearly $42,000 dollars a year at private universities. However, this average pales in comparison to the costs associated with attending the upper echelon institutions that are synonymous with post-graduation financial and social success. For example, the University of Pennsylvania estimates that it will cost students over $69,000 a year to attend the university while Middlebury College, a prestigious liberal arts college located

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in rural Vermont, puts its annual cost of attendance at over $66,000 a year.\textsuperscript{33} \textsuperscript{34} By contrast, that is more than $20,000 more than the average Vermonter makes in an entire year and it would take some low-income families nearly a decade to amass that amount of money.\textsuperscript{35}

Even if low-income students are undeterred by the sticker shock of higher education, simply navigating the maze of admission and financial aid applications in an affordable and efficient manner may prove to be prohibitively daunting for the average high schooler. In many cases colleges and universities charge applicants nearly one hundred dollars to merely submit their application for review thereby making the prospect of applying to even a handful of schools unaffordable for many low-income applicants. While many institutions will waive the application fee for low-income applicants, this is not a requirement and students must possess the wherewithal to seek out such waivers. The Common Application, despite stacking the deck against low-income applicants in the admissions process, does offer a fairly streamlined process by which low-income students can obtain need-based fee waivers for its member schools. However, in order to be eligible, a student must be able to provide supporting evidentiary material that demonstrates the requisite financial need or receive sign off from a school


official or community leader.\textsuperscript{36} While the requirement to verify financial need to ensure individuals do not abuse the system is not unreasonable, it still represents yet another hoop economically disadvantaged applicants are forced to jump through in the admissions process.

However, the admissions process represents but a single challenge for low-income students as once they receive an admissions offer, they must then navigate the cumbersome financial aid application process. The Free Application for Federal Student Aid (FAFSA), the federal government’s centralized form, was first introduced following the enactment of the Higher Education Amendments of 1992.\textsuperscript{37} By enacting the law, Congress intended to enhance low-income and disadvantaged students’ “opportunities to continue a program after secondary school,” which would thus increase their prospects for post-secondary employment.\textsuperscript{38} However, the 108-question FAFSA form has been assailed by prominent members of Congress from both sides of the aisle as being unnecessarily too complex and a deterrent for many students who aspire to pursue postsecondary education. Lamar Alexander, Chairman of the Senate Health Education Labor and Pensions Committee, has called the FAFSA the “the number one obstacle” for


\textsuperscript{38}Ibid.
students who would be eligible for Tennessee’s community college or trade school tuition
free program.39

Indeed Senator Alexander’s statement could be extrapolated to the entire country
as in total approximately 2 million students who would likely qualify for Pell Grants fail
to submit the documentation necessary to obtain federal assistance. A closer examination
of that figure illustrates that the outmoded FAFSA currently functions more as a barrier
to post secondary matriculation rather than a tool to facilitate it. This is evidenced by the
fact that approximately a quarter of Pell-eligible students either didn’t know how to apply
for federal aid or said that the process for doing so was too burdensome and
complicated.40

A quick glimpse at the FAFSA illustrates why that is the case as the form requires
applicants to provide the Department of Education with their parents’ “IRA deductions
and payments to self-employed SEP, SIMPLE, Keogh and other qualified plans from IRS
Form 1040—line 28 + line 32 or 1040A—line 17,” amongst 102 other detailed questions.
In addition, low-income students often lack sufficient access to the Internet that would
enable them to complete the cumbersome FAFSA, which often takes hours.41  According

Pledges to Simplify “Dreaded” FAFSA, “the No. 1 Obstacle” to Students Applying for
Tennessee Promise,” November 9, 2015, accessed August 29, 2016,
http://www.help.senate.gov/chair/newsroom/press/alexander-pledges-to-simplify-
dreaded-fafsa-the-no-1-obstacle-to-students-applying-for-tennessee-promise.

should-be-easier-say-experts-politicians-1776446.

41It should be acknowledged that applicants are able to fill out and file their
FAFSA in hard-copy format. However, it is a suboptimal option as the form could get
lost and hard copy submission does not allow for easy form retrieval.
to the U.S. Census Bureau, less than half of households with annual income of less than $25,000 have access to the Internet, which pales in comparison to Internet accessibility statistics seen in households from higher income brackets.\footnote{Thom File and Camille Ryan, “Computer and Internet Use in the United States: 2013,” U.S. Census Bureau, 4, November 2014, accessed August 27, 2016, https://www.census.gov/history/pdf/2013computeruse.pdf.}

