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It's Not About Race: The *True* Purpose of the University of Texas' Holistic Admissions System is to Give Preferences to Well-Connected White Applicants, Not to Disadvantaged Minorities

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It's Not About Race: The *True* Purpose of the University of Texas' Holistic-Admissions System is to Give Preferences to Well-Connected White Applicants, Not to Disadvantaged Minorities

Jonathan R. Zell

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I. INTRODUCTION

Most elite colleges and universities employ a so-called “holistic”-admissions system to select all of their incoming students. In contrast,

the University of Texas at Austin (“UT”)—one of the parties in the Supreme Court’s *Fisher* cases¹—uses holistic admissions to admit only 20% to 25% of its undergraduate students. The remaining 75% to 80% are chosen under a “Top Ten Percent Plan,” which guarantees admission to any student who graduates in the top 10% of a Texas high school. (Since Texas high schools are somewhat racially segregated, this results in the admittance of many more African-Americans and Hispanics than would otherwise occur if all applicants were considered together.²)

Under UT’s holistic system, applicants are given a score based on the sum of two numbers: an academic achievement index (which is the applicant’s high-school grades and test scores) and a personal achievement index or “PAI” (which is arrived at by grading two essays and looking at several non-academic factors, one of which is the applicant’s race³). The other non-academic factors include:

demonstrated leadership qualities, extracurricular activities, honors and awards, essays, work experience, community service, and special circumstances, such as the applicant’s socioeconomic status, family composition, special family responsibilities, [and] the socioeconomic status of the applicant’s high school.⁴

While a holistic-admissions system is usually contrasted with a merit-based system, the differences between the two extend far beyond the consideration of subjective non-academic factors. The most salient feature of the holistic process is its refusal to assign any specific values to the non-academic factors being considered. Moreover, there is no requirement that, for example, one applicant’s citizenship award, after-school restaurant job, or even race be given equal weight with that of other applicants. As a result, they are not. We know this because:

¹ The *Fisher* case has come before the Supreme Court two times. The first time, the Court remanded the case back to the Fifth Circuit. See generally *Fisher v. University of Texas at Austin (Fisher I)*, 133 S. Ct. 2411 (2013). As it had done before, the Fifth Circuit found for UT. See *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014). The Supreme Court then accepted cert and agreed to hear the *Fisher* case (*Fisher II*) once more. As of this writing, the Court has not yet decided *Fisher II*.

² *Fisher I*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

³ *Id.* at 2416 (2013) (“[T]he University included a student’s race as a component of the PAI score, beginning with applicants in the fall of 2004. The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.”).

⁴ *Fisher*, 758 F.3d at 638.

No numerical value is ever assigned to any of the components of personal achievement scores, and because race is a factor considered in the unique context of each applicant's entire experience, it may be a beneficial factor for a minority or a non-minority student.⁵

Thus, besides being unfair, the holistic process is opaque. That is, no one can ever know *why* any given applicant was admitted or rejected.

How did such an unprincipled admissions system ever become the predominant method of selecting college and university students in America? Answer: Precisely because such a system *hides* the reasons behind the admissions decisions, and thereby gives the schools a free hand in selecting their students. Thus, unfairness is its end and opaqueness is the means to that end.

As will be discussed later in this article, the Ivy League colleges invented the holistic-admissions system in the 1920s because it

allowed them to accept—and to reject—whomever they desired. The cornerstones of th[is] new system were discretion and opacity—discretion so that gatekeepers would be free to do what they wished and opacity so that how they used their discretion would not be subject to public scrutiny.⁶

Although in this article we will be critiquing the holistic-admissions process as a whole, in the *Fisher* cases plaintiff Abigail Fisher's only complaint was that UT had improperly used race as a factor in its consideration of her application.

Under the Supreme Court's modern jurisprudence, race may be used as a factor in university admissions to achieve diversity without violating the Equal Protection Clause of the 14th Amendment.⁷ However, the use of race must withstand "strict scrutiny" (i.e., must be narrowly tailored to serve a compelling state interest).⁸ Thus, the issue in *Fisher II* is whether or not UT's use of race in its holistic-admissions system was sufficiently narrowly tailored to pass constitutional muster.

⁵ *Id.*

⁶ JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 2* (2005) [hereinafter KARABEL].

⁷ See *Regents of Univ. of Calif. v. Bakke*, 438 U. S. 265, 315 (1978); see also *Gratz v. Bollinger*, 539 U. S. 244, 268 (2003); *Grutter v. Bollinger*, 539 U. S. 306, 325 (2003); *Fisher I*, 133 S. Ct. at 2417.

⁸ See *Gratz*, 539 U. S. at 275; see also *Grutter*, 539 U.S. at 326; *Fisher I*, 133 S. Ct. at 2418.

Given the strict scrutiny under which race must be evaluated, it is very suspicious that UT would voluntarily reveal its use of racially-conscious admissions criteria. For this is simply inviting judicial scrutiny where, otherwise, no one would ever be the wiser. As previously stated, due to its opaqueness holistic admissions enables a school “to accept—and to reject—whomever they desired . . . [and] how they used their discretion would not be subject to public scrutiny.” Thus, under its holistic-admissions system, UT could easily admit as many racial minorities as it wished, but then attribute their admission to some other (non-racial) factor. Indeed, this is precisely what UCLA has reportedly been doing since shortly after racial preferences were outlawed in California.⁹ Or, as colleges do with respect to the children of alumni and other financial donors—which is the focus of this article—UT could simply not explain (or lie about¹⁰) why the minority students were admitted.

Another reason to question UT’s motives in bringing about a situation that was guaranteed to be appealed to the courts is that “admission via the holistic review program . . . [is] overwhelmingly and disproportionately of white students.”¹¹ That is, UT admits very few racial minorities through its holistic-admissions system. For example, in 2008 (the year in which Abigail Fisher applied), only 216 (or less than 18%) of the 1208 applicants admitted through the holistic process were African-Americans or Hispanics.¹²

⁹ See Richard Sander & Stuart Taylor, Jr., *The Painful Truth About Affirmative Action*, THE ATLANTIC (Oct. 2, 2012), <http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/> (“[After] the Proposition 209 ban [on the use of race in admissions] took effect . . . the university reinstated covert, illegal racial preferences.”); Richard Sander, *The Consideration of Race in UCLA Undergraduate Admissions* (Oct. 20, 2012), available at http://www.seaphe.org/pdf/ucla_admissions.pdf (“Holistic admissions . . . provided a cover for [this] illegal discrimination.”); Tim Groseclose, *Report on Suspected Malfeasance in UCLA Admissions and the Accompanying Cover-Up*, at 2-5 (Aug. 28, 2008), available at <http://www.sscnet.ucla.edu/polisci/faculty/groseclose/CUARS.Resignation.Report.pdf> (UCLA is cheating on admissions . . . [A]dmissions staff members . . . learn the race of applicants; then, in violation of Proposition 209, readers [of applications] use such information to evaluate applicants . . . [S]uch practices are de facto implementation of racial preferences . . . It was obvious that the admissions staff was under intense pressure to admit more African Americans. It was also obvious that the main purpose of [the] holistic system was to facilitate that goal, by allowing all readers to learn the race of applicants who report race on personal essays.”). See also TIM GROSECLOSE, CHEATING: AN INSIDER’S REPORT ON THE USE OF RACE IN ADMISSIONS AT UCLA (2014).

¹⁰ See *infra* Part V.B.

¹¹ *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 658 (5th Cir. 2014).

¹² Brief for Petitioner at 9, *Fisher v. University of Texas at Austin (Fisher II)*, (U.S. 2015) (No. 14-981).

How can this low percentage be explained? Isn't the purpose of holistic admissions—a system that de-emphasizes the academic criteria on which certain racial minorities typically score low—to admit racial minorities who would otherwise be rejected?¹³ Not at all. As a headline in *The Daily Texan* put it in 2012: “Holistic review is not about race.” The article then went on to state:

What do university admissions officers look for in what's known as the holistic review process?

The answer is not what you'd expect.

* * * *

UT did not use its holistic review process to admit higher percentages of underrepresented minorities than earned automatic admission. Instead, the university granted drastically higher percentages of holistic review admissions to white students.

* * * *

For the past five incoming classes, UT has not used its holistic review process to let in higher percentages of minority students; it has done just the opposite by admitting vastly higher percentages of white students.

* * * *

[Thus], based on the numbers, we conclude that UT doesn't just want to admit more racially diverse students; it wants *control over who to admit*.¹⁴

Given the exceedingly small number of African-American and Hispanic applicants accepted through UT's holistic-admissions system, why is UT advertising its use of race as a positive factor in admissions?

¹³ Recent data from a variety of elite colleges show that, to receive equal consideration in admissions, on the SAT Asian-Americans had to outperform whites by 140 points, Hispanics by 270 points, and African-Americans by 450 points out of a possible 1600 points. See THOMAS J. ESPENSHADE & ALEXANDRA RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 92 (2009). Data from UT showed similar results. See *Fisher I*, 133 S. Ct. at 2431 (Thomas, J., concurring).

¹⁴ Editorial Board, *Holistic review is not about race*, THE DAILY TEXAN (Sept. 27, 2012), available at <http://www.dailytexanonline.com/opinion/2012/09/27/holistic-review-is-not-about-race> (emphasis added).

Could UT find no reason other than race to justify the 216 minority applicants admitted through its holistic process in 2008? Of course not. Certainly, UT had no trouble finding non-racial reasons to justify its acceptance of the *other* 992 students admitted that way.

As will be demonstrated in this article, the real reason that UT (as well as all of the other elite universities throughout the U.S.) is trying to get the courts to sanction its holistic-admissions system is *not* to increase the number of under-represented racial minorities, but rather to increase the number of non-minorities it admits—and to do so *based on non-academic criteria*. For the *true* purpose of holistic admissions is *not* affirmative action for under-represented minorities.

Instead, its purpose is to allow schools to scrape up low-performing—but politically well-connected—white applicants from the bottom of the heap and to admit those applicants based on the wealth, donations, and/or social status of their parents or sponsors.¹⁵ This is what Richard Kahlenberg has aptly termed “affirmative action for the rich.”¹⁶

II. THE VALUE OF AN IVY-LEAGUE TYPE DEGREE

As the late Justice Antonin Scalia noted last year, all of the members of the U.S. Supreme Court studied law at Harvard or Yale University.¹⁷ Similarly, as Northwestern University Professor Lauren Rivera has found, the top investment banks, law firms, and consulting firms tend to restrict their recruiting to candidates from Harvard, Yale, and two other Ivy-League type universities.¹⁸ Other researchers have documented that professor-ships at major universities are also mostly limited to graduates from the top universities.¹⁹ Finally, Crist Kolder Associates reported that

¹⁵ Justice Clarence Thomas made a related point in *Grutter v. Bollinger*, 539 U. S. 306, 368 n.10 (2003) (Thomas, J., concurring in part and dissenting in part) (suggesting that “the elites (both individual and institutional) supporting” the use of racially-conscious criteria in the holistic-admissions process were doing so because, were the Court to forbid the use of such criteria, “legacy preferences (and similar practices) might quickly become less [politically] popular,” i.e., subject to legislative restriction).

¹⁶ See generally AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS (Richard Kahlenberg ed. 2010) [hereinafter Kahlenberg].

¹⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting).

¹⁸ Lauren A. Rivera, *Ivies, extracurriculars, and exclusion: Elite employers' use of educational credentials*, 29 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 71, 71-90 (January 2011) (doi:10.1016/j.rssm.2010.12.001), available at <http://www.science.direct.com/science/article/pii/S027656241000065X> [hereinafter Rivera].

¹⁹ Spencer Headworth & Jeremy Freese, *Credential Privilege or Cumulative Advantage? Prestige, Productivity, and Placement in the Academic Sociology Job*

the undergraduate universities from which most current Fortune 500 companies' CEOs have graduated are Harvard, Princeton and Stanford.²⁰

As these statistics suggests, a degree from an elite university is a virtual requirement for reaching the upper echelons of American society. Indeed, such a degree is increasingly becoming necessary even to achieve middle-class status. For, according to a recent study conducted by PayScale, only 17 of 500 U.S. universities—led by the Ivy League—provided their under-graduates with a significant return on investment.²¹

What is so extraordinary about the undue weight given to the name of the university from which one has graduated is that, as Professor Rivera found:

[I]t was not the content of an elite education that employers valued but rather the perceived rigor of these institutions' admissions processes. According to this logic, the more prestigious a school, the higher its "bar" for admission, and thus the "smarter" its student body.²²

Indeed, Justice Scalia employed this same logic when hiring his law clerks:

By and large, I'm going to be picking from the law schools that basically are the hardest to get into. They admit the best and the brightest, and they may not teach very well, but you can't make a sow's ear out of a silk purse. If they come in the best and the brightest, they're probably going to leave the best and the brightest, O.K.?²³

That a degree from one of the elite universities is necessary for upward mobility in the U.S. makes it important to know whether the admissions processes at those universities are meritocratic or otherwise

Market, (March 24, 2015), available at <http://ssrn.com/abstract=2598639> and <http://dx.doi.org/10.2139/ssrn.2598639>.

²⁰ CRIST KOLDER ASSOCIATES, CRIST KOLDER VOLATILITY REPORT (2015), available at <http://criskolder.com/media/1457/volatility-report-americas-leading-companies.pdf>.

²¹ See Francesca Di Meglio, *College: Big Investment, Paltry Return*, BLOOMBERG (June 28, 2010, 9:33 AM), <http://www.bloomberg.com/news/articles/2010-06-28/college-big-investment-paltry-returnbusinessweek-business-news-stock-market-and-financial-advice>.

²² Rivera, *supra* note 18.

²³ Justice Scalia's remarks were delivered in a talk to law students at American University Washington College of Law in 2009. See Adam Liptak, *A Well-Traveled Path From Ivy League to Supreme Court*, N.Y. TIMES (Sept. 6, 2010), <http://www.nytimes.com/2010/09/07/us/politics/07clerkside.html>.

fair. For, if they are not, then our nation's founders merely replaced the British monarchy with an American aristocracy that is every bit as corrupt.

III. THE RACIST ORIGINS OF HOLISTIC ADMISSIONS

Although they catered almost exclusively to the WASP (white, Anglo-Saxon, Protestant) ruling class of the time, America's first colleges—the Ivy League—generally employed meritocratic admissions standards. However, that eventually changed after a new breed of students—Jews—began outscoring the WASPs on the admissions tests. To enable these colleges to continue to accept the low-scoring blue bloods over their peers, the colleges devised a new system of admissions in which non-academic criteria were added as a *pretext* to allow the colleges to admit or reject whomever they wanted. This is the father of the current system of holistic admissions used by virtually all elite U.S. colleges and universities today.

According to University of California at Berkeley Professor Jerome Karabel's monumental study of our nation's first colleges:

Harvard, Yale, and Princeton admitted students almost entirely on the basis of academic criteria for most of their long histories. But this changed in the 1920s, when traditional academic requirements no longer served to screen out students deemed “socially undesirable.” By then, it had become clear that a system of selection focused solely on scholastic performance would lead to the admission of increasing numbers of Jewish students, most of them of eastern European background. This transformation . . . was unacceptable to the Anglo-Saxon gentlemen who presided over the Big Three (as Harvard, Yale, and Princeton were called by then). Their response was to invent an entirely new system of admissions . . . It is this system that persists—albeit with important modifications—even today.

The defining feature of the new system was its categorical rejection of the idea that admission should be based on academic criteria alone . . . [T]he top administrators of the Big Three (and of other leading private colleges, such as Columbia and Dartmouth) recognized that relying solely on any single factor—especially one that could be measured, like academic

excellence—would deny them control over the composition of the freshmen class.

* * * *

Chastened by their recent experience with the traditional system of admission examinations, which had begun yielding the “wrong” students, the leaders of the Big Three devised a new admissions regime that allowed them to accept—and to reject—whomever they desired. The cornerstones of the new system were discretion and opacity—discretion so that gatekeepers would be free to do what they wished and opacity so that how they used their discretion would not be subject to public scrutiny.²⁴

As Professor Karabel further noted: “[Henceforth, the universities] followed what might be called the ‘iron law of admissions’: a university will retain a particular admissions policy only so long as it produces outcomes that correspond to perceived institutional interests.”²⁵ Most significantly, those institutional interests were “to admit . . . the dull sons of major donors and to exclude the brilliant but unpolished children of immigrants, whose very presence prompted privileged young Anglo-Saxon men—the probable leaders and donors of the future—to seek their education elsewhere.”²⁶

As a result, the Ivy League colleges instituted the following two-fold admissions policy. The first part of the policy was designed to limit the enrollment of Jews (and other undesirables):

[T]he colleges . . . restrict[ed] admission based on criteria that did not appear discriminatory but would have the effect of reducing Jewish enrollment. A prime example was Dartmouth College, which in 1922 developed admissions guidelines based not just on a candidate’s academic potential but on such factors as character, athletic prowess, geographical distribution (designed to curb the number of students from New

²⁴ KARABEL, *supra* note 6, at 2; *see also* MARCIA GRAHAM SYNNOTT, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970*, at 20 (1979); DAN A. OREN, *JOINING THE CLUB: A HISTORY OF JEWS AND YALE* (1985).

²⁵ KARABEL, *supra* note 6, at 2.

²⁶ KARABEL, *supra* note 6, at 2.

York City, where Jews and other immigrants were concentrated), and alumni status.²⁷

The second part of the policy was to maximize the admission of favored applicants: “the upper-class, prep-school-educated WASP . . . who had for so long set the tone of campus life.”²⁸ Thus, the colleges blatantly gave admissions preferences to the sons of the rich:

[In Harvard’s view, the most] desirable was an applicant of bona fide upper-class origin—in [Dean] Bender’s words, “the St. Grottlesex type, or at any rate the sons of the economic and social upper crust” . . . [Thus,] Harvard’s response was virtually to guarantee admission to those [upper class applicants] who met minimal standards.²⁹

To further these policies, the Ivy League colleges also favored applicants from the top preparatory (i.e., private boarding) schools. For not only are there few groups as homogeneous as prep-school students, but historically prep schools have been even more discriminatory than the elite colleges. For, at least until the Supreme Court’s 1976 decision in *Runyon v. McCrary*,³⁰ most prep schools openly practiced discrimination on the basis of race. Thus, by giving admission preference to prep-school graduates, the Ivy League colleges were able to “benefit” from the prep schools’ discriminatory practices.

As a result, throughout the 1930s Yale, for example, was “reliant on a handful of top private schools to fill its class with students deemed socially desirable.”³¹ Specifically, “Yale . . . took over 40 percent of its freshman from a dozen elite boarding schools attended almost entirely by upper- and upper-middle-class Protestant young men.”³²

Harvard showed a similar preference for prep-school graduates. As Professor Karabel related:

Harvard’s pronounced preference for the graduates of leading private schools followed . . . [a certain] logic . . . [S]uch schools educated just the sort of young

²⁷ DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA’S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* 128 (2006)[hereinafter GOLDEN, *THE PRICE OF ADMISSION*].

²⁸ KARABEL, *supra* note 6, at 548.

²⁹ KARABEL, *supra* note 6, at 188 (citation omitted).

³⁰ *See generally* Runyon v. McCrary, 427 U.S. 160 (1976).

³¹ KARABEL, *supra* note 6, at 116.

³² KARABEL, *supra* note 6, at 209.

men Harvard most wished to enroll. In 1940, of the 77 applicants from the St. Grottlesex schools, only 1 was rejected. The larger elite boarding schools fared just as well; of 137 applicants from Andover, Exeter, Choate, Hotchkiss, Hill, and Lawrenceville, 2 were denied admission.

In stark contrast, public school students—including those from some of the nation's finest high schools—were not sought out, and their applications were far more likely to be rejected

Applicants from public schools had to meet a higher academic standard for admission than those from private schools, and they out-performed them academically once at Harvard.³³

Even today, at Harvard “[g]oing to prep school almost doubles the chances that a white applicant will be admitted.”³⁴

IV. HOLISTIC ADMISSIONS HIDES THE TRUE CRITERIA BEING USED

Holistic admissions can best be described by stating what it is not. It is *not* a system of selection based solely on either academic criteria or any other objective factors. Instead, *any* admissions criteria can be used and can be given *any* weight. Objective factors are not used exclusively because this would tie the hands of the colleges, forcing them to admit the highest-performing applicants and revealing when the colleges did not follow their own rules (i.e., cheated). Such a result, of course, would conflict with what Professor Karabel called the elite colleges’ “institutional interests.” Another commentator has aptly described these interests as follows:

Because the colleges’ credentials offer graduates the best chance of social and economic advancement, alumni, trustees and administrators often want to limit their hallowed turf to their own kind, especially if newcomers

³³ KARABEL, *supra* note 6, at 174-75.

³⁴ DANA Y. TAKAGI, THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS 31 (1992); *see also* Paul W. Kingston & Lionel S. Lewis, *Introduction: Studying Elite Schools in America*, in THE HIGH STATUS TRACK: STUDIES OF ELITE SCHOOLS AND STRATIFICATION xii (Paul W. Kingston & Lionel S. Lewis eds. 1990).

appear smarter or more diligent than the traditional members of the club. And students might not want their comfortable academic life upset by competition from newcomers.³⁵

While it might be theoretically possible to look at every aspect of a student's life and then ascertain "who a student is and what he or she can bring to a college community"³⁶—which is how holistic admissions is often falsely portrayed—in practice that is not what happens nor is it even the real goal. Instead, as explained in a recent magazine article:

From colleges' perspective, "holistic" is just short-hand for, we make the decisions we make, and would rather not be asked to spell out each one. It's a way for schools to discreetly take various sensitive factors—"overrepresented" minorities, or students whose families might donate a gym—into account.³⁷

According to college-admissions professionals, the holistic process involves important criteria—called "tags" or "niches"—that the colleges tend not to disclose. As Sara Harberson, the former associate dean of admissions at the University of Pennsylvania, explains:

A tag is the proverbial golden ticket for a student applying to an elite institution. A tag identifies a student as a high priority for the institution. Typically students with tags are recruited athletes, children of alumni, children of donors or potential donors, or students who are connected to the well connected. The lack of a tag can hinder an otherwise strong, high-achieving students.³⁸

After interviewing Harvard's long-time Admissions Dean (William Fitzsimmons), Steve Cohen, a lawyer and co-author of a book

³⁵ Fred Hechinger, *Controversy Erupts Over Secret Admissions Quotas*, SUN NEWSPAPER 13A (Feb. 12, 1987), <https://news.google.com/newspapers?nid=1320&dat=19870211&id=GLQyAAAAIIBAJ&sjid=AOoDAAAAIIBAJ&pg=2403,3211124&hl=en>.

³⁶ Sara Harberson, *The Truth About "Holistic" College Admissions*, LA TIMES (Op-Ed) (June 9, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html> [hereinafter Harberson].

³⁷ Phoebe Maltz Bovy, Ph.D., *The False Promise of "Holistic" College Admissions*, THE ATLANTIC (Dec. 17, 2013), <http://www.theatlantic.com/education/archive/2013/12/the-false-promise-of-holistic-college-admissions/282432/>.

³⁸ Harberson, *supra* at note 36.

on college admissions, recently detailed how Harvard uses “niches.” Mr. Cohen reported that, at Harvard, various groups of applicants compete against each other rather than against the entire applicant pool. For example, Harvard divides its applicants into five main groups or “niches,” who then compete for admission only among themselves. These niches are: academic, athletics, performing arts, legacies, and diversity. As Mr. Cohen detailed:

About 50 percent of a highly selective college’s entering class will be admitted solely on academic potential

Some 20 percent of the entering class will be recruited athletes. Legacies—sons and daughters of Harvard grads—comprise 12 percent to 13 percent of every entering class. (Their acceptance rate is about 30 percent — four times the overall applicant pool’s admit rate.) The very wealthy and famous are also a sought-after target niche. Applicants whose families who can afford to endow buildings and professorships, while few in number, are high in clout.

* * * *

Within each of these niches the admission office will look for the smartest kids—or at least those likely to survive the school’s academic rigors—who satisfy the constituency’s recruiting needs.

* * * *

Without a particular special interest tag, smart kids compete within the academic niche—basically against each other . . . [It is wrong to assume that] Asian-American kids are competing against Blacks and Hispanics. They’re not. Without a special interest tag, they’re competing against all “just-smart” kids; mainly each other.³⁹

In a very real sense, what Harvard does is the exact *opposite* of a holistic approach. For, instead of considering all of an applicant’s

³⁹ Steve Cohen, *Asian-Americans Are Indeed Getting Screwed by Harvard (But Not How They Think): The Secret Quotas in College Admissions*, OBSERVER (June 24, 2015), <http://observer.com/2015/06/asian-americans-are-indeed-getting-screwed-by-harvard-but-not-how-they-think/> [hereinafter Cohen].

qualities, Harvard focuses mostly on whatever niche (if any) the applicants fit into. As a result, Asian-American applicants are competing against each other based on academic criteria, while other groups are competing against each other based in large part on non-academic criteria.

Mr. Cohen's information has been confirmed by many admissions counselors. For example, according to former Cornell admissions officer Nelson Urena:

[D]emographic data is used to aggregate students into pools with similarities along certain demographic statistics. The honest fact is that . . . Asian American students . . . fall . . . in . . . [their own] pool.⁴⁰

Indeed, a recent survey of 63 of the most-competitive colleges conducted by Rachel B. Rubin, a doctoral student in education at Harvard, concluded:

When an applicant has an exceptional talent (e.g. music, athletics) or is part of a severely underrepresented group at the institution, the applicant . . . may compete only among those with the same talent or within the same group . . . As a result, disparities may arise between the levels of academic merit of certain subgroups of students . . . That . . . contradict[s] . . . the Supreme Court's directives on how minority status may be considered.⁴¹

What Ms. Rubin is referring to is the longstanding (since the Supreme Court's 1978 *Bakke* decision) legal prohibition against the use of separate admissions tracks—a kind of quota—for different racial minorities. As the Supreme Court reiterated in *Grutter*:

⁴⁰ See Abby Jackson, *Ex-Ivy League admissions officer reveals why it's sometimes tougher for Asian kids to get in*, BUSINESS INSIDER (Aug. 12, 2015), <http://www.businessinsider.com/ivy-league-admissions-officer-explains-why-its-sometimes-tougher-for-asian-kids-to-get-in-2015-8>.