These incongruities are not lost on the Obama Administration as it proposed measures in its FY 2017 budget intended to ease the burden on low-income students and make college more accessible for them. Specifically, the Administration has proposed expanding the Pell Grant program by $300 for eligible students who are enrolled in a minimum of fifteen credits in a semester in to having annual Pell Grant increases that would be tied to inflation.\footnote{U.S. Department of Education, “President Obama’s 2017 Budget Seeks to Expand Educational Opportunity for All Students,” February 9, 2016, accessed August 28, 2016, http://www.ed.gov/news/press-releases/president-obamas-2017-budget-seeks-expand-educational-opportunity-all-students.} In addition to the Pell Grant expansion, the Administration has also proposed much needed simplifications to the FAFSA and would also provide financial incentives to colleges and universities that enroll and graduate students from low and middle class families.\footnote{The White House Office of the Press Secretary, “FACT SHEET: The President’s Plan for Early Financial Aid: Improving College Choice and Helping More Americans Pay for College, September 13, 2015, accessed September 11, 2016, https://www.whitehouse.gov/the-press-office/2015/09/14/fact-sheet-president%E2%80%99s-plan-early-financial-aid-improving-college-choice.} While the proposals offered by the Obama Administration are certainly well intentioned, they nonetheless fall well short of what is necessary to truly provide economically disadvantaged students with the means to attend the college of their choice. Unfortunately, the politicization of the federal appropriations process has made it virtually impossible to enact meaningful reforms that would make
college more affordable for the thousands of low-income students who would like to continue their academic career beyond high school. This is a short-sighted approach to policymaking that is largely driven by outside interest groups and ignores the many societal benefits, both economic and unquantifiable, that would be realized if more Americans are less encumbered by student debt.
CHAPTER 5
A PATHWAY TO REAL SOCIAL JUSTICE REFORM

The United States currently finds itself embroiled in the most racially tense period in perhaps the last fifty years. The reasons for the increased racial hostility are complex, institutional, and multi-faceted. Just this summer a national debate erupted over professional football players’ refusal to stand for the national anthem, claiming that such action was necessary in order to bring attention to the continued oppression of minorities in the United States. Indeed many minority communities have understandably felt feelings of hopelessness and the belief that the county’s economic and judicial systems are stacked against them on the whole. All too often such sentiments breed racial and institutional contempt with many minority adolescents turning to pretty crimes as a means to get ahead, ultimately winding up with criminal records or with extended jail sentences.

Considering the fact that nearly forty percent of African Americans in their twenties and thirties have been incarcerated at one point in their lives, it is inarguable that the minority community has been disparately impacted by governmental failures and a lack of opportunities for advancement.¹ Once burdened with the albatross that is a criminal record, individuals struggle to obtain meaningful employment, perpetuating their economically depressed status, which could lead to subsequent crimes that could carry

longer prison sentences. Ultimately, the deleterious social effects that come with a
criminal record are simply not limited to one individual, as the resulting economic
hardship will carry over to the family, miring future generations in poverty allowing the
poverty-criminal cycle to repeat itself. However, it is not racially insensitive to maintain
that poverty, not racism, is the underlying cause for the continued suppression and
heightened incarceration of minorities. It is also equally important to recognize that the
self-perpetuating cycle of poverty is not just limited to African Americans; it can affect
individuals from any race.

To be sure, systemic racism still exists in many segments of the United States,
which is a sad indictment on where we are as Americans in the 21st century. This reality
notwithstanding, the biggest impediment to the minority community’s ability to advance
in American society remains institutionalized poverty and its resulting limitations on
one’s ability to advance economically and socially. Indeed in many ways racism is far
less common in the United States today than 50 years ago when affirmative action
policies were first proposed and implemented. However, what hasn’t receded over the
past half century is the widespread poverty present in inner cities and rural towns
throughout the United States.

Indeed, Georgetown Law professor and race relations scholar, Sheryll Cashin,
seizes on that point and opines that one’s environment will often play a major role in
determining one’s potential for economic advancement, saying, “[e]xclusions from the
good life, good schools and jobs, and middle class stability is no longer based primarily
on race, as was the case in the Jim Crow era. While race certainly plays a role in the
geographic sorting that goes on in residential housing markets, it is no longer a definitive
marker for who is disadvantaged, because a person of color who has the means can
escape admittedly racialized segregation. Meanwhile, for those of any color relegated to low-opportunity environs, geography is largely destiny.” Indeed some of the poorest segments of America live in rural areas where only twenty seven percent of students go on to college or inner cities where less than a third of students enroll in a college or university following high school graduation. Yet despite the demonstrated struggles of low-income students to pursue post-secondary education, colleges and universities have chosen to continue providing supplemental admissions consideration to applicants based upon their race without any examination of their economic background. This outmoded admissions approach serves only to treat a symptom of class stagnation, but not the problem itself, which is self replicating poverty.

In earlier chapters, I have demonstrated how the current admissions paradigm works against low-income college applicants in both a passive and active manner. Colleges and universities continue to stubbornly administer admissions programs, which take into account an applicant’s race but fail to consider the systemic challenges faced by many, if not most, low-income individuals. These challenges, which are numerous, range from being forced to attend academically deficient schools to having heightened familial obligations as compared to middle and upper-income applicants. Compounding the problem are legacy admissions policies that colleges and universities employ to provide

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favorable consideration to a significant number of students who have a familial connection to the institution despite the fact these applicants likely hail from comparatively wealthy families. Such policies put low-income students at a significant and disappointing disadvantage when competing for spots at elite institutions against applicants who have already been afforded many more opportunities than them.