⁴¹ See Scott Jaschik, *How They Really Get In*, INSIDER HIGHER ED (April 9, 2012, 3:00 AM), <https://www.insidehighered.com/news/2012/04/09/new-research-how-elite-colleges-make-admissions-decisions>. See also Ed Boland, *Former Yale admissions officer reveals secrets of who gets in*, N.Y. POST (Feb. 7, 2016), <http://nypost.com/2016/02/07/former-yale-admissions-officer-reveals-secrets-of-who-gets-in/> (At Yale, “[o]nce the children of alumni, recruited athletes, underrepresented minorities or regions and students interested in underenrolled majors were considered, there wasn’t much room for your generic genius.”).

[A] university may consider race or ethnicity only as a “plus” in a particular applicant’s file, without insulat[ing] the individual from comparison with all other candidates.⁴²

Also, as the Court reminded everyone in *Fisher I*, the use of race-conscious criteria is only permitted to achieve diversity, not racial balancing:

A university is not permitted to define diversity as “some specified percentage of a particular group merely because of its race or ethnic origin.” *Bakke, supra*, at 307 (opinion of Powell, J.). “That would amount to outright racial balancing, which is patently unconstitutional.” *Grutter, supra*, at 330. “Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’” *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 732 (2007).⁴³

Thus, Harvard’s—and the other elite universities’—current use of separate admissions tracks to achieve racial balancing shows that these universities have never really changed their policies to conform to the law. For example, in 1992

[t]he [U.S.] Education Department found that [Boalt Hall,] the law school [at the University of California at Berkeley,] employed a practice of placing minority candidates into separate tracks, so that minority candidates competed only with members of their own groups The Education Department’s investigation was instituted, according to press reports, after an Asian applicant received a letter essentially saying she was on the “Asian waiting list.” Boalt Hall agreed, without an admission of guilt, to change its policy of “isolating minority applicants from the general pool.”⁴⁴

Even more disturbing was the reaction to the Education Department’s findings by the dean of the Berkeley law school. Stating

⁴² *Grutter v. Bollinger*, 539 U. S. 306, 334 (2003) (citation and internal quotation marks omitted).

⁴³ *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013).

⁴⁴ Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1051 n.84 (1996) (citations omitted).

that “[w]e are proud of this policy,” the dean added that “[w]e think we can correct these concerns about our program with very minor procedural changes and continue the thrust of our program.”⁴⁵ This shows the ease with which the universities think that they can hide their illegal policies under the guise of holistic admissions, thereby making the Supreme Court’s rulings “meaningless” in the eyes of some legal scholars.⁴⁶ And the universities are right.⁴⁷

V. DONOR PREFERENCES

Quoting educational consultants on the price it takes “to buy your child’s way into college,” Pulitzer-Prize winning journalist Daniel Golden stated:

At top-25 universities, a minimum of \$100,000 is required; for the top 10, at least \$250,000 and often seven figures.

It’s considered crass for wealthy parents to approach college officials directly with a financial proposal while their child is applying. “Every- one in my position was offered bribes,” said Mary Anne Schwalbe, former associate dean for admissions at Harvard

Parents have better luck negotiating through intermediaries . . . [such as] an independent college counselor.⁴⁸

Phyllis Steinbrecher, an independent college counselor, frequently approaches colleges on behalf of clients who want to donate money to the colleges in exchange for getting their children admitted. As Ms. Steinbrecher explained:

The code words you use are, “This is a development family.” Of course there’s influence. Everybody knows what they’re buying. I’m sure almost every school has a connection between their admissions office and their development office.⁴⁹

⁴⁵ *Id.*

⁴⁶ *Id.* at 1051.

⁴⁷ See *infra* Part VII.B.

⁴⁸ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 60-61.

⁴⁹ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 72.

In his book on the subject, Mr. Golden noted that almost every university routinely sells admission into their entering classes to underqualified students:

Duke has enrolled thousands of privileged but underqualified applicants with no prior ties to the university, in the expectation of parental payback. This strategy has helped elevate Duke's endowment . . . from 25th in 1980 (\$135 million) to 16th in 2005 (\$3.8 billion)But these gains have come at a price—the integrity of Duke's admissions process.

Duke is not alone in making this trade-off [S]tudents known as “development admits”—the children of wealthy nonalumniare the dirty little secret of college admissions. These students are often substantially underqualified and have no familial connection to the school. Their . . . primary qualification is the money their parents are expected to give to the school upon acceptance.

Colleges . . . often deny that they have development admits

In reality[a]lmost every university takes development admits, and the practice is increasingly prevalent

For appearances' sake, most colleges are careful to avoid making explicit deals or promises while the application is under review. But once the student is admitted they're quick to solicit contributions[and] there's a mutual understanding that one good turn deserves another.

* * * *

Top universities ranging from Stanford to Emory say they occasionally consider parental wealth in admission decisions. “We do advise the admissions office about applications coming from the children or grand- children of significant donors,” Yale president Richard Levin told the university's alumni magazine in 2004At New York University, the associate provost for admissions, the head of fundraising, and the president's chief of staff meet every Monday to discuss a three-page list of about

forty applicants whose parents are leaders in business, politics, media, and entertainment.⁵⁰

Even “Harvard . . . will bend admission standards . . . provided that the parent ponies up a suitable donation.”⁵¹ However, at Harvard, the cost of buying one’s way in is higher than at other universities. For example, as Mr. Golden also reported in his book:

Harvard’s Committee on University Resources [COUR] . . . consists of Harvard’s biggest donors

To qualify for membership, donors must generally have given at least \$1 million to Harvard

[As a] sign[] of Harvard’s gratitude to COUR members . . . Harvard gives a massive admissions edge to their children, who flourish in a selection process that lacks conflict-of-interest rules and systematically favors the wealthy and well-connected. Although Harvard bristles at any suggestion that its slots are for sale, I found numerous instances in which a child’s acceptance closely preceded or followed a major gift from the parents, giving at least the appearance of a quid pro quo. Most notably, a politically connected New Jersey real estate mogul with no Harvard ties pledged \$2.5 million to the university only months before his elder son—a student below Harvard’s usual standards—was admitted.

Harvard admits fewer than one in ten undergraduate applicants, turning down more than half of candidates with perfect SAT scores

Children of major donors enjoy far better odds218 of 424 COUR members, or more than half, have had at least one child at Harvard. Many donors send more than one child to Harvard[T]hese children attended Harvard as undergraduates [or] . . . the law and business schools, which provide an entrée into the corridors of American power.

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⁵⁰ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 54-56.

⁵¹ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 44.

Through their easy access to Harvard, the children of COUR members . . . acquire a prestigious career credential . . . consolidating their families' place in the American aristocracy.⁵²

The process of buying admission to an elite university can take place at any time: before, during, or after the application period. Understandably, the larger donations are often pledged during the application process itself so that they can then be withdrawn if the child is not accepted.⁵³ With regard to smaller donations, “[c]onventional wisdom has it that if an alumnus wants to help his kids’ chances of getting into the old alma mater, he should step up his contributions to the college for a few years before a child mails out an application [Indeed] *Altruism and the Child-Cycle of Alumni Giving*, a study . . . by the National Bureau of Economic Research, . . . confirm[s] that it is a common practice among alumni whose children are getting ready to apply.”⁵⁴ In contrast, other universities accept wealthy, but low-performing, students and then solicit their parents for large donations afterwards. As Mr. Golden noted in a 2003 *Wall Street Journal* article, Duke University has perfected this strategy:

[T]o attract prospective donors, colleges are . . . bending admissions standards to make space for children from rich or influential families that lack longstanding ties to the institutions. Through referrals and word-of-mouth, schools identify applicants from well-to-do families. Then, as soon as these students enroll, universities start soliciting gifts from their parents.

* * * *

The strategy appears to be paying off. For the last six years, Duke says it has led all universities nationwide in unrestricted gifts to its annual fund from non-alumni parents While 35% of alumni donate to Duke, 52% of parents of last year’s freshman class contributed to the university.

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⁵² GOLDEN, *THE PRICE OF ADMISSION*, *supra* note 27, at 24-26.

⁵³ See GOLDEN, *THE PRICE OF ADMISSION*, *supra* note 27, at 61

⁵⁴ Jennifer Epstein, *How They Really Get In*, INSIDE HIGHER ED (June 14, 2007, 4:00 AM), <https://www.insidehighered.com/news/2012/04/09/new-research-how-elite-colleges-make-admissions-decisions>.

The system at Duke works this way: . . . [T]he development office identifies about 500 likely applicants with rich and powerful parents who were not alumni . . . It cultivates them . . . It also relays the names to the admissions office . . . [Initially] admissions readers evaluate them on merit, without regard to family means. About 30 to 40 are accepted, the others . . . [then undergo a process where university officials] weigh[] their family's likely contribution against their academic shortcomings . . . [Finally] [o]nce these children of privilege enroll, the development office enlists their parents as donors and fundraisers.⁵⁵

As Mr. Golden further explained, the favoritism that universities show to the children of donors and potential donors is also given to the children of politicians:

[P]oliticians . . . expect, and usually get, an admissions boost for their children and whomever else they recommend. Colleges view politically sponsored applicants from nonalumni families as akin to development cases, with the distinction that admission is expected to be followed by government funding rather than a private gift.

* * * *

“Sometimes it’s a quid pro quo,” Daniel Saracino, Notre Dame assistant provost for admissions, acknowledged. “We’ve got a research grant worth \$8 million and we need the support of senators to push it. We’re going to keep them happy.”⁵⁶

Giving admissions preferences to the children of the rich and powerful hurts high-performing students as well as under-represented racial minorities. However, under the guise of holistic admissions, this kind of admissions corruption even occurs at public universities.

Preferential admissions treatment at the University of Virginia is given openly to applicants sponsored by legislators.⁵⁷ At The University

⁵⁵ Daniel Golden, *Many Colleges Bend Rules to Admit Rich Applicants*, WALL ST. J., Feb. 20, 2003, <http://online.wsj.com/public/resources/documents/golden2.htm> [hereinafter GOLDEN, *Many Colleges Bend Rules*].

⁵⁶ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 230-231.

⁵⁷ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 230.

of Michigan, similar treatment is given to the children of legislators and other potential supporters—but only if they are white or Asian:

Under the 150-point “Selection Index” Michigan uses for undergraduate admissions, a review committee may award 20 “discretionary” points to children of donors, legislators, faculty members and other key supporters. Minorities under-represented in higher education . . . are ineligible for the discretionary points.⁵⁸

In contrast, at other public universities such favoritism is a closely-guarded secret. For example, the University of Illinois operated a “shadow admissions process” where the only admissions criterion was “the power and money of the applicant’s sponsor.”⁵⁹ According to a 2009 state investigative report:

For years, a shadow admissions process existed at the University of Illinois . . . [T]his shadow process—referred to as “Category I”—catered to applicants who were supported by public officials, University Trustees, donors, and other prominent individuals (collectively “sponsors”). While applicants who lacked such clout sought admission through the University’s official admissions process, Category I applicants were given separate and often preferential treatment by University leadership. And while the official process took into account the applicant’s characteristics (e.g., academic achievement, special talents, personal circumstances), the Category I process tended to focus on the “power and money” of the applicant’s sponsor.

In scores of instances, the influence of prominent individuals—and the University’s refusal or inability to resist that influence—operated to override the decisions of admissions professionals and resulted in the enrollment of students who did not meet the University’s admissions standards—some by a considerable margin.

⁵⁸ GOLDEN, *Many Colleges Bend Rules*, *supra* note 55. Presumably, the ineligibility of under-represented minority applicants for these preferences was designed to offset other preferences that those applicants would receive (i.e., under diversity). Nonetheless, that universities would consider the same factor differently with different applicants demonstrates the inconsistency with which universities apply their admissions criteria.

⁵⁹ STATE OF ILLINOIS ADMISSIONS REVIEW COMMISSION, *Report & Recommendations* (Aug. 6, 2009), <http://www2.illinois.gov/gov/admissionsreview/Pages/default.aspx>.

In this way, sponsorship by prominent individuals at times became a heavy thumb on the scale, giving advantage to clouted applicants, who were typically from affluent backgrounds, and unfairly disadvantaging those in the general applicant pool.

* * * *

Media accounts and the work of this Commission have lifted the cloak of secrecy around Category I.⁶⁰

Finally, this same kind of corruption has also been rife in UT's holistic-admissions process. No better proof of this can be found than in the February 2015 report by Kroll, Inc., an international consulting firm commissioned by UT's Board of Regent to investigate the university's admissions practices.⁶¹

In its report, Kroll found that it was a longtime practice for UT's president to overrule decisions of the Admissions Office in order to allow politically well-connected individuals, such as state legislators and members of the university's Board of Regents, to get family members and other friends admitted.⁶² Many of these students were admitted "despite grades and test scores substantially below the median for admitted students."⁶³

"The message to young people is that cheaters win, ethics don't matter, good guys finish last," said Maribeth Vander Wee, an Illinois investigator.⁶⁴

After the Kroll report was issued, then-UT President William C. Powers, Jr., stated: "It is my observation that some similar process exists at virtually every selective university in America, and it does so because it serves the best interests of the institutions."⁶⁵

⁶⁰ *Id.*

⁶¹ Kroll Inc., *University of Texas at Austin – Investigation of Admissions Practices and Allegations of Undue Influence, Final Report to the Office of the Chancellor of The University of Texas System* (Feb. 6, 2015), <http://www.utsystem.edu/sites/utsfiles/documents/outside-reports/investigation-admissions-practices-and-allegations-undue-influence/investigation-admissions-practices-kroll-2015-02.pdf>.

⁶² *Id.* at 61-63.

⁶³ *Id.* at 60.

⁶⁴ Sanya Mansoor, *Report: UT Admitted Sub-par Students with Gold-Plated Recommendation*, THE CHRISTIAN SCIENCE MONITOR (July 22, 2015), <http://www.csmonitor.com/USA/USA-Update/2015/0722/Report-UT-admitted-sub-par-students-with-gold-plated-recommendations>).

⁶⁵ The Associated Press, *Disputed Admission at University of Texas*, N.Y. TIMES (Feb. 12, 2015), http://www.nytimes.com/2015/02/13/us/disputed-admissions-at-university-of-texas.html?_r=0.

Yes, because crime pays when the government—including the courts—does not enforce the law, favoritism and even bribery become universal.

VI. LEGACY PREFERENCES

A. *Legacy Preferences Are a Pretext for Discrimination*

One of the criteria—which is so important it is considered a “tag” or “niche”—that the elite colleges hide under the rubric of holistic admissions is being a legacy (i.e., a child of an alumnus or alumnae of the college or university in question).⁶⁶ Given the deceptive purpose of the holistic system in general, it should come as no surprise that the so-called legacy preference is itself the subject of many untruths given by the schools.

To begin with, like all of the other non-academic admissions criteria, the “[l]egacy preference [was] initiated to keep out Jews.”⁶⁷ As explained in a 1991 *Washington Monthly* article:

[T]he existence of the legacy preference in this fierce career competition isn't exactly news. According to historians, it was a direct result of the influx of Jews into the Ivy League during the twenties. Until then, Harvard, Princeton, and Yale had admitted anyone who could pass their entrance exams, but suddenly Jewish kids were outscoring the WASPs. So the schools began to use nonacademic criteria—“character,” “solidity,” and, eventually, lineage—to justify accepting low-scoring blue bloods over their peers. Yale implemented its legacy preference first, in 1925.⁶⁸

As a result, as Mr. Golden explained:

Yale's . . . new preference for alumni children helped roll back Jewish enrollment . . . Similarly, at Harvard,

⁶⁶ See Cohen, *supra* note 39 (“Other important niches include . . . legacies Legacies—sons and daughters of Harvard grads—comprise 12 percent to 13 percent of every entering class. (Their acceptance rate is about 30 percent—four times the overall applicants pool's admit rate.”)).

⁶⁷ GOLDEN, *THE PRICE OF ADMISSION*, *supra* note 27, at 201.

⁶⁸ John Larew, *Why are Doves of Unqualified, Unprepared Kids Getting into Out Top Colleges? Because their Dads are Alumni*, WASH. MONTHLY, June 1991, at 12, available at <http://www.unz.org/Pub/WashingMonthly-1991jun-00010> [hereinafter Larew].

Jewish enrollment declined [as a result of legacy preferences].⁶⁹

While discrimination against the Jews has abated, the Ivy League and other elite colleges are now using non-academic criteria—such as legacy preferences—to keep out high-performing Asian-American applicants. As Mr. Golden has pointed out:

Asian Americans are the new Jews, inheriting the mantle of the most disenfranchised group in college admissions. The nonacademic admissions criteria established to exclude Jews, from alumni child status to leadership qualities, are now used to deny Asians. “Historically, at the Ivies, the situation of the Asian minorities parallels very closely the situation of the Jewish minorities a half century earlier,” said former Princeton provost Jeremiah Ostriker.

* * * *

[J]ust as they [universities] constrained Jewish enrollment before 1950, they now set a higher bar for Asian American applicants, freezing out students who would be considered scholastic superstars if they hailed from a different heritage.

* * * *

Like Jews during the quota era, Asian Americans are overrepresented at selective colleges compared with their U.S. population . . . but are short-changed relative to their academic performance. Legacy preference, initiated to keep out Jews, has become academia’s justification for excluding Asian Americans

Now as then, a lack of preferences can be a convenient guise for racism.⁷⁰

⁶⁹ GOLDEN, *THE PRICE OF ADMISSION*, *supra* note 27, at 128-29.

⁷⁰ *Id.* at 199-201. See also Charles Murray, *At the Ivies, Asians are the new Jews*, AEIDEAS, Dec. 11, 2012, available at <http://www.aei.org/publication/at-the-ivies-asians-are-the-new-jews/>; Ron Unz, *The Myth of American Meritocracy: How corrupt are Ivy League admissions?* THE AM. CONSERVATIVE (Nov. 28, 2012), <http://www.theamericanconservative.com/articles/the-myth-of-american-meritocracy/>.

The legacy preference is very effective in keeping out minorities because it “perpetuates past patterns of discrimination,” thereby ensuring the continuous admission of a homogeneous group of “rich and powerful” individuals.⁷¹ For example, a 2007 study of Duke University by Nathan D. Martin and Kenneth I. Spenner found that:

Compared to other students who enroll at Duke, legacies are more likely to be white, Protestant and U.S. citizens, as well as having attended private schools. In terms of wealth, legacies are “considerably more affluent” than students whose parents don’t have college degrees and also wealthier than those with parents who went to colleges other than Duke. Specifically, the pre-college household income of legacy students is about \$240,000 a year—which the study finds is triple that of students whose parents didn’t earn a college degree and 44 percent higher than the average student whose parents attended college. Being black is associated with an 80 percent decrease in the odds of being a legacy student, the study finds, while being Roman Catholic or Jewish is associated with a 72 percent decrease.⁷²

Because the legacy preference allows elite universities to pad their enrollment with the children of the ruling class, who overwhelmingly comprise the alumni of their schools, then-U.S. Senator John Edwards called such preferences “a birthright out of 18th-century British aristocracy, not 21st-century American democracy.”⁷³

Besides being used to keep out minorities, the legacy preference is also unfair because it favors the already-privileged. As Mr. Golden writes:

The rich enjoy many advantages in American society. They . . . attend the best elementary and secondary schools. But such advantages provide all the more

⁷¹ See Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 *CARDOZO L. REV.* 379, 398 (1979) [hereinafter “Dershowitz & Hanft”].

⁷² Scott Jaschik, *Legacy Admits: More Money, Lower Scores*, *INSIDE HIGHER ED* (Aug. 4, 2008), <https://www.insidehighered.com/news/2008/08/04/legacy>.

⁷³ *The Curse of Nepotism*, *THE ECONOMIST* (Jan. 8, 2004), <http://www.economist.com/node/2333345>.

reason not to make exceptions for underqualified students from rich families.⁷⁴

B. *Colleges Misrepresent Their Legacy Preferences*

Many articles in Harvard's student newspaper, *The Harvard Crimson*, have reported on the various statements—which can only be characterized as disinformation—that Harvard officials have made from time to time concerning the amount of weight that Harvard gives to being a legacy and the academic credentials of the legacies that Harvard admits. For example:

- Marlyn McGrath Lewis, who was said to have been Harvard's admissions director from 1970-1973, "describe[d] legacy preference as 'a feather on the scale if all else is equal.'"⁷⁵
- Other Harvard administrators were said to have "insist[ed] that 'legacies' . . . only get preference in a tie between candidates of otherwise equal qualifications."⁷⁶
- An article written by *The Crimson* staff stated: "Dean of Admissions and Financial Aid William R. Fitzsimmons '67 has told *The Crimson* that a student's legacy status is merely a 'tip factor' in deciding whether or not to admit a student. Legacies tend to be some of Harvard's most qualified applicants, and most will likely still gain admission under a policy that does not consider their parents' Harvard diplomas."⁷⁷
- "At Harvard, SAT scores for Harvard legacy students are 'virtually identical' to those of the rest of the student body, Harvard College Dean of

⁷⁴ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 10.

⁷⁵ Daniel J. Hemel, *Leave Behind (a) Legacy*, THE HARVARD CRIMSON (June 6, 2007), <http://www.thecrimson.com/article.aspx?ref=519216>.

⁷⁶ *Is Harvard Really Innocent?*, THE HARVARD CRIMSON (Oct. 10, 1990), <http://www.thecrimson.com/article.aspx?ref=125858>; see also *No More Aristocracy*, THE HARVARD CRIMSON (Feb. 6, 1990), <http://www.thecrimson.com/article/1990/2/6/no-more-aristocracy-pbwbhat-would-you/>.

⁷⁷ The Crimson Staff, *End Legacy Preference: Mommy's or Daddy's Harvard degree should not give Junior a Boost*, THE HARVARD CRIMSON (Dec. 13, 2006), <http://www.thecrimson.com/article.aspx?ref=516360>.

Admissions William R. Fitzsimmons '67 said . . . According to Fitzsimmons, having a parent who graduated from Harvard or Radcliffe will tip the scale slightly in the admissions process.”⁷⁸

However, as a 1991 article in *The Washington Monthly* reported, Harvard had been lying to its students, its alumni, and the public about its legacy preference for many years. The truth finally came out when, in 1990, the U.S. Department of Education published its report on Harvard's admissions system:

If the legacies' big edge seems unfair to the tens of thousands who get turned away every year, Ivy League administrators have long defended the innocence of the legacy stat. Children of alumni are just smarter . . . That's what Harvard Dean of Admissions William Fitzsimmons told the campus newspaper, the *Harvard Crimson* . . . last year. Departing Harvard President Derek Bok patiently explained that the legacy preference worked only as a “tie-breaking factor” between otherwise equally qualified candidates.

Since Ivy League admissions data is a notoriously classified commodity, when Harvard officials said in previous years that alumni kids were just better, you had to take them at their word. But then federal investigators came along and pried open those top-secret files. The Harvard guys were lying.

This past fall, after two years of study, the U.S. Department of Education's Office for Civil Rights (OCR) found that, far from being more qualified or even equally qualified, the average admitted legacy at Harvard between 1981 and 1988 was significantly less qualified than the average admitted nonlegacy. Examining admissions office ratings on academics, extracurriculars, personal qualities, recommendations, and other categories, the OCR concluded that “with the exception of the athletic rating, [admitted] non-legacies scored better than legacies in all areas of comparison.”⁷⁹

⁷⁸ Aditi Balakrishna, *Low-SAT Legacies Receive Lower GPAs*, THE HARVARD CRIMSON (Apr. 5, 2007), <http://www.thecrimson.com/article.aspx?ref=518026>.

⁷⁹ Larew, *supra* note 68, at 11.

Even Harvard's own student newspaper trumpeted its school's deception, noting: "the OCR findings seem to contradict directly a number of Harvard's stated admissions policies."⁸⁰ In a follow-up article, the newspaper added: "The University should be humiliated that its deceptive handling of the admission process has been uncovered."⁸¹ Then, it took Harvard's officials to task for having understated both the weight that the legacy preference brings and the academic credentials of the legacies who were admitted:

IT WAS just as we suspected.

Over the past year, *The Crimson* has repeatedly protested the University's policy of granting preferential treatment in admissions to children of Harvard and Radcliffe alumni ("legacies") and recruited athletes. We have pointed to disparate admission rates that suggest that the fabled "tips" given to these groups are, in fact, hard shoves.

* * * *

IT'S HARD to argue with the facts: According to documents obtained from the U.S. Department of Education under the Freedom of Information Act, Harvard admitted 35.7 percent of legacy applicants and 48.7 percent of recruited athletes in the classes of 1985 to 1992, compared to 16.9 percent for the applicant pool as a whole.

These figures cast considerable doubt on Harvard's claims that legacy status is only considered at [sic] a tie-breaking factor and that athletic prowess is considered in the same way as any other extracurricular activity. Still, admission rates alone do not conclusively disprove those claims.

These statistics from the Department of Education report do: "With the exception of the athletic rating, non-legacy/non-athletes scored better than legacies and

⁸⁰ Philip P. Pan, *Making Sense of a Complex System: Harvard's Admission Process*, THE HARVARD CRIMSON (Nov. 3, 1990), <http://www.thecrimson.com/article/1990/11/3/making-sense-of-a-complex-system/>.

⁸¹ *Shaky Record, So-So Scores*, THE HARVARD CRIMSON (Nov. 7, 1990), <http://www.thecrimson.com/article.aspx?ref=241747>.

recruited athletes in all areas of comparison [SAT math, SAT verbal, academic rating, extracurricular rating, personal rating, teacher rating, counselor rating, alumni rating and class rank]. In addition, the differences . . . were found, in each category, to be statistically significant.”

The report continues, “The comparison shows that on average, the admitted non-athlete/non-legacy applicants scored more than 130 points higher on the combined math and verbal SATs than the admitted recruited athletes, and 35 points higher than the legacies.”⁸²

Although the Ivy League colleges have been giving legacy preferences the longest, almost all of the elite colleges and universities do the same—and the boost that such preferences provide is substantial:

For more than 40 years, an astounding one-fifth of Harvard’s students have received admissions preference because their parents attended the school. Today, these overwhelmingly affluent, white children of alumni—“legacies”—are three times more likely to be accepted to Harvard than high school kids who lack that handsome lineage.