However, if any doubt remained as to whether colleges and universities preferred to attract wealthy matriculants, the admissions policies related to ‘development cases’ could put that to rest. In these cases college and university admissions will look more favorably on the candidacy of applicants who they believe will provide access to major donors, putting them on uneven footing compared to their less affluent fellow applicants. It has been estimated that such a designation could net an applicant the equivalent of up to 500 points on the SAT.\(^5\) Needless to say low-income applicants have little to no chance of benefiting from this supplemental admissions consideration. Consequently, these development cases only serve to further limit the number of already scarce admissions spaces available at elite institutions, which have been artificially diminished thanks to the aforementioned legacy admission policies. In sum, colleges’ and universities’ own policies place low-income students at the back of the admissions line through absolutely no fault of their own. Clearly a change is needed if low-income students are going to be able to compete fairly with applicants from other income backgrounds, though the competition will never truly be fair considering the substandard academic environment seen in many low-income school districts.

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If colleges and universities were to abandon factoring race into their admissions calculus and were to adopt a policy that took applicants’ economic backgrounds into account, minorities would still overwhelmingly benefit under this policy shift. According to the U.S. Census Bureau twenty-four percent of African Americans live below the federal poverty line as compared to nine percent of white Americans.\(^6\) In addition, recalibrating higher education affirmative action policies to focus on socioeconomic background instead of race will also implement the original intent of affirmative action, which is to put historically oppressed individuals on a path to advancing their social status. In the seminal Moynihan Report, the Labor Department opined that once African American families achieved a sufficient economic standing in society, they would no longer require the supplemental consideration provided by affirmative action programs, saying, “[g]iven equal opportunities, the children of these families will perform as well or better than their white peers. They need no help from anyone, and ask none.”\(^7\) An examination of affirmative action’s underlying history illustrates the policy was never intended to be a race-based blanket policy that should be applied without giving regard to a person’s economic standing; if that point was true in the Jim Crow era\(^{1960s}\), it should certainly remain true in the 21st century.

If the United States is truly going to be the land of opportunity, low-income students must be able to realistically believe that, provided that they work hard enough,


they might be able to attend the college of their choice and be able to pursue a rewarding career thereafter. Certainly colleges and universities have the ability to play a large part in making this ideal a reality by eliminating the consideration of race in the admissions calculus. Replacing it with supplemental consideration for economically disadvantaged students will provide thousands of students aspiring to continue their academic career with a sense of hope. In many ways the underlying issue underpinning the race-related protests currently seen throughout the country is a desire to see actual change in the ways oppressed individuals are treated.

To be sure, many are protesting perceived racial injustices, especially as it relates to how people of color are treated by law enforcement and the judicial system generally. However, and perhaps paradoxically, one way the country could go about making significant progress in repairing race relations is to remove the consideration of race from the colleges admissions process and adopt an approach that only examines an applicant’s socioeconomic status. That way, members of the low-income minority community would be heartened by seeing members of their community advancing their education and resultantly their social standing, which could improve the outlook for impoverished communities on the whole. Such a paradigm also comports with the American ideal of equal justice as it would ensure that remedial benefits would go to the intended beneficiaries, which are the individuals who desperately need them. In addition, removing race from the admissions equation will serve to diffuse race-based animus stemming from white students who receive a letter of rejection and in turn feel as though “their” spot at a college or university was unfairly given to a minority.

Certainty the factors giving rise to socioeconomic stagnation in the United States are complex, multi-faceted and lack a singular policy solution to be resolved. However,
it is inarguable that educational attainment could play a major role in helping individuals free themselves from the bonds of poverty. First and foremost, the seeds of academic success are planted by family members when a child is very young but it is up to school districts to assume the role in the absence of a strong familial unit. Once a school is able to demonstrate it is able to provide its students with the tools necessary to succeed in college, guidance officials must work in tandem with students to execute an effective college search. As has already been analyzed, colleges and universities should take measures to make the cost of attendance more affordable while simultaneously amending their admissions policies so that race is no longer a permissible consideration, and is instead replaced with a mandatory examination of an applicant’s economic standing. Government can also play a role in promoting class advancement by implementing student loan forgiveness programs or discontinuing its defense of the constitutionality of affirmative action education programs.

Lastly, the general public, specifically those from middle and upper classes, will play a huge role in promoting economic advancement for the economically disadvantaged. If members of these classes advocate in favor of the aforementioned policy changes, they might actually have a chance to be put into force. Otherwise, governmental and academic institutions will simply maintain the status quo because other than a sudden sense of benevolence, there is no real impetus for them to implement change. However, for the tens of thousands of low-income college aspirants, the status quo is not working, they deserve better; in the end, adoption of a socioeconomic admissions model comports with the original aims of affirmative action and will make this a better, more just nation.
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