Yalies, don’t feel smug: Offspring of the Old Blue are two-and-a-half times more likely to be accepted than their unconnected peers. Dartmouth this year admitted 57 percent of its legacy applicants, compared to 27 percent of nonlegacies. At the University of Pennsylvania, 66 percent of legacies were admitted last year—thanks in part to an autonomous “office of alumni admissions” that actively lobbies for alumni children before the admissions committee.

* * * *

The practice of playing favorites with alumni children is nearly universal among private colleges and isn’t unheard of at public institutions, either. The rate of admission for Stanford’s alumni children is “almost twice the general population,” according to a spokesman for the admissions office. Notre Dame reserves 25

⁸² *Id.*

percent of each freshman class for legacies. At the University of Virginia, where native Virginians make up two-thirds of each class, alumni children are automatically treated as Virginians even if they live out of state—giving them a whopping competitive edge. The same is true of the University of California at Berkeley.⁸³

A second untruth that colleges tell (or at least imply) about legacy preferences is that all legacies get an admissions preference and that all legacy preferences are of equal weight. However, the truth is that some legacies get more of a preference than other legacies, and some legacies get no preference at all. This is because legacy preferences are generally given only to the children of alumni who have contributed money to the university; and, the more money that the alumni contribute, the greater the legacy preference that their children will receive.

For, according to Rachel Toor, a former admissions officer at Duke University:

Just having an alum parent didn't help; they had to have a history of consistent giving in order to have legacy status kick in on the admissions front.⁸⁴

Harvard does exactly the same thing. As journalist Daniel Golden has reported:

[T]he biggest reason for Harvard's legacy preference is money [T]he ability and willingness of graduates to donate to the university influence the size of the preference given to their progeny [My own survey was] corroborate[d] [by] a 1991 study by David Karen, now a professor at Bryn Mawr College, which concluded that alumni children at Harvard lose most of their admissions advantage if they apply for financial aid "[I]f you couldn't parlay a Harvard degree into an income sufficient to pay for your kid's education, Harvard was less likely to make the same mistake twice," Professor Karen told me.⁸⁵

⁸³ Larew, *supra* note 68, at 11-13.

⁸⁴ RACHEL TOOR, ADMISSIONS CONFIDENTIAL: AN INSIDER'S ACCOUNT OF THE ELITE COLLEGE SELECTION PROCESS, 192 (2001).

⁸⁵ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 28.

Because legacies typically get favored treatment only when their parents have a history of consistent giving to the college, it is difficult to tell where legacy preferences end and donor preferences begin. This is especially true because many legacies are passed over for admission in favor of non-legacies whose families are large donors.

Similarly, alumni preferences are given much more weight if the legacy comes from a prominent or well-known family. For example, as Professor Karabel has noted, George W. Bush received this kind of preference when he applied to Yale in 1963:

As the number of applicants to Yale increased, the administration decided that it could no longer afford to treat all legacy applicants equally. Instead, it would differentiate among alumni sons, giving extra preference on the basis of the family's contribution to Yale and its importance to American society.

As the son of a prominent Texas oilman then running for the United States Senate—and the grandson of a United States senator from Connecticut who had recently served as a member of the Yale Corporation—George W. Bush was no ordinary applicant. In April 1964, he was accepted to Yale—unlike 49 percent of all alumni sons who applied that year.⁸⁶

Even the Department of Education's Office for Civil Rights (OCR) acknowledged, in its Report about Harvard, that some legacies get more of a preference than other legacies:

It is evident . . . [in these cases] that being the son or daughter of an alumnus of Harvard-Radcliffe was the critical or decisive factor in admitting the applicant. It is clear that the "lineage tip" can work to the advantage of an applicant by offsetting weaker credentials in virtually any of the rating categories. There is also some evidence to suggest that certain alumni parents' status may be weighed more heavily than others.⁸⁷

⁸⁶ Jerome Karabel, *The Legacy of Legacies*, N.Y. TIMES (Sept. 13, 2014), http://www.nytimes.com/2004/09/13/opinion/13karabel.html?_r=0.

⁸⁷ *Excerpts From Federal Report on Harvard Admissions*, THE HARVARD CRIMSON (Nov. 2, 1990), <http://www.thecrimson.com/article/1990/11/2/excerpts-from-federal-report-on-harvard/?page=single>.

According to Professor Karabel, although OCR skirted the issue, the probable “source of differential treatment [among alumni parents] may well have been financial”—that is, based on the size of the donations they had made to Harvard.⁸⁸

C. The U.S. Department of Education’s 1990 Harvard Investigation Was Flawed

In July 1988 the Office of Civil Rights (“OCR”) of the U.S. Department of Education began investigating complaints of racial discrimination by Harvard against Asian-American applicants. OCR announced its findings in October 1990. Focusing on ten groups admitted from 1979 through 1988, it found that “Asian Americans had been admitted at a significantly lower rate for each of the past seven years” even though they were “similarly qualified” to white applicants.⁸⁹ However, despite the overwhelming evidence that Harvard had discriminated against Asian-American applicants, OCR claimed that the differential admission rates were not the product of racial or ethnic discrimination.⁹⁰

Instead, Harvard convinced OCR that Harvard’s use of a preference for legacies (and, to a lesser extent, for recruited athletes) was the sole reason for its low acceptance rate of Asian-American applicants and, moreover, that these preferences were not racially discriminatory.⁹¹ Apparently, OCR believed “Harvard’s rationale that the legacy policy will become less objectionable as soon as there are more minority [i.e., Asian-American] alumni to send their own children to good old Harvard.”⁹²

Indeed, this is also what Harvard told its Asian students:

“We have met with the admissions office and they have explained why they need a tip for legacies and athletes, and why this is not d[i]scriminating against Asian Americans,” said Joshua Li ‘92, co-president of the Asian American Association. “We understand that in

⁸⁸ KARABEL, *supra* note 6, at 507.

⁸⁹ KARABEL, *supra* note 6, at 504.

⁹⁰ See KARABEL, *supra* note 6, at 504.

⁹¹ KARABEL, *supra* note 6, at 504.

⁹² *Is Harvard Really Innocent? Education Dept Report*, THE HARVARD CRIMSON (Oct. 10, 1990), <http://www.the-crimson.com/article/1990/10/10/is-harvard-really-innocent-pblbast-week/>.

the future Asian Americans will receive these tips as well.”⁹³

But *will* the children of Asian-Americans students actually benefit from the legacy preference once they become Harvard alumni, and *will* this then raise Harvard’s acceptance rate of Asian-Americans in the future?

No, because there are two flaws in the Education Department’s logic. First, it is not true that, as OCR claimed, Asian-American enrollment at Harvard would rise as soon as more Asian-Americans became Harvard alumni. For, as previously pointed out in this article, legacy status alone is not sufficient to warrant an admissions “tag” unless the legacy’s parent has donated a lot of money to Harvard. This is not something that most Asian-Americans are able to do.

Second, and more importantly, legacy preferences *per se* do not actually exist. The idea of legacy preferences is that the children of a college’s alumni will get preference when applying to that college. But does this mean that a hypothetical legacy who is not given any preference by a college that professes to offer it would then have a valid legal claim against the college? If so, then what is the source of the legal right under which that claim is based? Is it a contract? No. Is it a government regulation? No.

In other words, legacy applicants have no enforceable right (contractual or other-wise) to receive a preference in college admissions. Therefore, colleges can admit or reject any applicant they want, including a highly-qualified legacy. As was previously documented in this article, Harvard has never applied its legacy preference equally to all legacies. Furthermore, no one is ever going to force Harvard to start doing so for the children of Asian-American alumni. Most significantly, even though the basis for OCR’s ruling was that Asian-Americans would start benefitting from the legacy preference once they became alumni, OCR did not give the Asian-American children of Harvard alumni a legally-enforceable right to obtain this legacy preference—let alone an equal preference in admissions with other legacies. Thus, Harvard will still be able to discriminate willy nilly in admissions—even among legacies—as Harvard already does.

So, to repeat, legacies do not have any legal right to receive preference in admissions at Harvard or any other college. Instead, these colleges can—and do—choose to give a preference to one legacy and

⁹³ Marc P. Berenson, *Students Split on Gov’t Ruling: Asian Groups Still Concerned With Low Admission Rate*, THE HARVARD CRIMSON (Oct. 6, 1990), <http://www.the-crimson.com/article/1990/10/6/students-split-on-govt-ruling-pleaders/>.

deny a preference to another legacy. In this sense, the legacy preference is just like all of the other factors that colleges say they consider under the holistic-admissions system. That is, colleges apply the legacy preference just as inconsistently as they apply all of the other admissions criteria. But what does it mean if a college can apply its admissions criteria inconsistently? It means that there really are no criteria at all—just arbitrary decisions. For, as Professor Karabel has confirmed, the sole guiding principle behind the holistic-admissions system is that this system allows colleges to accept—and to reject—whomever they desire and then to hide the reasons for their decision.

However, there was much more to OCR's vindication of Harvard than a simple misunderstanding of what the legacy preference does—and does not—entail. Indeed, Harvard's argument concerning its use of legacy preferences was not made in good faith and neither was OCR's decision to accept that argument at face value. In fact, considering that the original purpose of the legacy preference was to discriminate on the basis of ethnicity, OCR's use of this preference to justify Harvard's ethnically-disparate rates of admission made no sense whatsoever. Against the irrefutable, well-documented, and long history (since the mid-1920s) of discriminatory-admissions practices at Harvard, OCR stated: "While these [legacy] preferences have an adverse effect on Asian-Americans, we determined that they were long standing and legitimate, and not a pretext of discrimination."⁹⁴

But since when is the mid-1920s "long standing"; how is accepting bribes a "legitimate" purpose; and why is initiating the legacy preference to keep out Jews not a "pretext of discrimination"? Clearly, OCR's decision that Harvard did not discriminate against Asian-Americans was contrary to the facts. For, as Harvard Law Professor Alan Dershowitz has stated: "[Asian Americans] clearly get a big whack . . . in the direction against them [because] Harvard wants a student body that possesses a certain racial balance."⁹⁵

Before it would find any discrimination, OCR seems to have required that there be recent and express statements found in the admissions office's files specifying that "the implementation of . . . [a]

⁹⁴ Joshua W. Shenk, *Harvard Admissions Off The Hook (But What About Those Legacies?)*, THE HARVARD CRIMSON (Nov. 2, 1990), <http://www.thecrimson.com/article/1991/6/6/harvard-admissions-off-the-hook-but/>.

⁹⁵ P. Pan, *Ed. Department Clears Harvard: Government Accepts Harvard's "Legacy-Athlete" Explanation*, THE HARVARD CRIMSON (Oct. 6, 1990), <http://www.thecrimson.com/article.aspx?ref=345511>.

preference or 'tip' was . . . designed to negatively treat or affect Asian American applicants."⁹⁶

However, requiring direct and current evidence—while overlooking all of the circumstantial evidence of current discrimination as well as the direct evidence of past discrimination against all minorities—was quite unrealistic. Especially because Harvard had previously made the mistake of having put its anti-Jewish sentiments in writing, the university was unlikely to repeat this mistake again with regard to Asian-Americans.

For example, with regard to both athletics and legacy preferences, then-Harvard dean of admissions Wilbur J. Bender wrote a report in 1960 noting that those topics would become “sources of potential embarrassment if discussed candidly in a public document.”⁹⁷ Thus, one cannot expect Harvard to put or leave evidence in its files of explicit discrimination against Asian-Americans.

To see how common such deceptions are at Harvard, it is instructive to look at Harvard's response to the passage, in 1949, of Massachusetts' “Fair Educational Practices Act” (which Harvard had “vehemently opposed”), banning discrimination on the basis of race, religion, or national origin in educational institutions.⁹⁸ According to Professor Karabel:

While publicly denying that its admissions policy discriminated against Jews, Harvard moved quietly to inform those involved in admissions that . . . “you should not ask or give information at any time about race, religion, color, or national origin” . . . [s]ince such remarks are “forbidden in the law,” [and] everyone “must be super careful now.”

At the same time, [Harvard Dean] Bender saw “no reason why the law should make any difference in any of our basic policies and certainly not in our admission or scholarship policies.” . . . [By this, Bender meant that Harvard would] continue to use not only nonacademic criteria such as athletic ability, alumni parentage, and geographical diversity, but also the “intangible qualities” that had been used to limit the number of Jews.

⁹⁶ *Excerpts From Federal Report on Harvard*, THE HARVARD CRIMSON (Nov. 2, 1990), <http://www.thecrimson.com/article/1990/11/2/excerpts-from-federal-report-on-harvard/?page=single>.

⁹⁷ KARABEL, *supra* note 6, at 281 (citation omitted).

⁹⁸ KARABEL, *supra* note 6, at 194.

Precisely because such qualities remained critical [to keeping out Jews], Bender believed that it was “more important than ever before that we have good interviews and good assessment of intangible qualities that a candidate may possess.”

Despite his insistence that Harvard was already in full compliance with the Fair Educational Practices Act, Bender in fact was quite worried about its possible impact. For one thing [he advised his admissions staff], “we don’t know who will do the enforcing” and “the amount of trouble this law may cause for us.”⁹⁹

Shortly after OCR issued its decision vindicating Harvard, OCR essentially admitted that it had been biased in Harvard’s favor and that its investigation was a whitewash. For, as Professor Karabel has confirmed:

An OCR spokesman noted that Harvard was “an institution that has been around for several hundred years” and was following “a practice that is widespread.” It was not the OCR’s intention, he declared, “to set the world on its head” by declaring that common institutional policies “are going to be treated all of the sudden as violations.”¹⁰⁰

So, as it turned out, Dean Bender had nothing to worry about. For neither Massachusetts’ anti-discrimination law, its later federal counterpart in the Civil Rights Act of 1964, nor even the constitutional mandate of equal protection under law ever caused any “trouble” for Harvard, or most of the other elite colleges, because those who did “the enforcing” looked the other way while these colleges hid their illegal and discriminatory actions in plain sight.

VII. FAVORITISM IN ADMISSIONS LEADS TO FAVORITISM IN GRADES, ETC.

The admission of unqualified applicants to a highly-ranked university puts them at a disadvantage when they are forced to compete in class with the other (well-qualified) students. But this cannot be

⁹⁹ KARABEL, *supra* note 6, at 195-96 (citation omitted).

¹⁰⁰ KARABEL, *supra* note 6, at 505 (citing Scott Jaschik, *Doubts Are Raised about U.S. Inquiry on Harvard Policies*, CHRONICLE OF HIGHER EDUCATION (Feb. 6, 1991), <http://chronicle.com/article/Doubts-Are-Raised-About-US/87942>).

allowed to happen. For, after admitting applicants sponsored by politically-prominent individuals (including the universities' own officials), the universities still need to keep the sponsors happy. It simply won't do to let those privileged students flunk out. And, for the ambitious students desirous of later attending graduate or professional school, a "gentleman's C" won't cut it, either.

Therefore, almost universally, the solution that the universities have found to this problem is—academic fraud.¹⁰¹ This fraud involves fake grades,¹⁰² fake courses,¹⁰³ and even fake degrees.¹⁰⁴ In other words, the very same corrupt motivations that lead the universities to admit underprepared but well-connected students then lead them to corruptly "fix" the students' grades.¹⁰⁵

But the corruption doesn't end there. Universities also cover up privileged students' cheating,¹⁰⁶ sexual assaults,¹⁰⁷ and other disciplinary

¹⁰¹ See, e.g., Marissa Payne, *NCAA is reportedly investigating 20 universities for academic fraud*, WASH. POST (Jan. 21, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/01/21/ncaa-is-reportedly-investigating-20-universities-for-academic-fraud/>.

¹⁰² See, e.g., Carl Bialik & Jason Fry, *A Sad Ritual for Ohio State: National Title, Then Scandal*, THE WALL ST. JOURNAL ONLINE (July 15, 2003), <http://www.wsj.com/articles/SB105827396037731600>.

¹⁰³ See, e.g., Letitia Stein, *University of North Carolina put on probation over academic fraud scandal*, REUTERS (June 11, 2015), <http://www.reuters.com/article/2015/06/11/us-unc-fraud-idUSKBN0OR2EO20150611> (“[A]n independent investigation by former federal prosecutor Kenneth Wainstein disclosed that more than 3,000 students at the university received credit for fake classes over an 18-year period.”).

¹⁰⁴ See Ian Urbina, *University Investigates Whether Governor's Daughter Earned Degree*, N.Y. TIMES (Jan. 22, 2008), http://www.nytimes.com/2008/01/22/us/22heather.html?_r=0; Len Boselovic & Patricia Sabatini, *Calls mount for WVU officials to step down*, PITTSBURGH POST-GAZETTE (April 26, 2008), http://www.post-gazette.com/businessnews/2008/04/26/Calls-mount-for-WVU-officials-to-step-down/stories/2008_04260150.

¹⁰⁵ One of the reasons that grade-fixing is so rampant is that this activity is not treated as a crime. For example, in 2012, Montana Tech (a four-year college in Butte) got caught fixing the grades of 33 foreign students sponsored by the Saudi Embassy or the Saudi Arabian Oil Company. One of the students had 16 grade changes, including four (low) grades deleted from his transcript and six grades awarded for classes never taken. However, no one was ever prosecuted because, it was claimed, “Montana law doesn't bar the alteration of school records — even in return for gifts.” See Maggie Michael & Raphael Satter, *WikiLeaks: Saudis tried to shield students from US scandal*, SALON.COM (June 22, 2015), http://www.salon.com/2015/06/22/wikileaks_saudis_tried_to_shield_students_from_us_scandal/.

¹⁰⁶ See, e.g., *National News Briefs; Dartmouth Absolves 78 Students of Cheating*, N.Y. TIMES (Mar. 12, 2000), <http://www.nytimes.com/2000/03/12/us/national-news-briefs-dartmouth-absolves-78-students-of-cheating.html> (“Dartmouth College has cleared 78 students of accusations that they cheated in a computer science class . . . Computer records revealed that some students' terminals had been used to obtain the answer, but officials said that was not enough to prove which students had cheated . . . [The professor] said, ‘I think it's a whitewash.’”).

violations¹⁰⁸ as well as give them preferential treatment for awards and honors.¹⁰⁹

True, many of the scandals that make it into the news involve student-athletes:

[A]cademic fraud . . . is no stranger to college athletic programs, with phony classes, no-show lectures and grade changing tactics still key parts of the playbook of athletic programs across the country, records show Andrew Zimbalist, a sports economist and professor at Smith College in Massachusetts . . . called such cheating now a routine part of the game.¹¹⁰

As Dennis A. Foster (a former faculty president at Southern Methodist University) explained:

If athletes go to most classes, if they go to tutoring, we will carry most of them and make sure they pass and get a diploma. But some athletes have so little internalized good study habits that even that is hard.¹¹¹

¹⁰⁷ See, e.g., Michele Landis Dauber, *Transparency and Sensitivity Work Together to Stop Campus Rape*, N.Y. TIMES (Room for Debate, Dec. 12, 2014), <http://www.nytimes.com/roomfordebate/2014/12/12/justice-and-fairness-in-campus-rape-cases/transparency-and-sensitivity-work-together-to-stop-campus-rape> (“Between 1996 and 2009 Stanford University reported 175 forcible sexual assaults to the federal government, but had only four hearings and two findings of responsibility.”); Marc Tracy, *Florida State Settles Suit Over Jameis Winston Rape Inquiry*, N.Y. TIMES (Jan. 25, 2016), <http://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html> (“[S]enior Florida State athletic officials . . . decided, on behalf of the university, not to begin an internal disciplinary inquiry [into the rape allegation], as required by federal law.”); Jennifer Conlin, *Local News, Off College Presses*, N.Y. TIMES (Apr. 13, 2014), <http://www.nytimes.com/2014/04/14/business/media/turning-to-college-journalists-for-the-news-in-town-michigan.html> (The University of Michigan waited 4 years, “until [the student’s] athletic career had ended,” before punishing him for sexual assault.).

¹⁰⁸ See, e.g., Mike McIntire & Walt Bogdanich, *Florida State Player Fled Crash but Got Only Traffic Tickets*, N.Y. TIMES (Nov. 14, 2014), <http://www.nytimes.com/2014/11/15/sports/ncaafootball/for-an-fsu-football-player-a-hit-and-run-becomes-two-traffic-tickets.html> (The local police decided not to file criminal charges after consulting with Florida State University.).

¹⁰⁹ Personal knowledge obtained while the author was a student at Columbia University.

¹¹⁰ Ted Sherman, *Scoring grades: How schools cheat to keep athletes in the game*, NJ.COM (Sept. 22, 2015), http://www.nj.com/rutgersfootball/index.ssf/2015/09/scoring_grades_how_schools_cheat_to_keep_athletes.html.

¹¹¹ Michael Powell, *The Tragedy of a Hall of Fame Coach and His Star Recruit*, N.Y. TIMES (Mar. 4, 2016), <http://www.nytimes.com/2016/03/06/sports/ncaabasketball/smu->

But, at the elite universities, preferential treatment is also given to non-athletes. As former Yale professor William Deresiewicz explains:

At places like Yale, . . . [g]etting through the gate is very difficult, but once you're in, there's almost nothing you can do to get kicked out. Not the most abject academic failure, not the most heinous act of plagiarism, not even threatening a fellow student with bodily harm—I've heard of all three—will get you expelled.¹¹²

And the children of the rich and famous get even more special treatment. For example, in 2007 it was discovered that West Virginia University had given an unearned M.B.A. degree to the daughter of the governor and then retroactively manufactured fake records in an attempt to cover up this fraud.¹¹³

Finally, the top schools take grade-fixing to a new level by giving an average grade of A- to all students. According to William Deresiewicz:

Students at places like Cleveland State also don't get A-'s just for doing the work. There's been a lot of handwringing lately over grade inflation, and it is a scandal, but the most scandalous thing about it is how uneven it's been . . . [I]t's gone up everywhere, but not by anything like the same amount. The average gpa at public universities is now about 3.0, a B; at private universities it's about 3.3, just short of a B+ . . . At a school like Yale, students who come to class and work hard expect nothing less than an A-. And most of the time, they get it . . . Elite schools . . . nurture what a former Yale graduate student I know calls "entitled mediocrity." A is the mark of excellence; A- is the mark of entitled mediocrity.¹¹⁴

keith-frazier-larry-brown-corruption.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region®ion=top-news&WT.nav=top-news (Due to the student's poor high school record, the faculty committee that examines applications turned the student down. However, the S.M.U. provost overruled the committee based on "holistic" criteria. Later, "[a]n S.M.U. team assistant secretly completed [the student's] [course]work, an N.C.A.A. report found.").

¹¹² William Deresiewicz, *The Disadvantages of an Elite Education*, THE AM. SCHOLAR (June 1, 2008), <https://theamericanscholar.org/the-disadvantages-of-an-elite-education/> [hereinafter Deresiewicz].

¹¹³ See *supra* note 104.

¹¹⁴ Deresiewicz, *supra* note 112.

Similarly, according to a 2013 article in *The Harvard Crimson*: “The median grade at Harvard College is an A-, and the most frequently awarded mark is an A.”¹¹⁵ If there were ever any question about whether or not this is grade-fixing, Harvard professor Harvey C. Mansfield removed all doubt:

Mansfield said the issue of grade inflation, while not new and not isolated to Harvard, has become routine and has an adverse effect on standards and on the most talented students, whose merit goes unrecognized.

Mansfield described how, in recent years, he himself has taken to giving students two grades: one that shows up on their transcript and one he believes they actually deserve.

“I didn’t want my students to be punished by being the only ones to suffer for getting an accurate grade,” he said.¹¹⁶

VIII. THERE IS NO RIGHT TO OPERATE A CORRUPT ADMISSIONS SYSTEM

A. *Holistic Admissions Facilitates Fraud*

While the corruption inherent in the holistic-admissions system is a longstanding problem, what is new is the attempt by the elite colleges to equate this admissions system with something good—affirmative action for deserving minorities—when its true purpose was always affirmative action for the rich. Simply put—like the other elite colleges and universities—UT wants to continue to give admissions preferences based on corrupt political considerations while pretending to do otherwise.

In so doing, these universities are using the holistic process to facilitate false advertising—both to their applicants and to their students’ future employers—regarding the criteria on which the schools’

¹¹⁵ Matthew Q. Clarida & Nicholas P. Fandos, *Substantiating Fears of Grade Inflation, Dean Says Median Grade at Harvard College Is A-, Most Common Grade Is A*, THE HARVARD CRIMSON (Dec. 3, 2013), <http://www.thecrimson.com/article/2013/12/3/grade-inflation-mode-a/>.

¹¹⁶ Travis Andersen, Nicholas Jacques, & Todd Feathers, *Harvard professor says grade inflation rampant*, THE BOSTON GLOBE (Dec. 4, 2013), <http://www.bostonglobe.com/metro/2013/12/03/harvard-professor-raises-concerns-about-grade-inflation/McZHfRZ2Rxp0P5Xvwged1N/story.html>.

admissions decisions are based. The admissions process is held up as meritocratic and honest, but instead it is “fixed” in favor of the rich and well-connected. While “thousands of wealthy, well-connected applicants slide into elite colleges each year with little regard to merit or diversity,”¹¹⁷ “the poor schmuck who has to get in on his own has to walk on water.”¹¹⁸

To obtain such a patently biased result from an admissions system that is claimed to be fair, the elite colleges needed a process that they could manipulate and control. Thus, as Professor Karabel has amply documented, these colleges devised a holistic-admissions system that would hide their use of pretexts and double standards.

For example, to limit the number of Jews admitted, the Ivy League colleges added “certain non-intellectual” admissions criteria to the existing academic criteria. However, as Robert Nelson Corwin (Chairman of Yale’s Board of Admissions from 1920 to 1933) made clear in his “Memo on Jewish Representation,” the sole purpose of these additional requirements was to create a *pretext* on which to reject the Jewish applicants:

No college or school seems to have discovered or devised any general criteria which will operate to exclude the undesirable and uneducable members of this [Jewish] race. All which have been successful in their purpose have had to avail themselves of some agency or means of discrimination based on certain non-intellectual requirements.¹¹⁹

Thus, as Professor Karabel noted: “If the ‘Jewish invasion’ was to be halted, it was clear . . . that only a frank double standard was likely to work.”¹²⁰

Supposedly, the additional, non-academic criteria applied to all applicants. However, under the “double standard” adopted by the Ivy League colleges, these criteria were in fact applied only to the Jews and only for the purpose of rejecting them. This was because, as the schools realized, “[c]riteria intended to reduce the number of Jews, *if neutrally applied*, might not have the anticipated effects.”¹²¹

¹¹⁷ GOLDEN, *THE PRICE OF ADMISSION*, *supra* note 27, at 4.

¹¹⁸ GOLDEN, *THE PRICE OF ADMISSION*, *supra* note 27, at 14. This quote was attributed to Daniel Saracino, assistant provost for admissions at the University of Notre Dame.

¹¹⁹ KARABEL, *supra* note 6, at 114 (citation omitted).

¹²⁰ KARABEL, *supra* note 6, at 114.

¹²¹ KARABEL, *supra* note 6, at 114.

Thus, as Harvard's president A. Lawrence Lowell noted in 1926, any test of character implemented "with the intent of limiting Jews should not be supposed . . . as a measurement of character really applicable to Jews and Gentiles alike."¹²² According to Professor Karabel: "In frankly endorsing a double standard, Lowell was rejecting the argument that applying ostensibly neutral criteria such as 'character' would be sufficient to reduce the number of Jews . . . [H]is goal was restriction itself."¹²³

Later, Harvard began "euphemistic[ally]" referring to Jewish applicants as "Group III." When Harvard was having difficulty filling its class during World War II, "[Chairman of Harvard's Committee on Admissions Richard Mott] Gummere was euphemistic but clear: "Nearly all rejections as of May 1943, were 'Group III.' . . . We must have more candidates not Group III."¹²⁴

For the past 20 years, Harvard has been doing the very same thing to Asian-American applicants—and so has the entire Ivy League.¹²⁵ As author and journalist Daniel Golden was quoted as saying: "If you look at the Ivy League, you will find that Asian-Americans never get to 20 percent of the class. The schools semi-consciously say to themselves, 'We can't have all Asians.'"¹²⁶

Both to employ a double standard and then to hide its use, a university could find no more effective tool than the holistic-admissions system. This is why today virtually all elite colleges and universities use this system. However, while the schools satisfy their "institutional interests," they victimize both applicants and employers.

Applicants are being defrauded because those without connections (who think the admissions process is based on merit) have been tricked into paying an application fee when, in fact, they have no chance of being admitted. As Sara Harberson (the former associate dean of admissions at the University of Pennsylvania) pointed out:

In all, holistic admissions adds subjectivity to admissions decisions, and the practice makes it difficult to explain who gets in, who doesn't, and why. But has

¹²² KARABEL, *supra* note 6, at 89 (citation omitted).

¹²³ KARABEL, *supra* note 6, at 89 (citation omitted).

¹²⁴ KARABEL, *supra* note 6, at 180 (citation omitted).

¹²⁵ KARABEL, *supra* note 6, at 502 (citation omitted). Referring to Harvard's admission statistics, Professor Karabel stated: "At least with respect to academic qualifications, the evidence seemed clear: just like Jews before them, Asian Americans had to meet a different and higher standard than other applicants."

¹²⁶ Ethan Bronner, *Asian-Americans in the Argument*, N.Y. TIMES (Nov. 1, 2012), <http://www.nytimes.com/2012/11/04/education/edlife/affirmative-action-a-complicated-issue-for-asian-americans.html>.

holistic admissions become a guise for allowing cultural and even racial biases to dictate the admissions process?

To some degree, yes.

As an admissions professional, I gave students, families and guidance counselors a list of what it took to be admitted—the objective expectations of a competitive applicant. I didn't mention that racial stereotyping, money, connections and athletics sometimes overshadow these high benchmarks we all promoted. The veil of holistic admissions allows for these other factors to become key elements in a student's admissions decision.

The most heart-wrenching conversations I had were with students who hit all the listed benchmarks and didn't get in. I would tell them about the overall competitiveness of the applicant pool and the record low admit rate we had. But after I hung up the phone, I knew I wasn't being transparent.

There was always a reason. Once in a while, it was something concrete, like the student got a low grade in an academic course even though his or her overall GPA remained high. Often, it had to do with the fact that the application had no "tag."

...Typically students with tags are recruited athletes, children of alumni, children of donors or potential donors, or students who are connected to the well connected. The lack of a tag can hinder an otherwise strong, high-achieving student. Asian American students typically don't have these tags.

* * * *

Tags alone are not the only reason highly qualified Asian American applicants are turned away in droves from elite private institutions. Nowadays nobody on an admissions committee would dare use the term racial "quotas," but racial stereotyping is alive and well. And although colleges would never admit students based on "quotas," they fearlessly will "sculpt" the class with race and gender percentages in mind.

For example, there's an expectation that Asian Americans will be the highest test scorers and at the top of their class; anything less can become an easy reason for a denial. And yet even when Asian American students meet this high threshold, they may be destined for the wait list or outright denial because they don't stand out among the other high-achieving students in their cohort. The most exceptional academic applicants may be seen as the least unique, and so admissions officers are rarely moved to fight for them.

In the end, holistic admissions can allow for a gray zone of bias at elite institutions, working against a group such as Asian Americans that excels in the black-and-white world of academic achievement.¹²⁷

However, Ms. Harberson has a solution:

One way to improve the system for Asian Americans—and everyone else—is to add more transparency to the process. That would mean coming clean about tags and their influence in the admissions process. In addition, all colleges should be required to make public the demographics of their applicants and the percentages admitted. This is already the practice at many public universities, such as the University of California.

Better yet, schools should also break down their admits' high school GPAs and test scores by race and ethnicity. Knowing acceptance rates by identifiable characteristics can reveal institutional tendencies, if not outright biases; it can push schools to better justify their practices, and it would give applicants a look at which schools offer them the best opportunities.

Without more transparency, holistic admissions can become an excuse for cultural bias to dictate a process that is supposed to open doors. We are better than that. And our youth will demand that we do something about it.¹²⁸

¹²⁷ Harberson, *supra* note 36.

¹²⁸ Harberson, *supra* note 36.

Lawyer and author Steve Cohen also believes that the elite colleges should “make the process more transparent by acknowledging what niches they are looking to fill, and how many slots are open that year.”¹²⁹ As Mr. Cohen notes, with this new information students would “self-limit their applications as they realize the very long odds they face,” which would then “reduce the number of applicants to [these] college[s].”¹³⁰ However, “reducing the number of applicants would lower the number of kids who get rejected, thus diminishing the school’s reported selectivity—and thus its *U.S. News* ranking.”¹³¹ Thus, this is why the elite colleges do not tell applicants the true admissions criteria that will be applied. But this is fraud.

Of course, many students at the nation’s elite universities were admitted on merit. However, as we have seen, other students were admitted on the basis of their parents’ wealth or political connections. Since employers do not know the true extent of these underhanded admissions practices, they are being tricked into hiring underqualified graduates from what they think are elite universities. Thus, what these universities are doing is the equivalent of hiding rotten apples on the bottom of a barrel, and then selling the entire barrel as being fresh. While some might claim that this is just good marketing, that marketing is also based on fraud. We know this because:

Many colleges even place admitted legacies in a special “Not in Profile” file (along with recruited athletes and some minority students), so that when the school’s SAT scores are published, alumni kids won’t pull down the average.¹³²

As a result, by using a dishonest holistic-admissions system, the elite universities are defrauding not only applicants but also employers as well. The courts should *not* be a party to this fraud.

B. The Supreme Court is to Blame for the Prevalence of Holistic Admissions

Unfortunately, however, the Supreme Court is largely to blame for the prevalence of the holistic-admissions system today because the Court has seemingly put its imprimatur on the use of this system. Indeed, both the *Bakke* and *Grutter* Courts held up Harvard College’s holistic-

¹²⁹ Cohen, *supra* note 39.

¹³⁰ Cohen, *supra* note 39.

¹³¹ Cohen, *supra* note 39.

¹³² Larew, *supra* note 68, at 13.

admissions system—even though Harvard was not a party to either case—as an example of what a non-discriminatory admissions system *supposedly* looked like.¹³³ Yet, as we have seen, Harvard is one of the worst offenders in college admissions.

Moreover, in *Fisher I* it was held that, while “a court, of course, should ensure that there is a reasoned, principled explanation,” a university’s use of a holistic process to select its students is entitled to “some, but not complete, judicial deference.”¹³⁴

One wishes it could be said that the Supreme Court was unaware of the unsavory uses to which the holistic-admissions system has been—or could be—put when the Court made these pronouncements. But it cannot. For example, as early as the *Bakke* case Justice Blackmun acknowledged that the holistic process hides the very same corrupt admissions practices discussed in this article:

[W]e are [aware] that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.¹³⁵

Justice Blackmun also noted that, under its supposedly exemplary admissions system, “Harvard[] . . . [was] accomplish[ing] covertly” what the Court had just found in *Bakke* to constitute illegal racial preferences when done “openly” by the University of California at Davis.¹³⁶ For, as Justice Brennan pointed out in the same case, other than the secretive and discretionary nature of Harvard’s holistic process:

There is no sensible, and certainly no constitutional, distinction between . . . adding a set number of points to the admissions rating of disadvantaged minority applicants . . . with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants [as Harvard could do, if

¹³³ See *Regents of Univ. of Calif. v. Bakke*, 438 U. S. 265, 316-17 (1978); *Grutter v. Bollinger*, 539 U. S. 306, 335 (2003); See also *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2432 (2013) (Ginsburg, J., dissenting) (“the Harvard plan [was] referenced as exemplary in Justice Powell’s opinion in *Regents of Univ. of Cal. v. Bakke*.”).

¹³⁴ *Fisher I*, 133 S. Ct. at 2419 (citing *Grutter*, 539 U. S. at 328).

¹³⁵ *Regents of Univ. of Cal.*, 438 U. S. at 404.

¹³⁶ *Id.* at 406.

it wanted, through its holistic admissions process] and setting a fixed number of places for such applicants as was done [at Davis].¹³⁷

In *Fisher I*, Justice Ginsburg went even further, pointing out that if universities were not allowed to use racially-conscious admissions criteria openly, they would then “camouflage” their illicit use of such criteria through the opaqueness of the holistic process:

As for holistic review, if universities cannot explicitly include race as a factor, many may “resort to camouflage” to “maintain their minority enrollment.”¹³⁸

Justice Ginsburg’s prediction has already come to pass. As then-Harvard President Neil Rudenstine noted in “The President’s Report, 1993-1995,” Justice Powell’s opinion in the *Bakke* case permitted the continuation of policies that “preserve an institution’s capacity—with considerable flexibility—to make its own determinations in admissions.”¹³⁹ Thus, according to Professor Karabel, “Harvard was free” to continue its discriminatory admissions policies under the guise of the holistic process and “give heavy weight to nonacademic factors, including highly subjective ones such as ‘character,’ ‘personality,’ and ‘leadership.’”¹⁴⁰

Besides hiding preferences for the wealthy and well-connected, the universities are also able to use the holistic process to make an end run around the Supreme Court’s rulings restricting the use of race in admissions. Indeed, the holistic process provides a “cover” enabling colleges to hide their use of race both as a positive factor for African-Americans and Hispanics as well as a negative factor for Asian-Americans. As the head of the U.S. Justice Department’s Civil Rights Division, Assistant Attorney General William Bradford Reynolds, stated in 1988:

[M]any of the country’s elite universities may well be practicing discrimination against Asian-American student applicants—that is, evaluating their applications differently from the applications of non-Asian students of comparable qualifications.

¹³⁷ *Id.* at 378.

¹³⁸ *Fisher I*, 133 S. Ct. at 2433 n.2 (Ginsburg, J., dissenting) (quoting *Gratz v. Bollinger*, 539 U. S. 244, 304 (Ginsburg, J., dissenting)).

¹³⁹ KARABEL, *supra* note 6, at 509 (citation omitted).

¹⁴⁰ KARABEL, *supra* note 6, at 510.

* * * *

In practice, th[e] “diversity” explanation operates more often than not as a “cover” for the allocation of freshman positions based on race—precisely the evil condemned in *Bakke* . . . While specific numbers of places are no longer overtly set aside, percentages are regularly assigned as a method of reserving slots for different minority and nonminority groups. The losers under such a regime are those high school graduates deserving admission but passed over for less qualified applicants who are taken in order to satisfy percentage benchmarks.¹⁴¹

For example, here is one way in which colleges “game” the holistic-admissions system. Under the holistic process, some colleges award a “life-challenge” preference for applicants who have had to overcome hardships. Although various applicants may have overcome the same hardships, this preference is applied unequally based solely on the applicants’ race. As journalist and author Daniel Golden notes:

[T]he “life challenge” preference . . . [is] a back-door substitute for affirmative action. It was never meant for . . . Asian Americans at all.¹⁴²

Thus, as Harvard Law Professor Alan Dershowitz complains:

[*Bakke*] legitimated an [holistic] admissions process that is *inherently capable* of gross abuse and that . . . *has in fact been deliberately* manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions.¹⁴³

However, despite the Supreme Court’s acknowledgment of the various improper practices that occur under holistic-admissions systems, the Court appears to have defended the universities’ right to engage in these practices on the basis of so-called “academic freedom.” For example, as Justice Powell stated in *Bakke*:

¹⁴¹ William Bradford Reynolds, *Discrimination against Asian-Americans in Higher Education: Evidence, Causes, and Cures, Remarks presented at the Symposium on Asian American University Admissions*, 9, 13, 14 (Washington, DC, Nov. 30, 1988), available at <http://files.eric.ed.gov/full text/ED308730.pdf>.

¹⁴² GOLDEN, *THE PRICE OF ADMISSION*, *supra* note 27, at 199.

¹⁴³ Dershowitz & Hanft, *supra* note 71, at 385 (original emphasis).

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the “four essential freedoms” that constitute academic freedom:

It is the business of a university . . . to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (concurring in result).

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967):

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.” *United States v. Associated Press*, 52 F.Supp. 362, 372.¹⁴⁴

However, as amply demonstrated in this article, the elite universities do not use the holistic-admissions process “to determine . . . on academic grounds . . . who may be admitted to study” as Justice Powell implied in *Bakke*. Indeed, there is nothing academic about the improper influences that determine the elite-universities’ admissions decisions. Nor does the holistic process uncover the “truth [of which applicants are the most qualified] out of a multitude of . . . [academic criteria] rather than through any kind of authoritative selection.”

Instead, the holistic process relies on bribery, cronyism, and other forms of corruption. This is the exact *opposite* of the “reasoned,

¹⁴⁴ *Regents of Univ. of Calif. v. Bakke*, 438 U. S. 265, 312 (1978).

principled explanation” for the admissions decision that, as stated in *Fisher I*, “a court should ensure.” For example, besides being illegal, bribes to colleges make admissions decisions turn on what the applicants’ parents did rather than on anything having to do with the applicants themselves. So do legacy preferences as well as the preferences given to those whose parents have, in Justice Blackmun’s words, “connections with celebrities, the famous, and the powerful.” Thus, the use of such irrelevant factors, which is a complete corruption of the admissions process, has *nothing* to do with academic freedom or the First Amendment. For this reason, various legal scholars have argued that, for example, legacy preferences are actually illegal.

Steve Shadowen, Sozi Tulante, and Shara Alpern contend that legacy preferences at public universities violate the 14th Amendment’s Equal-Protection clause.¹⁴⁵ This is because the amendment extends to what Justice Potter Stewart called “preference based on lineage.”¹⁴⁶ They¹⁴⁷ also believe that legacy preferences at private universities violate the Civil Rights Act of 1866,¹⁴⁸ which outlaws discrimination on the basis of “ancestry.”¹⁴⁹

Similarly, Carlton Larson (a law professor at the University of California at Davis) argues that legacy preferences constitute a government-sponsored hereditary privilege.¹⁵⁰ Therefore, he believes that legacy preferences at public universities violate the constitutional provision that “no state shall . . . grant any Title of Nobility.”¹⁵¹

As of this writing, the status of legacy preferences under the law is unsettled. In *Grutter*, Justice Clarence Thomas asserted that “[t]he Equal Protection Clause does not . . . prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures.”¹⁵² However, this is only the Justice’s personal opinion. Moreover, as Judge Boyce F. Martin Jr. of the U.S. Court of Appeals for the Sixth Circuit pointed out in a chapter of Richard Kahlenberg’s book:

¹⁴⁵ See Steve D. Shadowen, Sozi P. Tulante, & Shara L. Alpern, *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 55, 101-111 (2009) [hereinafter Shadowen, Tulante, & Alpern].

¹⁴⁶ *Fullilove v. Klutznick*, 448 U. S. 448, 531 (1980) (Stewart, J., dissenting).

¹⁴⁷ See Shadowen, Tulante, & Alpern, *supra* note 145, at 111-120.

¹⁴⁸ Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981 (1991).

¹⁴⁹ See *Saint Francis College v. Al-Khazraji*, 481 U. S. 604, 613 (1987).

¹⁵⁰ See Carlton F. W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375, 1379 (2007).

¹⁵¹ U.S. CONST. art. I, § 9, cl. 8, § 10, cl. 1.

¹⁵² *Grutter v. Bollinger*, 539 U. S. 306, 368 (2003) (Thomas, J., concurring in part and dissenting in part).

[T]here has only been one decision addressing the constitutionality of legacy preferences. In 1976, Judge Hiram Ward of the United States District Court for the District of North Carolina ruled that the University of North Carolina at Chapel Hill was free to favor the children of alumni because the school had shown a rational reason for the legacy preference: “monetary support for the university.” However, as this case was decided before the Supreme Court had described all of our current standards of review and determines the question of whether legacy preferences are constitutional in a scant five sentences, it is neither binding nor persuasive to future courts.¹⁵³

But the most important reason for opposing the holistic-admissions system under which universities hide legacy and other unseemly preferences is that, as several Supreme Court Justices have pointed out, the holistic process is so opaque that it would allow the universities to hide even illegal admissions criteria and, thus, flout the law—whatever that law may be.

IX. THE ELITE UNIVERSITIES HAVE CREATED AN AMERICAN ARISTOCRACY

Since colonial times, the wealthy of this nation have sought to establish a hereditary aristocracy. In modern times, they have largely accomplished this goal by creating, first, a corrupt admissions system at the nation’s premier colleges and universities that overwhelmingly favors their children and, second, a caste system in society where students get jobs based on their school pedigrees.

To begin with, as journalist Daniel Golden explains, there is a “double standard that favors rich and well-connected students applying to the one hundred or so” selective colleges and universities.¹⁵⁴ As a result, as noted in a recent *New York Times* article, “[f]or all of the other

¹⁵³ Boyce F. Martin with Donya Khalili, *Privilege Paving the Way for Privilege: How Judges Will Confront the Legal Ramifications of Legacy Admissions to Public and Private Universities*, http://www.academia.edu/2652985/Privilege_Paving_the_Way_for_Privilege_How_Judges_Will_Confront_the_Legal_Ramifications_of_Legacy_Admissions_to_Public_and_Private_Universities (quoting *Rosenstock v. Bd. of Governors of Univ. of N.C.*, 423 F. Supp. 1321, 1327 (D.C.N.C. 1976)).

¹⁵⁴ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 4.

ways that top colleges had become diverse, their student bodies remained shockingly affluent.”¹⁵⁵ The article continues:

At the University of Michigan, more entering freshmen in 2003 came from families earning at least \$200,000 a year than came from the entire bottom half of the income distribution. At some private colleges, the numbers were even more extreme.

* * * *

[A] Georgetown University study of the class of 2010 at the country’s 193 most selective colleges . . . [found that,] [a]s entering freshmen, only 15 percent of students came from the bottom half of the income distribution. Sixty-seven percent came from the highest-earning fourth of the distribution. These statistics mean that on many campuses affluent students outnumber middle-class students.

“We [i.e., colleges] claim to be part of the American dream and of a system based on merit and opportunity and talent,” . . . [former Amherst College president Anthony] Marx says. “Yet if at the top places, two-thirds of the students come from the top quartile and only 5 percent come from the bottom quartile, then we are actually part of the problem of the growing economic divide rather than part of the solution.”¹⁵⁶

Despite having an admissions process often favoring inherited privilege over individual merit, the nation’s elite colleges and universities have created the illusion that their students are the best. As a result, they have been extraordinarily successful in placing their students at the top echelons of government, industry, and academia. Thus, as Mr. Golden puts it, these schools “serve as the gateway to affluence and influence in America.”¹⁵⁷

As Mr. Golden further points out:

Despite the popular notion that top colleges foster the American dream of upward mobility and equal

¹⁵⁵ David Leonhardt, *Top Colleges, Largely for the Elite*, N.Y. TIMES (May 24, 2011), http://www.nytimes.com/2011/05/25/business/economy/25leonhardt.html?_r=0.

¹⁵⁶ *Id.*

¹⁵⁷ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 5.

opportunity, the truth is quite different. While only a handful of low-income students penetrate the campus gates, admissions policies channel the children of the privileged into premier colleges, paving their way into leadership positions in business and government.¹⁵⁸

Since the students at the elite schools are preferred for the top jobs in America and since these students were selected by the schools in large part based on their families' wealth or position, "higher education has become a powerful force for reinforcing advantage and passing it on through generations."¹⁵⁹ Indeed, according to a study by the Brookings Institute: "[T]he average effect of education at all levels is to reinforce rather than compensate for the differences associated with family background."¹⁶⁰

In this way, "[t]he hereditary transmission of educational opportunity converges with the hereditary transmission of economic advantage to produce a class society."¹⁶¹ Consequently, the elite colleges and universities have created what is, in essence, an American aristocracy whose treatment in society is, in many ways, similar to that of titled personages in a monarchy. For, as stated on the cover of Mr. Golden's book *The Price of Admission*:

America, the so-called land of opportunity, is rapidly becoming an aristocracy in which America's richest families receive special access to elite higher education—enabling them to give their children even more of a head start.¹⁶²

As the *The Economist* reported in 2004, the result is that:

Income inequality is growing to levels not seen since the Gilded Age, around the 1880s . . . [W]ould-be Horatio Algiers are finding it no easier to climb from rags to riches, while the children of the privileged have a greater

¹⁵⁸ GOLDEN, *THE PRICE OF ADMISSION*, *supra* note 27, at 1.

¹⁵⁹ Richard Pérez-Peña, *Generation Later, Poor Are Still Rare at Elite Colleges*, N.Y. TIMES (Aug. 25, 2014), <http://www.nytimes.com/2014/08/26/education/despite-promise-s-little-progress-in-drawing-poor-to-elite-colleges.html>. The quote comes from Anthony P. Carnevale, director of Georgetown University's Center on Education and the Workforce.

¹⁶⁰ JULIA B. ISAACS, ISABELL V. SAWHILL & RON HASKINS, *GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA* 7 (2008), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2008/pewempgettingaheadfull2pdf.pdf.

¹⁶¹ ROBERT MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 85 (1996).

¹⁶² GOLDEN, *THE PRICE OF ADMISSION*, *supra* note 27.

chance of staying at the top of the social heap. The United States risks calcifying into a European-style class-based society Everywhere you look in modern America . . . you see elites mastering the art of perpetuating themselves. America is increasingly looking like imperial Britain, with dynastic ties proliferating.¹⁶³

X. HOLISTIC ADMISSIONS SHOULD BE BANNED

As documented in this article, the elite colleges and universities have been hugely successful in establishing a mostly-hereditary aristocracy based on school pedigree. Perhaps such un-American practices might be tolerable if they relied exclusively on private funding. However, considering the massive government subsidies that these schools have always enjoyed, the government is, in effect, helping the rich to maintain their primacy in American society:

Although they are tax-exempt, nonprofit institutions subsidized by our tax dollars and receive billions of dollars in government funding and research grants, [elite private colleges and universities] help to enshrine an American aristocracy¹⁶⁴

Therefore, as a condition of receiving this federal aid, Congress should require that colleges and universities base their admission decisions solely on the applicants' own merit and not on the wealth or power of the applicants' parents or friends. Of course, if desired, the definition of "merit" could include a consideration of the disadvantages that any applicant may have had to overcome.

Yet, given the generous preference in admissions that the elite colleges and universities provide to the children of politicians and those whom the politicians recommend, favorable congressional action does not seem likely. As Mr. Golden notes:

Few politicians want to dismantle preferences for alumni children and other privileged applicants, because the system works to their advantage. Not only do their children enjoy special consideration, but they can deliver

¹⁶³ THE ECONOMIST, *Ever higher society, ever harder to ascend* (Dec. 29, 2004), <http://www.economist.com/node/3518560>.

¹⁶⁴ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 10.

admissions breaks for children of campaign contributors and key constituents.¹⁶⁵

Thus, due to the complicity of the members of Congress (as well as of the state legislatures) in the schools' corrupt admissions practices, the courts must act. There are two possibilities: (1) the courts could ban these corrupt admissions practices or (2) the courts could ban the use of the holistic-admissions system, which hides these practices.

For example, the courts could do one or the other (or both) by ruling that, under the guise of holistic admissions, the colleges are hiding admissions practices that:

- Should be found to be illegal *per se*;
- Unlawfully discriminate against racial minorities (including Asian-Americans); and/or
- Are not sufficiently related to any compelling state interest using the level of scrutiny appropriate in each instance under the Equal Protection Clause of the Fourteenth Amendment.

These admissions practices include:

- (i) Basing admissions on donations made or expected to be made to the schools, i.e., selling places in a school's entering class (constituting potential bribery); and
- (ii) Basing admissions on the prominence or alumni status of the applicants' parents or sponsors rather than on the applicants themselves (constituting cronyism, illegal preference based on lineage, discrimination on the basis of ancestry, and/or government-sponsored hereditary privilege).

Or the courts could simply ban the use of the holistic-admissions system by ruling that:

- Under the guise of holistic admissions, the schools are hiding practices that have previously been ruled illegal, such as placing minority applicants into separate tracks and engaging in racial balancing; or

¹⁶⁵ GOLDEN, THE PRICE OF ADMISSION, *supra* note 27, at 230.

- The secretive aspect of holistic admissions prevents the courts from determining whether or not their rulings are being followed.

While it seems less likely that the Supreme Court would ban any of the above admissions practices *per se*, the Court should at least ban the holistic-admissions process whereby these practices are hidden from both the public and the courts.

Banning holistic admissions simply means that colleges and universities must be transparent about the admissions criteria they employ and therefore able to explain the reasons that they have rejected or admitted an applicant. This is something that the Supreme Court can and should require.